IN THE HIGH COURT OF SINDH, KARACHI

H.C.A. No. 421 of 2016

Present
Mr. Justice Aqeel Ahmed Abbasi
Mr. Justice Aziz-ur-Rehman

Al-Tamash Medical Society. ……Appellant

Versus

Dr. Anwar Ye Bin Ju & others ……..Respondents

Date of hearing : 29.01.2018

Date of Judgment : 24.05.2018

M/s. Khawaja Shams-ul-Islam and Imran Taj, Advocates for the appellant.

M/s. Arshad Tayebaly, Sehar Rana and Shahzad Ashraf, Advocates for the respondents No.1 & 8 to 10.

Ms. Naheed A. Shahid, Advocate for respondent No.3(a)/KDA a/w Syed Khalid Zafar Hashmi, Additional Director, KDA.

J U D G M E N T

Aqeel Ahmed Abbasi, J: Instant High Court Appeal arises from the impugned order dated 16.12.2016 passed by the learned Single Judge of this Court in Suit No.2389/2014, while disposing (08) interlocutory listed applications through combined order, whereas, the appellant has expressed his grievance to the extent of disposal of CMA No.16156/2014 (under Order 39 Rule 1 & 2 CPC), whereby, an injunction order passed in favour of the appellant on 03.12.2014 has been vacated, and has also expressed his grievance to the extent of CMA No.17997/2014 (under Section 94 read with Section 151 CPC), whereby, the appellant had prayed for suspending the revised proposed plan in respect of disputed property, however, the said application has also been dismissed.

2. Briefly the relevant facts for the disposal of instant High Court Appeal are that the appellant has filed suit for declaration, directions, cancellation and injunction against the respondents in respect of amenity plot No.ST-2, Block-3, Scheme No.5 (Clifton), Karachi, admeasuring 1000 sq. yard in view of restrictive clause No.20 of the lease deed initially executed in favour of defendant No.1 i.e. Dr. Anwar Ye Bin Ju son of Ye Shie Chan. According to appellant, the appellant society was allotted a plot of land bearing ST-2/B, Block-3, Clifton, Karachi, admeasuring 2422 sq. yard vide allotment letter dated 16.07.1989 issued by the defunct KDA (now respondent No.3) upon which the appellant society constructed state of art medical, dental complex as well as medical and dental college in the name of Al-Tamash Institute of Dental Medicine (AIDM). Whereas, adjacent to appellant plot another plot No.ST-2, measuring 1000 sq. yard was also carved out and allotted to respondent No.1. The appellant and respondent No.1 acquired lease deed of their respective plot in the year 1992 on payment of occupancy charges at the rates applicable to the amenity plots, whereas, clause 20 was inserted in the lease deed dated 17.08.1992 granted to the respondent No.1, which provides that lessee will not sell, transfer or passing his right in respect of demises in any manner. However, the appellant in the month of April, 2013, came to know that existing structure standing on suit plot No.ST-2 was partly demolished and preparations were started for construction of multi-storeyed building on the said plot. On inquiries made by the appellant society, transpired that respondent No.1 in violation of the terms and conditions, particularly, the condition No.20 of lease deed dated 17.08.1992 has executed a sale deed dated 28.03.2013, thereby selling and conveying the said plot in favour of respondent No.2, whereas, according to appellant, respondent No.5 by misusing the official status and authority as Sub-Registrar for extraneous motive registered the sale deed vide registration No.1911 dated 28.06.2013 in favour of respondent No.2. The respondent No.4 firstly issued demolition permission dated 10.04.2013 in respect of suit plot and then on 03.07.2013 also granted approval for construction of multi-

storeyed building consisting of basement (parking) + ground + 11 floors on the suit plot under the garb of Hospital Building in favour of respondent No.2, which according to appellant, is a builder and does not have any background of medical expertise in the field of liver transplant, whereas, according to appellant, the very execution of sale deed dated 28.06.2013 was illegal in view of clause 20 of the lease deed dated 17.08.1992. Learned counsel for the appellant has argued that aforesaid facts have not been disputed, whereas, inspite of clear violation of restrictive clause No.20 in the lease deed the respondent No.3 (defunct KDA) has not taken any action whatsoever against the private respondents, therefore, the appellant was forced to file suit seeking declaration to this effect.

