

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI

Suit No.2554/2017

Date	Order with signature of Judge
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1. For ex-parte order against defendant No.4
2. For hearing of CMA No.17139/2017
3. For hearing of CMA No.37/2018.

M/s. Muhammad Ahmed Masood, and Shariq Razzaque Advocates for the Plaintiffs.

Mr. Suresh Kumar, AAG.

Mr. Tufail H. Ebrahim, Advocate for Defendant No.2.

Mr. Iqbal Khurram, Advocate for M.D.A [Defendant No.3]

Date of Hearings: 18.11.2021, 25.11.2021, and 25.01.2022

ARSHAD HUSSIN KHAN, J.- This order will dispose of the listed two Applications viz: CMA No.17139/2017 & CMA No.37/2018, both filed by the Plaintiffs-Company, under Order XXXIX Rules 1 & 2, CPC., dated 12.12.2017 and 02.01.2018 respectively.

2. Concisely, the facts essential for disposal of the above applications are that the Plaintiff filed the present suit for Declaration, Possession and Permanent Injunction stating therein that the Plaintiff was allotted Plot No.ST-1, Sector 24-E, measuring 6001.38 sq. yards in Shah Latif Town, Scheme 25-A, [suit property] by Malir Development Authority [MDA], in lieu of Plot No.ST-1, Sector 18-A, Shah Latif Town Scheme-25-A, MDA, vide allotment letter dated 29.03.2011. Though the Plaintiff was issued possession order dated 26.04.2011, however, physical possession of the suit property was not handed over to it for which the Plaintiff, vide letter dated 21.06.2011, requested Senior Member, Board of Revenue, Sindh, to handover physical and peaceful possession of the suit property. In the meantime, the plaintiff noticed that some unknown person started construction over the suit property upon which the Plaintiff, vide letter dated 26.01.2016 informed the Additional Director Anti Encroachment Cell, MDA, and requested that measures shall be taken to stop the illegal construction. SHO, Shah Latif Town, was also requested to take action against illegal encroachment on the suit property and stop the same. However, when despite efforts no

meaningful action was taken by the relevant authorities, the plaintiff filed the present suit to protect its property along with the listed applications.

3. Upon notice of the applications, Ghandara Nissan Limited [Defendant No.2] filed Counter Affidavit to the above applications denying the contents of the injunction application and the supporting affidavit.

4. Learned counsel for the Plaintiff has argued that the Plaintiff was granted allotment by MDA and MDA claims ownership from the Board of Revenue. The Plaintiff does not claim adverse title to that of the private Defendant, whereas, all that required is to assess the location of the land of both the Plaintiff and Defendant No.2. It has been argued that Defendant No.2 alleges that the status of their land is commercial in nature, whereas Defendant No.2 has not attached a single document by which it may be ascertained that the alleged commercial plot was ever auctioned. Learned counsel while referring to Section 10A (2)(b) of the Colonization and Disposal of Government Lands Act, 1912, submits that the provision is quite clear that no land for commercial purposes shall be disposed of except by open auction at a price not less than the market price. It has also been argued that Defendant No.2 has also not attached any document with respect to the demarcation nor any survey document of the land; they allegedly claim to be in their ownership. He has further argued that they have never applied for demarcation of land as stipulated under Section 67-A of the West Pakistan Land Revenue Rules, 1968. It is argued that the location as claimed by Defendant No.2 through documents attached by Defendant No.2 are dissimilar and inconsistent. It has also been argued that Defendant No.2 claims to be in ownership of Survey No.158 and has attached a Geospatial Map, whereas the schedule of the Conveyance Deed dated 02.12.2015 does not coincide with the location in the Geospatial Map. Such irregularities and inconsistencies are an indication that Defendant No.2 themselves are not aware where their land exists and are illegally encroaching upon the Plaintiffs lawfully allotted land. It has further been argued that as per the letter dated 28.05.2008 of the MDA, the Authority admits that the survey No.155 to 159 do not fall within the land acquired by the Authority, therefore, demarcation of

