

IN THE HIGH COURT OF SINDH AT KARACHI

Suit NO. 1955 of 2014

Plaintiff :Mst. Humaira
through: Mr. Muhammad Yasin Azad, Advocate.

Defendant Abdul Rahim Rafi,
through Mr. Basil Nabi Malik, advocate for defendant
No.1.

Mr. Saba Siddiqui, Advocate for SBCA (defendant
No.4)

C.M.A. No. 16459 of 2015
& CMA No.13465 of 2014.

Date of hearing : 10.12.2015.

Date of announcement: 21.12.2015

ORDER

SALAHUDDIN PANHWAR, J. Through CMA, filed by the plaintiff, u/o 39

R 1 & 2 CPC r/w Section 151 CPC , it is prayed that:

“...to restrain the defendants, their agents /
representatives/ employees from raising construction of
multistory building on the residential plots bearing
Nos.9/1, 9/2, and 9/4, Rohilkand Cooperative Housing
Society. It is further prayed that the defendants Nos.1 to 5
may be restrained to convert the residential plot into
commercial till the final disposal of the suit.”

2. Succinctly, facts are that plaintiff has filed suit for *Declaration, Cancellation, Easmentary Rights, Permanent Injunction & Damages'* while pleading that she owns and resides at plot no.9/3 situated at Rohilkhand Cooperative Housing Society since 1997 vide conveyance, duly registered as

per law. The defendant no.1 is owner of adjacent plot nos.9/1, 9/2 and 9/4.; that per clause-7 the land is for residential purposes hence none of the plot of this land can be used or converted for any other purpose except residential; that adjacent to her plot, the plots of the defendant No.1 are situated which too are residential but defendant No.1 and 5 illegally converted those plots into commercial plots; that plot No.9/4 is situated on Haider Ali road which is purely residential hence construction of parking plaza thereon is illegal and will badly affect her easement rights. Plaintiff wrote a letter dated 08.8.2014 to defendant No.6 (Rohilkhand Society whereby raising objection and demanding copy of illegal notification). plaintiff received reply along with photo copy of letter dated 20.3.2014 of Master Plan department and notification dated 22.5.2008 regarding conversion of residential plot nos.9/1 and 9/2 by defendants. plaintiff lodged written complaint dated 26.8.2014 with request to defendant no.2 (now known as KMC) to look into the matter and to do the needful; that due to construction of commercial building her easement rights of light, Air and passage are being violated; that notification was with regard to *from Jail Chowrangi to Minto circle and Shaheed-e-Millat road* while Rohilkhand society falls within Hyder Ali road. The defendants did not invite any objection from members of the society. The plaintiff, having alleged conversion to be illegal and at cost of her easement rights, claimed to have suffered anguish, agony, loss of privacy hence claimed damages to tune of Rs.20 Crores.

3. In above back ground, the plaintiff has sought following reliefs:-

- A) Declare that the Plot No.9/1,9/2 and o/4 situated at Rohilkand Cooperative Housing Society Limited Karachi are purely residential;

- B) Declare that the Plot No.9/1, 9/2 and 9/4 situated at Rohilkand Cooperative Housing Society Limited Karachi, cannot be converted into commercial;
- C) Declare that amendment of the Plot No.9/1, 9/2 and 9/4 in the Grab of Notification No.EDO(Law)/CDGK/3310/2008 dated 22.5.2008 is illegal and have no legal effect in the eye of law;
- D) Declare that the plots No.9/1 & 9/ cannot be converted into commercial without due process of law;
- E) Declare that the conversion of plots Nos.9/1 and 9/2 in the grab of Notification No.EDO(Law)/CDGK/3310/2008 dated 22.5.2008 is illegal and have no effect in the eyes of law;
- F) Cancel the illegal conversion of the Plot No.9/1 & 9/2 under the garb of the Notification No.EDO Law) CDGK/3310/2008 dated 22.5.2008;
- G) Declare that right of Easements of Air, Light and Passage of the plaintiff are absolute the Defendants cannot take away the easmentary rights of the plaintiff under the garb of the notification no.
- H) Pass a mandatory decree of Rupees 20 Carors in favour of the plaintiff and against the Defendants jointly and severally for taking away the easmentary rights of Air, Light and Passage by the Defendants, for causing nuisance to the Plaintiff and for destroying the privacy of the plaintiff and her family due to illegal conversion of the Plots No.9/1 & 9/2 by the Defendants;
- I) Grant permanent injunction, restraining the defendants from allowing / permitting for raising construction of multistory building of Plot Nos.9/1, 9/2 Rohilkand Cooperative Hosing Society Karachi, till disposal of the instant suit;

4. Against the above application (CMA No.13465 of 2015), the objections in shape of counter affidavit were filed on behalf of defendant No.1 wherein maintainability of the suit was attacked while raising preliminary legal obligations that:

- i) *Suit is barred by limitation;*
- ii) *No irreparable harm is being caused to plaintiff;*