3. It has been argued by the learned counsel for the appellant that once all the relevant fact was brought to the notice of the learned Single Judge of this Court alongwith relevant documents, the appellant could have been restrained from raising any construction upon the subject plot on the basis of totally illegal documents and could have confirmed the interim order passed in favour of the appellant instead of rejecting the same. On the contrary, according to learned counsel for the appellant, the official respondents i.e. Registrar as well as officials of KDA are in collusion with the appellant. Per learned counsel, since the respondent No.1 has no authority whatsoever to sell or transfer title in respect of subject plot, therefore, subsequent sale deed dated 17.08.1992 as well as sale deed dated 28.06.2013 are liable to be cancelled and revoked and the plot in question is liable to be resumed by the respondent No.3 and respondent No.7 with proper allotment, exclusively for the amenity purpose i.e. Hospital, through public auction. It has been further argued by the learned counsel for the appellant, the application filed on behalf of the respondent under Order 7 Rule 11 has been rightly dismissed by the learned Single Judge as the appellant has been recognized as whistleblower, whereas, the learned Single Judge of this Court is of the view that a declaration and cancellation

of lease deed executed in respect of subject plot can be sought by the appellant in view of judgment of this Court, according to which, Courts can issue declaration with regard to legality of allotment of an amenity plot, which according to learned counsel for the appellant, can be disposed of through public auction and not otherwise. It has been contended by the learned counsel for the appellant that since the very foundation, whereby, the respondent No.1 has sold-out the subject amenity plot to respondent No.2 is illegal without lawful authority and in violation of express provision of lease deed, particularly, clause 20 of the lease, therefore, no subsequent transfer of the subject plot, permission to demolition and to approve plan for construction of multi-storeyed building upon the subject plot by the KDA are equally illegal and liable to be cancelled.

4. Learned counsel for the appellant has referred to relevant provision of Transfer of Property Act and has argued that an Allottee/lessee cannot transfer a better title, and is bound by the terms of Allotment/Lease, and in case of any violation, particularly, in view of a restrictive clause, whereby, subsequent transfer of the plot by the Lessee/Allottee is prohibited, subject plot could be sold out to any third party. Per learned counsel, an amenity plot allotted for a specific purpose cannot be used for any other purpose, whereas, in case of any violation of the terms of allotment or the lease, as the case may be, the said plot is to be resumed by the KDA in accordance with law,. However, in the instant case, according to learned counsel, inspite of admitted violation of Clause 20 of the lease, the official respondents, in connivance with the respondents, have not taken any action of resuming the said plot, but have also allowed subsequent transfer of such amenity plot, as well as registration of conveyance deed in favour of the respondents. It has been prayed by the learned counsel for the appellant that in view of hereinabove facts and circumstances of the case, which clearly reflects that sale deed executed by respondent No.1 in violation of Clause “20” of lease deed, and subsequent conveyance deed in respect of

the subject amenity plot, are totally illegal and without lawful authority, therefore, this Court may set-aside the impugned order passed by the learned Single Judge and may direct the respondents to maintain status-quo in respect of the amenity plot and construction thereto, whereas, the learned Single Judge may be directed to decide the suit filed by the appellant at an early date by framing issues and recording evidence. In support of his contention, learned counsel for the appellant has placed reliance on the following case laws:-

i) *Rana Ameer Raza Ashfaq and another v. Dr. Minhaj Ahmed Khan and another [2012 SCMR 6]*

ii) *Subedar Manzoor Hussain through L.Rs. v. Mst. Mehmooda Begum through L.Rs. [PLJ 2004 SC 439]*

iii) *Muhammad Sabir v. Maj. (Rtd.) Muhammad Khalid Naeem Cheema and others [2010 CLC 1879]*

iv) *Muhammad Shamim through L.Rs. v. Mst. Nisar Fatima through L.Rs. and others [2010 SCMR 18]*

v) *Muhammad Aslam and 2 others v. Syed Muhammad Azeem Shah and 3 others [1996 SCMR 1862]*

vi) *Mst. Naz Shaukat Khan and 2 others v. mst. Yasmin R. Minhas and another [1992 CLC 2540]*

vii) *Arif Majeed Malik and others v. Board of Governors Karachi Gramper School [2004 SBLR 333]*

viii) *Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC) and 4 others [1999 SCMR 2883]*

5. Conversely, Mr. Arshad Tayebaly, learned counsel representing respondent Nos.1, 8 to 10 has vehemently opposed the contention of the learned counsel for the appellant and has argued that the suit filed by the appellant against the respondents is misconceived and not maintainable as the appellant has no legal character or any lawful cause of action to seek any declaration against the respondents in terms of Specific Relief Act. Per learned counsel, though separate appeal has not been filed against dismissal of CMA No.18660/2015 filed by the respondent under Order 7 Rule 11 CPC in the suit, nor any cross-objections has been filed in this regard, however, this Court can examine the legality of the combined order