the suit property is necessary to determine the exact location of the lands of both the contesting parties. Learned counsel lastly prayed for status quo with respect to the suit property. He, in support of his arguments, has relied upon the following case law viz: *Muhammad Aslam v. Muhammad Nazir Khan* [2008 SCMR 1075], *Sinotec Co. Limited through authorized person v. Province of Sindh through Secretary Sindh and 5 others* [PLD 2018 Sindh 303], *Syed Mahboob Shah v. Tehsil Nazim, Pishin and another* [2012 SCMR 196], *Muhammad Aslam v. Baldia Noor Pur Thal through Administrator and another* [2004 YLR 803], *Abdul Ghani v. Mandh and 15 others* [2002 YLR 3253], and *M/s. Bambino (Pvt.) Ltd. through Director v. Government of Sindh through Chief Secretary and another* [2002 MLD 1673].

5. Conversely, learned counsel for Defendant No.2, has contended that the Plaintiff cannot claim itself to be the lawful and absolute owner of the suit property merely on the basis of allotment letter issued by the MDA on the directives of a Minister that too without due process of law, more particularly when the MDA itself is not the owner/ lessor of the land-Survey No.158 measuring 04-21 acres, Deh Khanto, District Malir, Karachi. It is also contended that the suit property, allegedly belongs to the Plaintiff, is not shown in the Settlement Survey & Land Record of Sindh. He has further contended that the plaintiff was initially allotted a plot No.ST-1, measuring 2183 square yards in Sector 18-A, Shah Latif Town, Scheme No.25-A, KDA, in the year 1986 and thereafter without due process of law and despite the ban imposed by the Government of Sindh as to exchange of land, the Plaintiff on the recommendation of Minister of Information and Technology, vide letter dated 08.06.2006, got allotted the suit property in exchange bearing same plot number viz. ST-1, measuring 6001.38 square yards [nearly three times the size of original allotment] in Sector 24-E, Shah Latif Town, Scheme No.25-A, by MDA, in the year 2011. The site plan of the suit property clearly shows that it is adjacent to private land and not to any land belongs to MDA and further there is no 100 ft. wide road on the Northern side of the suit property. He has further contended that, in fact, Government of Sindh is the owner / lessor of the land-Survey No.158 measuring 04-21 acres, Deh Khanto, District Malir, Karachi,

which was leased out to the predecessor-in-interest of Defendant No.2, and subsequently acquired by the Defendant from its previous owners, vide registered Conveyance Deed dated 02.12.2015, after completing all legal formalities. It has been argued that the said land was duly mutated in the Record of Rights maintained by the Mukhtiarkar, who also issued Form No.II in favor of defendant No.2 and till date the name of the defendant is appearing in the Record of Rights maintained by the Government of Sindh. It has further been argued that since the relevant authorities have not handed over the vacant peaceful physical possession of the suit property to the Plaintiff, as such the Plaintiff has never been in physical possession or occupation of the suit property and the suit property only exists on paper issued by MDA at the instance of the Minister and not by any competent authority. It is further argued that since the plaintiff is in lawful possession of its lawfully acquired land as such question of encroachment of the suit property doesn't arise. It has been argued that the Nazir in his Report dated 18.09.2019 has attached the Sketch, filed by the Survey Superintendent showing the Survey No.158. There is no mention of plot of the Plaintiff or any other plot of MDA. It has been argued that most of the annexures filed along with the Plaintiff are not relevant and have been filed with malafide intention in order to mislead this Court. It has also been argued that the land bearing Survey No.158 has never been declared under any notification within the meaning of Section 14 of the MDA Act. 1993. The Survey No.158 has never been acquired by KDA and in the Revenue Records the Survey Number of Defendant and other Survey Numbers are in the name of the private persons. The Plaintiff has no right, title or interest in Survey No.158, which is in exclusive possession and occupation of Defendant No.2 as the lawful owner. The Plaintiff has never taken possession of the suit property. It has been argued that the Plaintiff has no prima facie case and the balance of convenience is not in their favour. The Plaintiff has not suffered any loss and the Plaintiff did not even lodge any FIR against the answering defendant on the date of the alleged dispossession. The Plaintiff is not the lawful owner of the said property and has not acted diligently and is not entitled to discretionary relief. The Plaintiff has not come with clean hands and has not disclosed the true facts of the case. That no