It was further claimed that plots *in question* were though residential but conversion thereof was legally allowed vide City District Council Resolution No.360 dated 13.5.2008 which was confirmed by notification dated 22.5.2008 issued by City District Government in pursuance of Section 40(A) and 192(2) of Sindh Local Government Ordinances, 2001; defendant no.1 also obtained all requisite approvals from pertinent authorities. He further asserted that plaintiff *even* after filing the suit filed complaint dated 18.8.2014 to Secretary, Housing and Town Planning, Government of Sindh which was forwarded to the Registrar, Cooperative Societies, Sindh *who in turn* sought a reply from the Rohilkhand Cooperative Housing Society. The reply was submitted vide letter dated 03.9.2014 wherein nefarious designs of plaintiff were thwarted and the legality of commercialization was unequivocally upheld. To stop such harassment, the defendant No.1 also filed Suit No.1986/2014. The defendant No.1 also denied existence of any *prima facie* case, balance of convenience or irreparable injury/loss to plaintiff.

5. The learned counsel for the plaintiff has argued that the plaintiff has *prima facie* case in her favour; easement rights of the plaintiff are evident that commercial multistory building adjacent to residence of the plaintiff shall cause prejudice to her recognized rights. The conversion of residential plots into commercial one is *prima facie* violation to condition(s) of lease hence he prayed for grant of injunction. In support of contentions, the reliance was placed on case(s), reported as 1994 CLC 314, 2006 YLR 2537, 1984 CLC 340, 1995 CLC1012(1019), 1989 MLD 1966, PLD 2007 SC 472.

6. The counsel for the defendant No.1, *on his turn, contends that* no case is made out in favour of the plaintiff because conversion of the plots from

residential to commercial is strictly in accordance with law. The defendant no.1 has every right to raise the construction over his property particularly when the same is being strictly in accordance with rules and laws. He insisted that no illegal construction has been done nor shall be done therefore; plaintiff has no case at all. He insisted that not only the suit of the plaintiff but her application merits dismissal.

7. Learned counsel for the defendant No.4 (SBCA) also opposed the application; conversion of plots was under NOC from MPGO, CDGK and even Master Plan Department approved amalgamation and issued such plan with a new Number i.e plot No.9/1(measuring 1034 Sq.yards) under letter from KCHS Union (Ltd) with Commercial category vide NOC dated 09.9.2014. It was asserted that proposed building plan for said amalgamated commercial plots is as per regulation 3-2.2 of the KBTPR 2002. Town planning Section SBCA also granted NOC from Town planning point of view and that no illegal construction is raised nor shall be allowed.

8. Since question of the maintainability of the suit is strongly pressed, therefore, it would be in all fairness to decide this issue first because for deciding an injunction (interim order under Order 39 r 1 & 2 CPC) '*prima facie*' case is one of the ingredients which *undeniably* has nexus with maintainability of a *lis*. Though, through instant suit plaintiff has been challenging and calling in question the legality of *status* of property & owner thereof with reference to certain *claimed* illegalities in procuring such *status*. If, it had been a simple case of seeking such a declaration without showing '*an interest of the plaintiff or a threat to any of his legal rights*' then such a *lis* would not sustain. However, the position will become different if plaintiff *though not*

having direct interests but claims infringement of his/her easement rights in result of lawful exercise of ownership even.

“Right of enjoyment of a property is independent right and it is shown that the public functionaries act in a manner as it may encroach upon a private right which may also be invasion of a public right than individual whose rights are encroached may bring an action against such invasion’. (PLD 2003 Kar. 477)

*‘As far as the objections of learned counsel for the defendants that plaintiff has no right which could be enforced. **In my humble opinion section 42 of the Specific Relief Act do give a right to institute a suit to any person who has (sic). Any right as to any property”.** As discussed above, such right read with ‘Right of Enjoyment of a property as postulated under section 54 of Specific Relief Act do give such right to a plaintiff who could establish that the right to view and exposure of his commercial establishment is of some beneficial interest to him. Right to life as has been expounded by the Hon’ble Supreme Court in Shela Zia’s case reported in PLD 1994 SC 693 as approved in ‘Costal Livina’s case in 1999 SCMR 2882 that Right to Life is not merely a vegetative living .Likewise, right of property or right to carry on business on a property are also recognized under the Constitution, 1973. Such right to property is not be interpreted in a narrow sense but must be given a broader perspective and meaning more particularly in present commercial environment where every bit of a commercial premises or establishment has its due importance and pecuniary benefit. **Injunctive relief is also obtainable in case of invasion of civil right in the nature of Tort. A person seeking injunction must make out a case of actual or of threatened violation of its right.***

**Clifton & Defence TW Association Vs. President CCB
(PLD 2003 Karachi-495).**

*'Where act constitute a public nuisance are not defined under the Code of Civil Procedure. Nuisance cannot be defined exactly and exhaustively, all definitions are merely illustrative, it is premise on large number of variables. Causes keep on adding with emergence of new and complex inter personal relationship between person to person and person to society. **Nuisance amounts to interference with the person's use or enjoyment of his property or any right appurtenant thereto, a tortious act.***

*An act at the same time can be both, public or private nuisance, public because it effects adversely many person or community at large and private in the sense that it also entails special damages or injury to private and individual right of one or few. **Where an act complained of is both public and private nuisance, then any person effected by such wrong or nuisance may bring an action without permission of Advocate-General.***

(Underlining has been supplied for emphasis)

From the above, it is *quite* clear that to maintain a suit even on the ground of *easement right* the person has to show his/her suffering from an independent act of other over his own property *even*. Since, the plaintiff has *specifically* asserted a threat to her personal rights of *easement* but has also sought such declaration and a relief of *damages* to have been suffered in result of acts of the defendants (private and official). Thus, the above discussion and legal position makes me to conclude that the suit of the plaintiff is sustainable in law.