passed by the learned Single Judge, while deciding the instant appeal. In support of his contention, learned counsel for respondents has referred to provision of Order XLI Rule 33 CPC and also placed reliance in the case of ***Messers S.M. Yusuf & Bros. v. Mirza Muhammad Mehdi and another [PLD 1965 SC 15] and Muhammad Ali v. Sindh Appellate Tribunal and another [1985 CLC 1527]***. Per learned counsel, learned Single Judge, while passing the impugned order, has been pleased to observe that prima facie the appellant has no legal character, personal grievance or cause of action to file a declaratory suit against the respondents, however, has been pleased to observe that the appellant can be treated as a whistle-blower, whereas, according to learned counsel, appellant having acquired the adjacent plot under the similar terms of lease has an evil eye on the subject plot of the respondents and has even sought a declaration to the effect that while cancelling the lease deed after assumption of the subject plot by the KDA, the same may be allotted to the appellant. It has been further argued by the learned counsel for the respondents that in the absence of any legal character, personal grievance and valid cause of action, the appellant has no right either to file a suit seeking declaration against the subject plot or to seek any negative injunctive relief in the subject plot. Learned counsel for the respondents has further argued that respondents have acquired lawful title of subject plot through registered documents after fulfilling all the codal formalities and making payment of huge amounts, whereas, there has been no conversion of land use as per terms of original lease, whereas, respondents will continue to use it as amenity plot upon which respondents are raising construction of a Heart of State Liver Transplant Unit and General Hospital after having obtained all necessary approvals from the Sindh Building Control Authority, strictly in terms of original lease deed and as per approved building plan, and there has been no violation in this regard, therefore, according to learned counsel for the respondents, the appellant was not justified to seek any injunctive relief against respondents for raising construction on the subject plot. Per learned counsel, perusal of

prayer clause (a) and (b), shows that relief sought therein by the appellant is couched in negative sense, whereas, in terms of provision of Section 42 of the Specific Relief Act, 1877, relief can be sought by a party, if any, right, title and interest of a party in any property has been denied. Similarly, according to learned counsel for respondents, relief sought by the appellant through clauses (c) and (d), which are relevant for the cancellation of documents i.e. Registered Sale Deed is also misconceived, as according to learned counsel, Section 39 of the Specific Relief Act, 1877, enables any person, who apprehends that a written instrument, which is void and voidable, and is likely to cause serious injury, than such person may approach to the Court for getting the document so adjudged, whereas, in the instant case, admittedly, the appellant has no title, right or interest whatsoever, in the subject plot. It has been further argued by the learned counsel for respondents that without prejudice to hereinabove, if the appellant succeeds to establish that there has been some violation of the terms of original lease by the lessee then the same can be objected to by the lessor only and not by a third party, who has no title, right or interest on the subject plot. Learned counsel for the respondents further argued that the appellant has not approached the Court with clean hands, and has also violated the terms of the lease in respect of adjoining plot, whereas, the only purpose to file a suit against the respondents is to create harassment and to prevent the respondents to construct a state of the art Liver Transplant Unit and General Hospital, by investing huge amount, for the welfare and benefit of large number of people. According to learned counsel, under the relevant law, relating to transfer of amenity plots, the only bar that exists is against the change of land use i.e. amenity, whereas, there is no bar with regard to transfer of such property by one lessee to another. Per learned counsel, in the instant case, admittedly, there has been no violation of any law, rules, building regulations or, the terms of lease deed, except the alleged violation of Clause 20, which according to learned counsel for respondents, cannot be read in isolation, and has to be reconciled with the

remaining terms of lease deed. Moreover, according to learned counsel, the appellant has miserably failed to establish the basic ingredients for grant of an injunctive relief i.e. prima-facie case, balance of inconvenience and irreparable loss and injury, in his favour before the learned Single Judge. On the contrary, all the above factor are in favour of the respondents, who have acquired the subject property after fulfillment all the codal formalities through registered documents by investing huge amount and have not violated any law, rules, regulations or the terms of the conveyance deed executed in their favour. It has been further contended by the learned counsel for the respondents that the Building Plan of the subject property has been approved after fulfillment all the codal formalities for construction of a state of the art Liver Transplant Unit and General Hospital, for the benefit of public at large, and to cater to the requirements of needy patients as well, and the said project is not meant for any individual interest on the contrary its construction is intended to safeguard the interest of public at large. Per learned counsel, the learned Single Judge, while passing the impugned order has taken into consideration all the relevant facts and law applicable thereto, and has allowed the respondents to raise construction upon the subject plot, keeping in view the undertaking given by the respondents that they are committed to establish a liver transplant hospital on the amenity plot without change of use, strictly in accordance with law, as per terms of lease and approved plan, whereas, it is still open to the lessor i.e. K.D.A. to take action against the respondents/lessee for alleged violation of clause 20 of the lease in accordance with law. While concluding his arguments, learned counsel for respondents has argued that the impugned order passed by the learned Single Judge, while rejecting the application filed by the appellant seeking injunction against construction being raised thereon, does not suffer from any error or illegality, hence requires no interference by this Court in the instant appeal, whereas, instant High Court Appeal, being devoid of any merits, is liable to be dismissed with

