

IN THE HIGH COURT OF SINDH, KARACHI
Suit No. 392 of 2018

Plaintiffs : Wamiq Aziz Zuberi and others, through
Mr. Amel Khan Kasi, Advocate.

Defendants : Province of Sindh, through Secretary Land
No.1, 4 & 5. Utilization Department, Board of Revenue,
Karachi, Mukhtiarkar (Revenue) Civil Lines,
Karachi-South and Sub-Registrar-II, Clifton
Town, Karachi (*nemo*)

Defendants No.2&3 : Sindh Building Control Authority, Karachi
through Mr. Ghulam Akbrar Lashari,
Advocate.

Defendant No. 6. : Faisal Hussain, through Mr. Aijaz Ahmed
Advocate.

Date of hearing: 04.12.2023
Date of order :

ORDER

ZAFAR AHMED RAJPUT, J:- By this order, I intend to dispose of C.M.A. 2918 of 2018 filed on behalf of the plaintiffs, under Order XXXIX, rules 1 & 2 read with Section 151, C.P.C., seeking interim injunctive relief restraining the defendants No. 1 to 6 from constructing a commercial building on Plot No. 10, Sheet No. CF 1-5, Old Clifton Quarters, Karachi admeasuring 1995 square yards (*“the suit property”*) on the basis of Approval Letter, bearing Ref. No. SBCA/D .D-II/ Saddar Town-II/PROP-26/2017/53 dated 13.10.2017, issued by the defendant No. 2 [*Sindh Building Control Authority (SBCA)*] and/or converting it into a commercial property.

2. The facts germane for the disposal of the instant C.M.A. are that the plaintiffs have filed the instant suit for declaration and permanent injunction alleging therein that they are residents of Clifton, Karachi and living in the vicinity of the suit property. It is claim of the plaintiffs that the schedule of the Conveyance Deed, dated 03.11.2016, verifies the residential status of the suit property but its owner, the defendant No. 6, misrepresented its position as

“residential cum commercial property” and the SBCA vide impugned Approval Letter granted an unlawful approval for a commercial building of ground plus four floors, which includes offices, on the suit property in violation of the law and regulations. It is case of the plaintiffs that the commercialization of the suit property will cause plaintiffs’ purdah-observing women great distress, as it will result in an unwarranted influx of public in a residential area and it is axiomatic that such influx of unknown people in the neighborhood raises security concerns and otherwise causes great inconvenience to the residents of the vicinity. It is further case of the plaintiffs that the commercial activities on the suit property will create severe traffic congestion, smoky/polluted environment and security hazard; lead to noise pollution, loss of privacy and overpopulation, and ultimately would result in a loss of property value of prime residential neighborhood and in violation of the plaintiffs’ right to freely enjoy their residential properties. It is also case of the plaintiffs that the heritage site of Mohatta Palace is also located in the same vicinity, which is in danger of being damaged by the alleged construction of illegal commercial project on the suit property. Hence, cause of action accrued to plaintiffs to file the instant suit with following prayers:

- I. Declare that the approval vide Approval Letter issued by the defendant No.2 dated 13.10.2017, Reference No.SBCA/D.D-II/Saddar Town-II/PROP-26/2017/53 is illegal, null and void, and liable to be set aside;*
- II. Declare that the defendants cannot grant any approval for beyond the Floor Area Ratio of 1:1 in respect of the said property as per the floor area ratio prescribed by Regulation 25-2.1 of the Regulations, 2002 for residential properties;*
- III. Declare that the said property which is a residential property has not been legally converted into a commercial or a residential cum commercial property and any approvals or sanctions including the approval on such basis are illegal and liable to be cancelled;*

- IV. *Grant a permanent injunction restraining the defendants No.1-6, their agents, servants, and/or any other person(s) acting on their behalf from constructing a building on the basis of the illegal approval and/or converting the said property which is a residential property into a commercial property;*
- V. *Issue a mandatory injunction directing the official defendants to conduct an inquiry and take legal action against such officers of the official defendants found to be acting in collusion with the defendant No.6 in issuing the approval in violation of the law;*