cause of action has been accrued to the Plaintiff against the answering Defendant. The suit plot of the plaintiff only exists on paper and the Plaintiff has not taken the physical possession of the suit plot and it is specifically denied that the answering Defendant has dispossessed the Plaintiff from the suit plot and has raised any illegal construction on it. Learned counsel has lastly argued that the present owner wants to construct a factory, they shall suffer irreparable loss and injury if the application of the Plaintiff is allowed as prayed. In support of his arguments, learned counsel has relied upon the following case law viz: *M.Y. Corporation (Private) Ltd. v. Messrs Erum Developers and 2 others* [PLD 2003 Karachi 222], *Puri Terminal Ltd. v. Government of Pakistan through Secretary, Ministry of Communications and Railways, Islamabad and 2 others* [2004 SCMR 1092].

6. Learned AAG has submitted that as per record maintained by the Mukhtiarkar, Ibrahim Hydery, Entry No.95/213 dated 29.10.2009 [Annexure G] of the Deh shows that Survey No.158 Acres out of 35 Acres N.C. No.89 of Deh Khanto was sold out by Mr. Muneer Mushtaq through Attorney Mr. Faryad to M/s. Muhammad Raees son of Muhammad Yousuf and Muhammad Tahir son of Muhammad Yousuf, vide registered Sale Deed No.2516, dated 01.08.2009. On the request of Purchaser M/s. Muhammad Raees s/o Muhammad Yousuf and Muhammad Tahir s/o Muhammad Yousuf, the Deputy Commissioner Malir, Karachi, had granted permission for construction of boundary wall on the Survey No.158/4-21, Acres Deh Khanto, vide his letter No.DC/Malir/K/Rev./Br./3235/2015 dated 17.09.2015. M/s. Muhammad Raees and Muhammad Tahir, the subsequent purchaser, had sold out the Survey No.158/4-21, Acres of Deh Khanto to Defendant No.2 [M/s. Ghandhara Nissan Limited], vide Conveyance Deed registered under No.346, dated 02.12.2015 and mutated in the Property Register as per entry No.130/2016 dated 20.06.2016. Thereafter, M/s. Ghandhara Nissan Limited had constructed boundary wall over Survey No.158/4-21 Acres of Deh Khanto. The Sketch attached by the Plaintiff with the Plaint shows that the same had been issued by the Malir Development Authority to the Plaintiff overlapping a portion of the Survey No.158/4-21 Acres of Deh Khanto owned by M/s. Ghandhara Nissan Limited [Defendant No.2].

7. Mr. Iqbal Khurram, Advocate for M.D.A [Defendant No.3] in his submission has stated that the Plaintiff is the lawful and legal owner of the suit plot allotted by the KDA defunct as well as Malir Development Authority to the Plaintiff and the possession of the said plot was with the Plaintiff since his allotment but Defendant No.2 illegally and unlawfully with the help of Revenue Authority managed the forged and fabricated documents and illegally occupied and encroached upon some piece of the said plot of land. He has further submitted that the Plaintiff has the cause of action to file the present suit and hence he will have No Objection if the listed applications are granted in the best interest of justice.

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

Since interlocutory application are to be decided as such at this stage only necessary facts and documents, which have not been disputed would be considered and discussed.

From the records it appears that a plot bearing No. ST-1, Sector 24-E, measuring 6001.38 Sq.Yds in Shah Latif Town, Scheme 25-A, MDA in lieu of plot No. ST-1, Sector 18-A, Shah Latif Town Scheme 25-A, was allotted to the plaintiff. In this regard initially, MDA, Commercial Cell, issued an Allotment Order/License bearing No. ST-1/Sector 24-E/Sch-25A(SLT)/Comm./2011/167 dated 14.02.2010 (sic), however, subsequently, it issued another Allotment Order bearing No. ST-1/Sector 24-E/Sch-25A(SLT) /Comm/2011/106 dated 29.03.2011. Although pursuant to the said allotment order, on 26.04.2011 a possession order was also issued to the plaintiff however, admittedly physical possession of allotted land was never handed over to the plaintiffs. A site plan annexed with the plaint also mentioned 'subject to demarcation at site' which apparently has not been done.