cost. In support of his contention, learned counsel for respondents has placed reliance in the following cases:-

i) *Messrs S.m.Yusuf & Bros. v. Mirza Muhammad Mehdi & another [PLD 1965 SC 15]*

ii) *Muhammad Ali v. Sindh Appellate Tribunal & another [1985 CLC 1527]*

iii) *Faiz Ahmed and 23 others v. Ahmed Khan and 7 others [PLD 2013 Lahore 234]*

iv) *Abdur Rahman Mobashir and 3 others v. Syed Amir Ali Shah Bokhari and 4 others [PLD 1978 Lahore 113]*

v) *Naseer Ahmed v. Hafiz Mohammad Ahmed [1984 CLC 340]*

vi) *Moosa Bhunji v. Hashwani Sales and Services [PLD 1982 Karachi 940]*

vii) *Vazir Ali & others v. Hanif [1989 MLD 1966]*

6. Ms. Naheed A. Shahid, learned counsel appearing on behalf of respondent No.3(a)/KDA, while giving the chronology, and the history of allotment of subject plot, issuance of lease deed in favour of respondent No.1 and its subsequent transfer through registered conveyance deed, has contended that the subject amenity plot i.e. ST-2, Block 3, Clifton, Karachi, measuring 1000 square yards was allotted without any public auction, however, for the amenity purpose, and to raise construction of hospital. Per learned counsel, respondent No.1 has failed to acquire the required results and transferred the subject plot to respondent No.2, who has also sold out the subject plot to respondent No.8 and 9 through registered conveyance deed, and presently, the subject plot stands mutated in the name of respondent No. 8 and 9, who, after having complied with all the codal formalities and having obtained approval of building plan from the Building Control Authority, have started raising construction to establish a Liver Transplant and General Hospital by investing huge amount, whereas, prima-facie respondent Nos.8 & 9 have not violated any provision of law, rules or regulations. As regards violation Clause 20 of the lease deed is concerned, according to learned counsel for respondent No.3(a), it is the right of the lessor to take action against the lessee, if any, for the alleged

violation in accordance with law. However, according to learned counsel for respondent No.3(a), any violation of terms of the lease deed, executed between the lessor i.e. KDA and lessee i.e. respondents No.1, 2, 8 & 9 can be subjected to an action by the lessor only, and not by any third party, including the appellant, who according to learned counsel, after having acquired the adjoining land for the amenity purposes, have violated the terms of the lease deed, hence, have not approached the Court with clean hands, particularly, when the appellant seeks a declaration to the effect that subject plot may be allotted to the appellant after resuming the same from the respondents. It has been further contended by the learned counsel for respondent No.3(a) that there are certain clauses in the lease deed, violation of which, provides for penal consequences, however, according to learned counsel, there is no penal clause in case of violation of Clause 20. It has been further argued by the learned counsel for the respondent that the impugned order passed by the learned Single Judge under the facts and circumstances of the instant case, does not suffer from any error or illegality, whereas, respondents have been allowed to raise construction strictly in accordance with law and as per approved plan, without change of land use, however, at their own cost, risk and consequences. It has been prayed that instant appeal may be dismissed for being devoid of any merits as the appellant has no prima-facie case to seek injunction in respect of subject plot in which, the appellant has no personal right or interest whatsoever.

7. We have heard the learned counsel for the parties, perused the record with their assistance and also gone through the impugned order passed by the learned Single Judge as well as the case law relied upon by the learned counsel for the parties in support of their contentions. Through impugned order dated 16.05.2016, the learned Single Judge has been pleased to dispose of eight (08) interlocutory Civil Misc. Applications through combined order which has been assailed by appellant, however,

only to the extent of dismissal of stay application filed by the appellant under Order XXXIX Rule 1 & 2 CPC i.e. CMA No.16156/2014 and disposal of CMA No.17997/2015 filed by the appellant under Section 94 read with Section 151 CPC, whereby, the injunctive relief sought by the appellant in Suit No.2389/2014 filed by the appellant against the respondent, has been declined.

