

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
H.C.A. No. 286 of 2023

Dated: Order with signature of Judge(s)

Before: Nadeem Akhtar, J.
Mohammad Abdur Rahman, J

1. For orders on Office Objection.
2. For hearing of CMA No. 3347/2023.
3. For hearing of Main Case.

Appellant : Through Mr. Agha Shahzaib Advocate

Respondent No.1
& Respondent No.2 : Through Mr. Blosch A. Junejo advocate

Date of hearing : 17 October 2023

Date of Decision : 17 October 2023

JUDGEMENT

MOHAMMAD ABDUR RAHMAN J. This Appeal has been maintained by the Appellant under the provisions of Section 3 of the Law Reforms Ordinance, 1972 read with Section 15 of the Ordinance X of 1980 as against an *ex parte ad interim* order dated 22 August 2023 passed by a Learned Single Judge of this Court in Suit No. 1565 of 2023 on CMA. No. 12062 of 2023 being an application under Order XXXIX Rule 1 and & 2 of the Code of Civil Procedure, 1908 seeking to restrain the demolition of a heritage building that was being carried out by the Appellant on Plot No. 22/7 Civil Lines Quarter No. 9, Karachi (hereinafter referred to as the "Said Property").

2. The Appellants are the owners of the Said Property which has been declared as a "Protected Heritage" under the provisions of Section 6 of the Sindh Cultural Heritage (Preservation) Act, 1994. It seems that the Province of Sindh had permitted the partial demolition of the construction on the Said Property and had *inter alia* contended that as long as the façade

of the building was maintained, the Appellants were permitted to demolish the internal structure of the building and construct a ground plus 37 storey structure thereon. The Respondent No. 1 and 2 were aggrieved and had maintained Suit No. 1565 of 2023 challenging such permission. The Learned Single Judge had on 22 August 2023 been pleased to pass an ex parte ad interim order directing that:

“ ... *Meanwhile, defendants are restrained from carrying on any demolition work at/ of the subject building, till the next date of hearing.*”

3. Being aggrieved by the ex parte ad interim order passed by the Learned Single Judge, the Appellants have preferred this Appeal and which had been heard by this Court on 25 August 2023 and on which date on an ad interim order was passed suspending the operation of the order dated 22 August 2023 passed on CMA. No. 12062 of 2023 in Suit 1565 of 2023.

4. At the very outset and noting that this Appeal has been preferred as against an ex parte ad interim order we had raised a question as to the maintainability of this Appeal. Mr. Agha Shahzaib, appeared on behalf of the Appellant and contended that the Appeal was maintainable as it was the “practice” of the court to maintain such appeals. He relied on two unreported decisions of this Court in support of his contentions being:

- (i) Special High Court Appeal No. 279 of 2010 entitled **M/s.Moghul & Sons VS NIB Bank Ltd., & Ors.** which was as against a final Judgement and Decree passed by the Banking Court and not as against an ex-parte ad interim order; and
- (ii) an order dated 23 June 2023 passed HCA No. 262 of 2023 entitled **Prof. Nazeer Ashraf Laghari V/S Isra University and Others** and in which an order of the learned single judge

was suspended on the first date as both the Appellant and the Respondent were in appearance to proceed with the Appeal.

5. We have heard the counsel for the Appellant and have perused the record. The Jurisdiction of this Court to hear an appeal as against an interim order has been settled by the Supreme Court of Pakistan in the decision reported as **Habib Bank Limited and Others vs. Syed Zia ul Hasan Kazmi**¹ wherein it was held:

“ ... *We may observe that this Court, being the apex Court, generally does not interfere with an interlocutory order passed by competent Courts but if the same is arbitrary or capricious or against the well-settled proposition of law, this Court is bound to interfere with the same in order to obviate miscarriage of justice. We may further observe that the principle that non-interference in interlocutory orders of the Courts below by this Court is a matter of rule and interference is an exceptions, seems to be a sound principle subject to what has been observed earlier.*”

On the basis of the decision of the Supreme Court of Pakistan, the principles for maintaining an appeal are that:

- (i) non-interference by an appellate court in interlocutory order is a rule and interference is an exception; and
- (ii) the grounds for interfering are that the order should be “arbitrary” or “capricious” or against “well settled propositions of law” so as to “obviate the miscarriage of justice”.