3. Learned counsel for the plaintiffs has contended that the impugned Approval Letter has been obtained by the defendant No.6 by concealment of facts and abusing the law; that the easement rights of the plaintiffs would be violated by any construction of a commercial building on, and/or commercial usage of the suit property; that the plaintiffs bought their respective properties in the neighborhood of the suit property on the very basis that the same is purely a residential area; hence, the residential nature of the neighborhood wherein the plaintiffs reside are vested rights of the plaintiffs; as such, carrying out any sort of commercial activities on residential suit property is not only a violation of the relevant law, rules and regulations but will also create extreme public nuisance for the plaintiffs; that the criteria applicable for construction on residential plots is different to that of commercial plots, as the Regulation 25-2.1 of the Karachi Building & Town Planning Regulations 2002 (**“the Regulations 2002”**) states that a plot size of 1000 square yards or larger shall observe the Floor Area Ratio (**“FAR”**) as of 1:1, whereas Regulation 25-3.1 (*ibid*) states that the FAR to be observed by commercial plots is 1:5.5; hence, by illegally obtaining the approval, the defendant No. 6 has attempted to circumvent the law and the mandatory restriction applicable on residential buildings that applies on the suit property; that the Regulation 18-4.2 (*ibid*) sets out the applicable procedure that the defendant No. 6 is bound to follow in order to convert the suit property into a commercial and/or a residential cum commercial property; however, no such

procedure has been followed by the defendants; that as per to Regulation 18-5 (*ibid*) the conversion of a residential plot into a commercial plot can only be done “according to a uniform commercialization policy formulated and revised from time to time by the Master Plan Group of Offices (*now under the SBCA*) with approval of Government and individual plots outside the policy cannot even be considered for commercialization; that the Regulation 18-5.2 (*ibid*) specifically requires that a public notice be issued for the change of land use of residential plots; however, no such notice was published in any newspaper inviting objections from public; that the defendants No. 1 to 6’s acts and inactions in allowing the defendant No. 6 to convert the suit property is unlawful, mala fide and without jurisdiction; that unless the instant application is granted, the plaintiffs shall be seriously prejudiced and suffer irreparable loss and injury; that the plaintiffs have made out a strong prima facie case and the balance of convenience also lies in their favour.

4. On the other hand, learned counsel for defendant No. 6 has maintained that the suit is itself barred under Sections 21, 42 and 56 of the Specific Relief Act, 1877; that since the suit property is a perpetual leasehold property in terms of Government tenure H/3/1, it can be used for residential-cum-commercial purposes, and no question of any conversion of its use under the relevant regulations of the Regulations 2002 arises; that as per defendant No. 1’s own records as well as that of the Board of Revenue Sindh, the suit property can be used for residential-cum-commercial purposes, which fact was also confirmed by the Addl. Deputy Commissioner-II, South-Karachi vide his letter dated 28.04.2017 addressed to defendant No. 2, who has approved the building plan in accordance with law; that the plaintiffs, with mala fide, have attached only part of the title documents of the defendant No. 6 and excluded the document which acknowledges the nature of the lease tenure of the suit property; that defendant No. 6 has not converted the use of the suit property, as the word “residential”

instead of “residential-cum-commercial” was inadvertently mentioned in the Conveyance Deed while the nature of the lease of the suit property is clearly stated in all other title documents and such error has been rectified; that the roads in the area are thoroughfares and open to use by general public and none of the plaintiffs own any property on the road on which the suit property is located as all of them live far away from it; that the defendant No. 6 is entitled to use the suit property in accordance with its lease tenure for residential cum commercial purpose, the building being constructed by the defendant No. 6 comprises of apartments and limited office space; therefore, the assertions of the plaintiffs are excessively exaggerated; that the letter purportedly issued on the letterhead of Mohatta Palace Museum is *ex facie* a letter motivated by the plaintiffs and it is a matter of public knowledge that the museum building itself is being used for commercial purposes, while the purported letter, even so cannot restrict the defendant No.6’s use of the suit property; that the suit and the instant application are sheer abuse of the process of the Court, which are liable to be dismissed with costs, as the plaintiffs have failed to make out any legal right to seek the injunction and prima facie case for the grant of the injunction, so also, the balance of convenience lies in favour of the defendant No. 6 as he is entitled to the use of his property; hence, the CMA is liable to be dismissed.

5. Learned Counsel appearing for the defendants No.2 & 3 (*SBCA*) has maintained that before approving the proposed building plan, Deputy Director, Saddar Town-II, *SBCA*, vide letter dated 27.04.2017, sought verification of the status of the suit property. In response thereof, the Addl. Deputy Commissioner-II, South-Karachi vide letter dated 28, 04.2917 verified the status of the suit property as “residential-cum-commercial”. Hence, the *SBCA* approved the proposed building plan in accordance with law.