8. The crux of the arguments advanced by the learned counsel for the appellant is that in view of a restrictive clause 20 of the lease deed dated 17.08.1992 executed in favour of respondent No.1 in respect of plot No.ST-2, measuring 1000 sq. yds., the respondent No.1 was not entitled to sell out or to pass on his right in respect of the said plot to any one including but not limited to respondent No.1, therefore, according to learned counsel for the appellant, the sale deed dated 28.06.2013 executed by respondent No.1 in favour of respondent No.2 and illegally registered by respondent No.5, by misusing his authority is also illegal and liable to be cancelled. Similar declaration has been sought against subsequent sale deed dated 09.09.2014 executed by respondent No.2 in favour of respondent Nos.8 & 9. Consequent upon such declaration the appellant have sought further declaration to the effect that respondent No.3(a) may be directed to resume the suit plot No.ST-2, measuring 1000 sq. yd. situated Shahrah-e-Firdousi, Block-3, Clifton, Karachi, while suspending the operation of the lease deed dated 17.08.1992 executed in favour of respondent No.1 and thereafter to allot/handover the same to the appellant society for appropriate use as amenity plot for expansion of appellant hospital and other related medical and educational studies, or alternatively after resumption of said plot the same may be put to auction in accordance with law. Besides seeking above declaration the appellant has also prayed for permanent injunction to restrain the respondent from raising any construction on the aforesaid plot and to seal the same till final disposal of the suit. From perusal of the pleading in the suit and the relief sought therein as contained in the prayer clause, it appears that no declaration had been sought by the appellant regarding his legal character to file the suit against respondent nor the appellant appears to have claimed any declaration with regard to his title, right or interest in the suit plot No.ST-2, measuring 1000 sq. yd. situated Shahrah-e-

Firdousi, Block-3, Clifton, Karachi. Admittedly, the appellant has no privity of contract with the private respondent in respect of suit plot nor the appellant has claimed any direct relief against the private respondent except a declaration to the effect that respondent No.1 was not authorized to sell out the subject plot to respondent No.3 in view of restrictive clause No.20 of the lease deed dated 07.08.1992 executed by respondent No.3(a) in favour of respondent No.1. Moreover, from perusal of pleading, it transpired that the appellant has not been able to establish his legal character so far to file the subject suit except in clause 13 of the pleading, wherein, the appellant claiming to be owner of adjacent plot No.ST-2/B, Block-3, Shahrah-e-Firdousi, Clifton, Karachi, has claimed easementary right for allotment of the suit plot. It is pertinent to note that through impugned order an application filed by the private respondent under Order VII Rule 11 CPC, while raising objection as to rejection of plaint on account of maintainability of suit has also dismissed by the learned Single Judge, however, the objection with regard to maintainability of the suit is yet to be decided by the learned Single Judge during course of the suit proceedings. The reasons which have been assigned by the learned Single Judge while dismissing the application under Order VII Rule 11 CPC filed by the respondent, are that the proper course would have been to frame issue and decide the same on merit in the light of evidence. While dilating on the above issue further the learned Single Judge has been pleased to hold that unless proper issues are framed and parties are allowed to lead evidence on these issues, the plaint cannot be rejected. The learned Single Judge being cognizant of the intricate legal issues to be decided in this suit, particularly, legal character of the appellant and cause of action, if any, available to the appellant to file the subject suit, has been pleased to hold that at this juncture of the proceedings the plaint cannot be rejected, the plaintiff may maintain the suit, whereas, the plea of appellant to be a whistleblower, appears to have not been turned out by the learned Single Judge at this stage of the proceedings, however, the injunctive relief sought by the appellant has been declined through impugned order.

9. It will not be out of place to observe that while deciding the aforesaid application through combined impugned order, the learned Single Judge has taken pains to examine the pleadings and the relief sought therein, as well as the scope

of various interlocutory applications filed by the parties, particularly, the scope and application of Order XXXIX Rule 1 & 2 CPC on the facts of this case, with particular reference to three basic ingredient i.e. prima-facie case, balance of convenience and irreparable loss and injury to the party, which are required to be taken into consideration while deciding application under Order XXXIX Rule 1 & 2 CPC. It will be advantageous to reproduce hereunder the finding of the learned Single Judge as contained in paragraphs No.26 to 30 of the impugned order passed by the learned Single Judge, in which detailed discussion has been made and reasons have been given for rejecting the injunction application filed by the appellant in the instant case, the same read as follows:-