6. We have perused the order dated 22 August 2023 passed on CMA. No. 12062 of 2023 by the Learned Single Judge in Suit No. 1565 of 2023 and note that the learned Single Judge had after hearing arguments regarding the right of the Appellant to demolish a “Protected Heritage” granted an ex-parte ad interim injunction restraining the demolition. Rule 123 of the Sindh Chief Court Rules states that:

¹ 1998 SCMR 60

“ ... 123. Notice to the other party.

Except in cases in which party is entitled as a matter of right and of course to the order asked for in a petition, notice shall ordinarily be issued to the other party interested to show cause why the order asked for should not be granted. If a party making an application desires that the order asked for be made without notice to any other party interested, reasons for making the order without such notice shall be set out in the petition.

It would seem that as per Rule 123 of the Sindh Chief Court Rules, prima facie notice of an application must be given to the parties to a *lis* before granting the same. The right however to apply for *ex parte* ad interim relief, as an exception to Rule 123 of the Sindh Chief Court Rules, is contained in Rule 76 of the Sindh Chief Court Rules and which clarifies as under:

“ ... 76. Procedure in applying for interim relief.

*Notwithstanding anything contained in Rule 123, the plaintiff may move the Court *ex parte* for interim relief on the ground of urgency and the Court on such application may, if it shall think fit grant interim relief on such terms as shall seem just.”*

As Rule 76 of the Sindh Chief Rules operates “Notwithstanding anything contained in Rule 123” therefore clearly the Learned Single Judge was well within his jurisdiction to pass the *ex parte* ad interim order dated 22 August 2023 on CMA. No. 12062 of 2023 in Suit No. 1565 of 2023 and no exception can be taken on this ground. It remains therefore to see whether the Order dated 22 August 2023 passed on CMA. No. 12062 of 2023 in Suit No. 1565 of 2023 was either “arbitrary” or “capricious” or against “well settled propositions of law” so as to “obviate the miscarriage of justice” so as to entitle this Court to exercise its Appellate Jurisdiction against such an order. While the Appellants may well have arguments on merits on which they would be able to satisfy the Learned Single Judge that the application under Order XXXIX Rule 1 and & 2 of the Code of Civil Procedure, 1908 does not merit consideration, we can see nothing in the Order dated 22 August 2023 passed on CMA. No. 12062 of 2023 in Suit No. 1565 of 2023 to suggest that it was “arbitrary” or “capricious” or against “well settled propositions of law”. Rather the order is premised on an exception being created by the Province of Sindh in respect of the preservation of a “protected heritage”

and which would have to be defended within the perimeters of that law by both the Appellants and the Province of Sindh.

7. While perusing the Appeal we note that the main ground of the Appellant seems to be that the Respondent No. 1 having maintained C.P. No. 95 of 2023 and having not obtained injunctive relief in that Petition had subsequently maintained Suit No. 1565 of 2023 and which was an abuse of process and which would disentitle the Respondent No. 1 from claiming injunctive relief. Without dilating on the merits of this argument, we are clear that such an argument is not the basis for maintaining an appeal as being either “arbitrary” or “capricious” or against “well settled propositions of law” so as to “obviate the miscarriage of justice.” This is an argument clearly towards the maintainability of Suit No. 1565 of 2023 and which must be addressed to the learned Single Judge and not in Appeal. In addition, the reliance of the Counsel for the Appellant on the decision Special High Court Appeal No. 279 of 2010 entitled **M/s.Moghul & Sons VS NIB Bank Ltd., & Ors.** is clearly misplaced as that Judgement passed in that Appeal was as against a final judgement and decree and not as against an exparte ad interim order. While noting that the unreported exparte ad interim order in HCA No. 262 of 2023 entitled **Prof. Nazeer Ashraf Laghari V/S Isra University and Others** was against an interim order, that case had its particular facts as both the Appellant and the Respondent appeared before the Court to argue the matter on the first date of hearing and both counsels were put on terms on the hearing of the main appeal. It is also to be noted that HCA No. 262 of 2023 was also dismissed on 15 September 2023 sustaining the order of the learned Single Judge and which clearly therefore cannot be used as a precedent to justify the maintainability of this *lis*.

8. For the foregoing reasons we are of the opinion that this Appeal is not maintainable and is dismissed along with all listed applications with the observations that the Learned Single Judge should adjudicate CMA. No.

12062 of 2023 in Suit No. 1565 of 2023 preferably within a period of 4 weeks from the date of the passing of this order and that nothing contained in this Judgement should in any manner prejudice the hearing of that application.

JUDGE

JUDGE

Karachi dated 17 October 2023