6. Heard, record perused.

7. It appears that the defendant No.6 being owner of the suit property submitted the proposed building plan consisted of Basement (*ARS & Parking*) + Ground Floor (*Offices, Recreation & Flats*) + 1st to 4th Floors (*Flats*) along with a forwarding letter, dated 18.04.2017, of the Addl. Deputy Commissioner-II, South-Karachi/the lessor, as per Regulation 3-2.2 of the Regulations 2002. The Town Planning Section also issued NOC for the proposed construction on 01.06.2017 and on the basis thereof Architectural Concept Plan was accepted for Basement (*ARS & Parking*) + Ground Floor (*Offices, Recreation & Flats*) + 1st & 2nd Floors (*Flats*) only, in compliance of the order of the Hon'ble Supreme Court of Pakistan, and remaining 3rd & 4th Floor were withheld till further decision in C.P. No.38/2016 by the Apex Court, vide approval letter, dated 07.06.2017. The plan was also forwarded to the Structure Section for their NOC, which was also accorded. After completing all legal and technical formalities, the SBICA granted final approval of building plan for Basement (*ARS & Parking*) + Ground Floor (*Offices, Recreation & Flats*) + 1st & 2nd Floors (*Flats*) only, as per Regulations 3-2.2.1 of the Regulations 2002, vide letter dated 13.10.2017. The defendant No. 6 has also obtained height NOC, dated 31.10.2017, from Pakistan Civil Aviation Authority allowing the construction up to 100 ft. height Above Ground Level and an application, dated 21.02.2018, for further release of 3rd & 4th Floor in pursuance to modified order dated 14.01.2018 passed by the Apex Court in the said Constitution Petition, which was also allowed.

8. It further appears that the plaintiffs filed the instant suit on the basis of Conveyance Deed, registered with the Sub-Registrar-II, Clifton Town, Karachi vide registration No. 2363 dated 23.11.2016, which described the status of the suit property as 'residential'; however, the said Deed was subsequently rectified vide Deed of Rectification, registered with the said Sub-registrar vide registration No. 1229, dated 02.10.2019, whereby the nature of the lease tenure/category was described in the Conveyance Deed as 'H/3/1'. As per the letter of the Addl.

Deputy Commissioner-II South-Karachi, dated 28.04.2017, the suit property is held on Govt. 'H/3/1' Category, which can be used for "residential cum-commercial purpose". Hence, the plaintiffs failed to make out a good prima facie case in respect of their claim that the suit property is having status of a 'residential property'

9. So far the applicability of the clauses of regulations 18.5 of the Regulations 2002 referred to by the learned counsel for the plaintiffs are concerned, it may be observed that the same are applicable only in case of change of land use. In the instant case *prima facie* the clauses of regulation 18.5. are not applicable as there is no case of change of land use for the reason that the suit property under the relevant official record falls in category "residential cum-commercial purpose".

10. As regards the claim of the plaintiffs that the easement rights of the plaintiffs would be violated by any construction of a commercial building on, and/or commercial usage of the suit property, it is yet to be established by the plaintiffs through substantial evidence that, being owner or occupier of certain immovable property in the vicinity of the suit property, they have been enjoying easement uninterruptedly as absolute right for last twenty years and thus, as held by the Apex Court in the case of Abdul Khaliq alias Mithoo v. Moulvi Sher Jan and others reported as **2007 SCMR 901**, they fulfill the following conditions as required under Section 15 of the Easement Act, 1882, for the acquisition of a right of easement by prescription,

- i) *The right claimed must not be uncertain.*
- ii) *The right claimed must have been enjoyed.*
- iii) *It must have been enjoyed independently of any agreement with the owner or occupier of the land over which the right is claimed.*
- iv) *It must have been enjoyed (a) peaceably, (b) openly, (c) as of right, (d) as an easement, (e) without interruption, (f) for twenty years.*

As such, the determination of above-mentioned attached conditions to the easement right, claimed by the plaintiffs, need trial and without proving such right I am of the view that the defendant No. 6 cannot be restrained from raising alleged construction under an approved plan merely on the basis of plea of violation of easement right.

11. Keeping in view of the aforementioned facts of the case, I am of the tentative opinion that there is nothing on record to show that the suit property was a residential property; therefore, plaintiffs could not establish arguably the existence of right claimed in the suit and infringement thereof to make out a prima facie case for injunction. The balance of convenience also does not lie in favour of plaintiffs but in favour of defendant No.6, who has incurred heavy investment for construction of a commercial building, thus, it is the defendant No.6 who would suffer more inconveniently by granting of injunction than the plaintiff by withholding of injection. In similar terms, it is the defendant No.6 who shall suffer irreparable loss rather than the plaintiffs. The question of nuisance and infringement of easement rights would be determined after recording of evidence of the parties in suit. As such, I am not inclined to grant discretionary relief of injunction and, therefore, this application (CMA 2918 of 2018) is dismissed with no order as to costs.

12. Before parting with this Oder, I may clarify that the observations made herein above are tentative in nature and will not be taken into consideration by the Court while deciding main suit after examining the evidence produced by the parties.

JUDGE

Abrar