> "26. An injunction is an equitable relief based on well-known equitable principles. Since the relief is wholly equitable in nature, the party invoking the jurisdiction has to show that he himself was not at fault. The phrase prima facie case in its plain language signifies a triable case where some substantial question is to be investigated or some serious questions are to be tried and this phrase "prima facie" need not to be confused with "prima facie title". Before granting injunction the court is bound to consider probability of the plaintiff succeeding in the suit. All presumptions and ambiguities are taken against the party seeking to obtain temporary injunction. The balance of convenience and inconvenience being in favour of the defendant i.e. greater damage would arise to the defendant by granting the injunction in the event of its turning out afterwards to have been wrongly granted, than to the plaintiff from withholding it, in the event of the legal right proving to be in his favour, the injunction may not be granted. A party seeks the aid of the court by way of injunction must as a rule satisfy the court that the interference is necessary to protect from the species of injury which the court calls irreparable before the legal right can be established on trial. In the technical sense with the question of granting or withholding preventive equitable aid, an injury is set to be irreparable either because no legal remedy furnishes full compensation or adequate redress or owing to the inherent ineffectiveness of such legal remedy. Ref: **(C.M Row Law of Injunctions, Eighth Edition).**
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> 27. In the case of **Karachi Stock Exchange** (supra), the conversion of public/amenity plot into residential/commercial plot was changed and the suit for declaration and injunction was filed. The plaintiff pleaded that amenity plot could not be converted into residential or commercial plot.

The court held that even if the appellants failed to get the said plot transferred in their favour, it did not mean that they are estopped from challenging its grant in favour of the respondent, if it was granted in violation of the laws dealing with amenity plots. Similarly in the case of **Naseem Ali Khan** (supra) the court discussed Article 52-A of KDA Order 1957 which required that the amenity plot could not be converted into any other purpose without inviting public objections. While in the case of **Province of Sindh through Chief Secretary** (supra) the apex court held that allotment of amenity plot for commercial use is directly in conflict with Article 52-A of the Karachi Development Authority Order, 1957 which specifically provided for procedure of conversion of amenity plot for other use.

28. With all humility, the aforesaid dictums are distinguishable as on the face of it in the present case there is no change or conversion of amenity plot to commercial or residential use but throughout the pleadings, nothing has been surfaced that the defendant Nos.1 and 2 or the defendant Nos.8 to 10 are endeavoring to convert the use of land from amenity to commercial or residential use. On the contrary they have vigorously articulated that they intend to build liver transplant unit and general hospital even they went on to argue that if this court is not inclined to reject the plaint due to some triable issues even then they may be allowed to raise construction at their own risk and peril which obviously means that if at any later stage the court comes to the conclusion that the restrictive clause of lease which put an embargo not to sell or transfer the plot has been contravened or violated then naturally the law will take its own course and party found at fault will have to face the adverse consequences. In the case of **Chairman Municipal Committee** (supra), court held that a case standing in need of evidence having to be led for being established, cannot be considered a proper subject for issuing temporary injunction.

29. So far as the dictum laid down in the case of **Abdullah** and **Barkat Ali** (supra), the court in the first case held that no duty was cast upon the plaintiffs/respondents to take the pain of filing a suit at huge expenses just to protect the government land. The question of fraud was brought to the

knowledge of authorities and only the Government could have challenged the order whereas in the second case while interpreting Section 105 of the Transfer of Property Act, the court held that contravention of restrictive covenants of lease can be enforced only by the lessor and not by the third party. While in the case of **Naseer Ahmed** (supra) it was held that breach of restrictive covenant in respect of leases of urban lands could be resisted by lessor alone and not by other lessees. In the case of **R.G. Sehwani Cooperative Housing Society Ltd.** (supra) again Section 105 of the Transfer of Property Act was under discussion and the court was of the view that lease deed providing for cancellation of lease in discretion of lessor in case of contravention of provisions of lease, such covenants, of lease, held, cannot be enforced by plaintiffs. At this moment the case of **Shahnaz and others** (supra) is also quite relevant in which the court reached to the conclusion that ostensible title has been transferred in favour of the appellant who are also in possession of the disputed plot, it may not be altogether fair to deny them the benefit of its possession till such time the matter is finally resolved and the respondent's claim is established. In the same judgment, the case of **Muhammad Shafi v. Kaniz Zohra Bibi (1983 CLC 2541)** has been referred to in which the court held that the defendant vendee has absolute right to enjoy the possession of the area in dispute for so long as the decree for pre-emption is not passed against him and its executed.

30. The title of the plot conveyed by defendant No.2 in favour of defendant Nos.8 and 9 is not denied and their possession is also not disputed. At this juncture I would like to quote my another judgment authored in the case of **Sayyid Yousaf Husain Shirazi v. Pakistan Defence Officers' Housing Authority** reported in **2010 MLD 1267,** in which the basic ingredients warrant examination while granting injunction have been discussed in detail in the following words:-

> *"Relief of injunction is discretionary and is to be granted by court according to sound legal principles and ex debito justitiae. Existence of prima facie case is to be judged or made out on the basis of material/evidence on record at the time of hearing of injunction application and such evidence or material should be of the nature that by considering the same, Court should or ought to be of the view that plaintiff applying for injunction was in all*