9. Insofar as the claim of defendant No.2 that it is the owner of the plot of land bearing Survey No. 158, measuring 4-21 acres Deh Kanto, Tapo Landhi, Taluka Ibrahim Hyderi, District Malir, Karachi [Survey No. 158] is concerned, from the record it appears that in the year 1994, a 99-years industrial/commercial/residential lease in respect of 35 Acres N.C. No.89 of Deh Khanto was executed in

favour of one Muneer Mushtaq. Although the said land was cancelled upon promulgation of Sindh, Government Land (Cancellation of Allotments, Conversion and Exchanges) Ordinance of 2000, however, subsequently, the same was regularized upon payment differential malkano. Later on, Muhammad Muneer sold out 4-21 Acres out of above 35 Acres to M/s. Muhammad Raees and Muhammad Tahir, both sons of Muhammad Yousuf, vide registered Sale Deed No.2516, dated 01.08.2009, thereafter, the survey property was mutated vide Entry No.95/213 dated 29.10.2009 maintained by the Mukhtiarkar, Ibrahim Hydery and they were also granted permission to construct a boundary wall on the said Survey [No.158/4-21, Acres Deh Khanto]. M/s. Muhammad Raees and Muhammad Tahir, had sold out the Survey No.158/4-21, Acres of Deh Khanto to Defendant No.2 [M/s. Ghandhara Nissan Limited], vide Conveyance Deed registered under No.346, dated 02.12.2015 and mutated in the Property Register as per entry No.130/2016 dated 20.06.2016.

10. Having considered the arguments advanced at the bar, it merits consideration that the rival claims of the parties more particularly the location of plaintiff's property is a substantive matter that could be decided at the final stage, on the basis of the evidence that may be brought on record. Hence, suffice it to say that, at this stage, in the face of the documents underpinning the chain of title filed and relied by defendant No.2, as well as the entries in its favour in the Revenue Record, coupled with the factum of possession, prima facie, justifies the possession of defendant No.2, being owner of the property. Moreover, defendant No.2, who has been put into possession of the land under a registered instrument after completing legal formalities would be put to more inconvenience in the event if its enjoyment and/or utilization of the land is denied. In such circumstances, in my opinion, at the moment, it will not be fair to deny defendant No.2 to have the benefits of its possession till such time the matter is finally resolved between the parties. In this regard, reliance can be placed in the case of *Mrs. Shahnaz and others v. Hamid Ali Mirza* (2006 CLC 1736) wherein learned Divisional Bench of this Court, inter alia, has held as under:

“With respect to construction, however, we are of the view that when ostensible title has been transferred in favour of the appellants, 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 that the matter is finally resolved and the respondent's claim is established. In Muhammad Shafi v. Kaniz Zohra Bibi 1983 CLC 2541, it was held by the Lahore High Court that a defendant "vendee has absolute right to enjoy his possession of the area in dispute for so long as the decree for pre-emption is not passed against him and is not executed. If he makes an improvement prior to notice of the suit the pre-emptor is required to reimburse him but after such notice he can do so only at his own risk". The same view seems to have reiterated in Muhammad Akram v. Rehmat Khan PLD 1987 Lab. 68 relied upon by Mr. Siddiqui. For the foregoing reasons, we would modify the impugned order to the extent that the appellants may raise construction on the plot but entirely at their own risk and could be required to pull it down if so required by the respondents in case the suit is decreed. The appeal is dismissed with the aforesaid modification."

11. In view of the above discussion, the listed applications viz: CMAs No. 17139/2017 and 37/2018 are disposed of in the following terms:-

- i. Ghandhara Nissan Limited [Defendant No.2], at its risk and cost, may continue with the construction of the subject plot strictly in accordance with the approved documents, 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 Defendant No.2, if any violation is found during the construction.
- ii The Defendant No.2, and/or anyone else, on its behalf, are restrained from creating any further third party interest in respect of the property till final disposal of the case.

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

JUDGE

Karachi;
Dated: 18.03.2022