9. Now, I would revert to the application of the plaintiff through which the injunctive relief *pending disposal of suit* is sought. Before going further, pertinent to mention that mere sustainability of a *lis* shall not necessarily result in earning an *injunctive relief* within meaning of Order XXXIX rule 1 & 2 C.P.C. The

Marghub Siddiqui vs. Hamid Ahmed Khan & 2 others

(1974 SCMR 519)

*‘ It is well settled law that **an injunction is not to be granted only on the basis that a prima facie case exists in favour of the plaintiff.** The Courts are required to take into consideration whether the question of balance of convenience or irreparable loss to the party seeking such relief co-exists or not.*

10. The grievance of the plaintiff *appears* to be relating to her rights of easement in result of some alleged illegalities/irregularities towards approval of the project in question. The rights of the easement are *recognized rights* in law but such rights *nowhere* bring a permanent **full stop** over the use of ownership over one’s own property but such ownership is required to be exercised in the manner so as to avoid certain prejudice to the rights of immediate neighbours such as **light, air** e.t.c. The **project** is still at initial stage with clear undertaking of the defendants that no violation or departure shall be carried out but the construction of the project shall continue strictly in accordance with rules, procedural and approval thereof which *undeniably* is from competent authorities. The matter *at this stage* is requiring assessment of the material only to find out availability of required ingredients in favour of the plaintiff to maintain her plea of an *injunctive order*. The record shows that defendants have specifically claimed the conversion of the status of the plots into *commercial* with under a legal **resolution** confirmed by the notifications dated 22.5.2008 by the **City District Government** with reference to Section 40(a) of **Sindh Local Government Ordinance, 2001** which reads as:

‘(a) *approve master plans, zoning, **land use plans**, including classification and reclassification of land, environment control, urban design, urban renewal and ecological balances;*

11. Further, the defendant (SBCA) has affirmed that defendant no.1 obtained all the requisite approvals from concerned quarters, including that

of MPGO, CDGK and even *Master Plan department* and even commercial plan is with reference to *regulation 3-3.2 of KBTPR, 2002*. This *prima facie* makes out a case in favour of the defendants and since it is *specifically* claimed that no violation of the rules and procedure shall be carried out and quarters concern shall ensure observance and compliance of all the relevant rules, procedure and *approval* even hence *balance of convenience* also appears to be floating in favour of the defendants. Therefore, *prima facie* plaintiff has failed to make out a case for injunction

12. Since the plaintiffs have claimed damages and a declaration in respect of her *easement rights* which the plaintiff shall have to prove with reference to structure of the project, acts and omission of the defendants in completing the structure thereof which *prima facie* appear to be questions of facts and law requiring evidence hence even existence of such questions will not be enough for grant of an injunctive order as it would only be granted if one succeeds in establishing co-existence of all three requisite ingredients i.e *prima facie case, balance of inconvenience and irreparable injury*. Not only this, but the project is at *initial stage* hence without proper evidence it would not be practicable to determine the future aspects and impacts thereof.

ATCO Lab. (Pvt) Ltd. V. PFIZER Ltd. & Ors(2002 CLD 120)

'It is also a settled principle of law that besides the above factors the Courts in the facts and circumstances of a case have to taken into consideration certain other factors such as whether the plaintiff has approached the Court with clean hands or not; whether the Court has been approached promptly or not; whether grant of an injunction will be against public interest / policy; whether grant of an injunction to a party shall result into an undue advantage being given to him which would perpetuate injustice and whether a party approaching the Court for interim relief has concealed material facts and / or acted in a malafide manner. In case the answer of any of the questions is in the affirmative then the relief of an injunction being discretionary in nature can be declined.

13. Thus, plaintiffs have failed in establishing *co-existence* of all three ingredients therefore, it would not be in the interest of equity to grant injunctive order restraining the defendants from continuing an action for which there is approval from quarter concerned. Accordingly, I am of the view that the plaintiff has not been able to make out a case for grant of injunctive order. In consequence of such view, the instant CMA is hereby dismissed. However, while parting it is needless to say that if the construction of the project *at any stage* of its raising appears to be one causing prejudice to the easement rights of the plaintiff she can *at any time* come for an injunctive order and even to have it so to protect her rights which *even otherwise* is also to be considered by the authorities while approving the project but by maintaining a balance between protected rights of ownership,

Imran/PA

J U D G E