> *probability likely to succeed in the suit by having a decision in his favour. The term "prima facie case" is not specifically defined in the Code of Civil Procedure. The Judge-made-law or the consensus is that in order to satisfy about the existence of prima facie case, the pleadings must contain facts constituting the existence of right of the plaintiff and its infringement at the hands of the opposite party. Balance of convenience means that if an injunction is not granted and the suit is ultimately decided in favour of the plaintiffs, the inconvenience caused to the plaintiff would be greater than that would be caused to the defendants if the injunction is granted. It is for the plaintiffs to show that the inconvenience, caused to them would be greater than that which may be caused to the defendants. Irreparable loss would mean and imply such loss which is incapable of being calculated on the yardstick of money."*

10. It is now settled legal position that injunction is discretionary relief based on well known equitable principle, whereas, it is also equally settled legal position that unless a party can establish or make out a prima-facie case for permanent injunction, is not entitled to obtain an interlocutory injunction during pendency of the suit to the disadvantage of the other party. Scheme of law as enshrined in the provisions of Order XXXIX Rule 1 & 2 CPC provides a party seeking injunction in terms of Order XXXIX Rule 1 & 2 has to prove by affidavit or otherwise, that any property in dispute in a suit is in danger of being wasted, damage or alienated by any party to the suit, or wrongfully sold in execution of a decree or the defendant threatens or intends to remove or dispose of his property with the view to defraud his creditor. Once a party seeking injunctive relief satisfies fulfillment of the above requirement of law to seek injunctive relief has to satisfy three basic conditions for grant of injunction i.e. **prima-facie case, irreparable damage or injury and balance of inconvenience**. To establish a prima-facie case, the applicant has to prove prima-facie existence of the right, claim in the suit and also its infringement, whereas, to show existence of a prima-facie case a completed and binding contractual relationship has to be in existence. For this purpose, the pleading, documents and affidavit and record have to be examined and the matter has to be determined on the basis of the record then existing. However, Court need not closely examine the merits of the case. As regard the second ingredient which is to be taken into consideration while deciding injunction application i.e. irreparable damage or injury, the Court has to see that if the injunction sought by applicant is granted, it may cause irreparable damage and injury, which cannot be adequately compensated. However, where the loss is ascertainable in terms of money, then it cannot be treated as a case of irreparable loss. In other words, where pecuniary

compensation is an adequate relief, the injunction will not be granted in such cases. As regards the third ingredient, which is to be taken into consideration while deciding an injunction application i.e. balance of inconvenience, the Court is required to balance the inconvenience and to see as to where the applicant will suffer more inconvenience by withholding of the injunction, then the respondent would be by coordinating it in other requirement to weigh the mischief of either party i.e. to the applicant, if refused and the respondent if allowed and will grant injunction only if the balance is only in favour of the applicant. It is now well settled that normally the balance lies in favour of continuation of a state of thinks, unless shown to be patently illegal and without lawful authority. From perusal of the impugned order passed by the learned Single Judge in the instant case, it transpires that the learned Single Judge has aptly dealt with all relevant facts and the legal issues, which are required to be taken into consideration while deciding injunction application and has rightly held that the appellant has failed to make out a prima-facie case for grant of injunction at this stage of the proceeding. It will not be out of place to observe that while hearing in High Court Appeal against an order passed on interlocutory application this Court has to examine as to whether the impugned order passed by the learned Single Judge while deciding injunction application suffers from any patent illegality or legal error, and only then an interference can be made by this Court in appropriate cases, for the reason that dispute is yet to be finally decided on conclusion of trial in the suit after recording of evidence, therefore, in the absence of any final determination of the rights of parties on merits by the learned Single Judge in the suit, the tentative view formed while deciding the injunction application by the learned Single Judge does not require to be disturbed by this Court in the High Court Appeal.

11. The Divisional Bench of this Court in the case of ***Muhammad Saad and another v. Amna and 27 others (2015 YKR 1),*** while examining the scope and the preconditions attached to provision of Order XXXIX Rule 1 & 2 CPC as well as the powers to be exercised by this Court while hearing a High Court Appeal against an order passed on injunction application has been pleased to hold as under:-

> "16. While determining the question of granting a temporary injunction following factors are required to be taken into consideration:-

- The prima facie existence of a right in the applicant and its infringement by the respondent or the existence of a prima facie case in favour of the applicant.

- That irreparable damage or injury will accrue to the applicant if the injunction is not granted.

- That the inconvenience which the applicant will undergo from withholding the injunction will be comparatively greater than that which is likely to arise from granting it, or in other words the balance of inconvenience should be in favour of the applicant.

17. While seeking a favourable injunctive relief the applicant is to prove the prima-facie existence of the right claimed in the suit and also its infringement. But the mere fact that a prima-facie case has been established will not entitle the applicant to an injunction unless the other two factors i.e. balance of convenience and irreparable damage or injury, are fulfilled. The Court is required to balance the inconvenience and to see as to whether applicant will suffer more inconvenience by the withholding of the injunction than that which the respondent would suffer by granting of injunction. The Court is further required to weigh the mischief of either party in case of grant or refusal of the injunction. Normally the balance lies in favour of continuation of a state of things, such as to protect the possession of a party or to allow the continuance of a contract. Similarly, while granting injunction or otherwise it has to be ensured that the grant of injunction to one party may not cause irreparable damage or injury to the other party whose loss cannot be compensated in terms of money.

18. In the case of Shahzada Muhammad Umar Beg v. Sultan Mahmood Khan and another PLD 1970 SC 139, the Hon'ble Supreme Court while defining principles for grant or refusal of injunction has held as follows:-

> "The well-settled principle for the grant or refusal of temporary injunctions are, firstly, whether the plaintiff had a prima facie good case, secondly, whether the balance of convenience lies in favour of the grant of injunction and thirdly, whether the plaintiff would suffer irreparable loss if the injunction is refused."

19. In the case of Abdul Ghafoor Memon v. Muhammad and another PLD 1975 Karachi 464, learned Judge of this Court while placing reliance on the judgment of the Hon'ble Supreme Court (supra) and while defining the scope of injunction under Order 39 Rule 1 & 2 CPC has held as under:

> "It is the essence of all interim relief that the action in which it is claimed should be brought without unnecessary delay. In the instant case the encroachment in question took place on or about the 24th of September 1970, and it was not till about six months later that the

> action challenging it was, brought by petitioner. The petitioner, has, therefore, forfeited his right to interim relief by this unexplained delay and during this period the building of the respondent was allowed to reach in an advance stage of construction."

20. In the case of Marghub Siddiqi v. Hamid Ahmad Khan & 2 others 1974 SCMR 519, the Hon'ble Supreme Court while defining the scope of injunction in terms of Order 39 Rule 1&2 CPC has held as follows:

> "We are unable to agree with this contention, for, the trial Court had clearly not taken into account the question of balance of convenience or irreparable loss but based its decision purely upon its finding that the impugned resolution was bad in the eye of the law. An injunction is not to be granted only on the basis that a prima facie case exists but it is incumbent upon the Court to take into account the other questions.
> ……
> ……
> ……
>
> The first is that in a suit where no perpetual injunction is claimed no question of granting ad interim injunction can possibly arise. In the present case, the application for ad interim injunction should have failed on this ground alone."

21. In the case of Pervaiz Hussain & another v. Arabian Sea Enterprises Limited S.B.L.R 2006 SC 3, it has been held as under:

> "8. However, we are of the view that since the suit is pending between the parties and as the dispute i.e. the status of the parties, is yet to be determined in the suit, therefore, we should be careful in making any observations on merits of the case. We are also of the view that on having come to the conclusion that there was no sufficient material on the record to give any prima facie finding about the status of the parties, the learned Division Bench of the High Court ought to have set aside the impugned injunctive order because this conclusion in itself disclosed that plaintiff had failed to make out a prima facie case as it had failed to prima facie establish before the Hon'ble Judges that the petitioners were licensees. Thus, in such a circumstances, the balance of inconvenience, because of the stoppage of business, was in favour of the petitioners and in such a situation, in our view, the learned Division Bench of the High Court erred in directing the parties to maintain status quo other than status quo ante."

12. Keeping in view hereinabove facts of the instant case and the ratio of the aforesaid judgments, we are of the opinion that the learned Single Judge vide impugned order has rightly declined the injunctive relief sought by the appellants as they could not make out a prima-facie case for seeking discretionary relief in their favour. Moreover, none of the factors which are required to be taken into consideration for grant of an injunction application were in favour of the appellants.

On the contrary, the private respondents did make out a prima-facie case in their favour, whereas the official respondents also supported their claim and entitlement over subject land. We are of the opinion that the learned Single Judge while passing the impugned order has taken the complete stock of the relevant facts and also made tentative assessment of the material and the documents produced by the parties in support of their respective claim of entitlement and possession over the subject land, whereas three factors i.e. prima-facie, balance of convenience and irreparable loss and injury required to be considered for grant of injunction, have also duly been taken cognizance by the learned Single Judge.

13. The conclusion drawn by the learned Single Judge under the circumstances does not suffer from any error or illegality, hence does require any interference by this Court. Accordingly, we do not find any merits in the instant High Court Appeal, which is hereby dismissed.

14. However, before parting with this order, we may clarify that the observations made hereinabove are tentative in nature and the learned Single Judge shall not be influenced by any such observation and may decide the case strictly in accordance with law after examining the evidence produced by the parties.

J U D G E

J U D G E

Nadeem