

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.525/2011

1. For hearing of CMA No.7791/2015
2. For hearing of CMA No.12763/2013
3. For hearing of CMA No.14912/2015

Plaintiffs : Pakistan Defence Officers Housing Authority,
through Mr. Khalid Mehmood Siddiqi, advocate.

Defendants : CREEK MARINA (PVT) Limited Pakistan & others
through Mr. Arshad M. Tayyabaly, Advocate for
defendant No.1 & 2 alongwith Ms. Sehar Rana and
Muhammad Shahid Advocates.

M/s. Navin Merchant and Munawar Ghani
Advocates for defendants No.6 to 20.

Mr. Amin M. Bandukda, Intervener.

Date of hearing : 30.03.2016.

Date of announcement : 22.04.2016.

ORDER

SALAHUDDIN PANHWAR, J: Through *joint application* (CMA No.7791/2015), defendants No.1 to 4 & interveners (allottees), seek to allow defendant No.1 to utilize the funds, maintained with the defendant No.5 for the Creek Marina Project; whereas through CMA No.12763/2013 defendant No.1 to 4 seeks permission to allow the defendant No.1 to withdraw further amounts for the project without any hindrances or obstructions by the plaintiff.

2. Leaned counsel for applicant contends that instant suit is filed by plaintiff (DHA) against the builder and due to hindrances created by DHA, defendants have failed to complete the project; DHA has not invested any amount; title of defendants No.1 to 4 is not disputed. CMA No.7791/2015: Builder and allottees, have filed joint application appended with MoU. Albeit, plaintiff has filed appeal against Order dated 11.5.2011 but no stay is operating.

3. Learned counsel for allottees (defendants) has contend that they have no objection if CMA 7791/2015 is allowed, however, to save the interest of allottees, defendants shall be directed to submit financial plan, as well as the construction raised much earlier back may not be feasible for further structure, therefore, strength of that construction is yet to be verified by the competent engineering company. Further it is contended that standing committee may be framed jointly, having representation of all parties. Newly added defendant (intervener) contended that his name is not available in the list appended with above application, though he is also allottee. On this, learned counsel for builder contended that the intervener and other allottees also would be treated on same terms and conditions enshrined in MOU.

4. Learned counsel for plaintiff while refuting the above contention has contended that basically the defendants No.1 to 4 entered into contract with DHA thereafter two addendums were added in main agreement, according to mutual understanding; defendants No.1 to 4 are required to pay Rs.01 Billion to the plaintiff; that CMA No.5286 of 2011

was also decided by Order dated 11.5.2011 but material questions were not resolved.

5. I have heard the respective sides and have also *carefully* gone through the available record.

6. It is worth to mention here that through instant *joint application* (CMA 7791/2015), the defendant Nos.1 to 4 and interveners insist application on following proposed *terms*:-

1. *The Defendant No.5 be directed to submit an up to date account of the total funds of the Defendant No.1 maintained by it, inclusive of the mark-up accrued to date.*
2. *The Intervenors No.1 to 15 represent the Creek Marina Action Committee ("CMAC") which is comprised of 129 customers of the Defendant No.1 CMAC has executed an MOU with the Defendants No.1 to 4 on 17.02.2015 which has been appended herewith as Annexure A. The terms for construction management, implementation, completion and controls for the Project have been detailed in the MOU which may be deemed as an integral part of this Application.*
3. *The parties hereto will jointly form a committee ("the Steering Committee") comprising of one representative of CMAC, and one Representative of CMPL. The function of this Committee will be to oversee the construction work at the Project, its Management and Finances.*
4. *The Defendants who are hereby making this joint application, by mutual consent agree to appoint an independent project monitoring consultant being M/s Engineering Associates ("the Consultant"). The Consultant will fully monitor the progress of work at the Project as per agreed specification and process and approve all payments related to the Project in the manner detailed below.*
5. *The Defendant No.1, within first 7 days of each month, will submit to the Consultant a projected monthly budget of expenditures with respect to the Project. Such budget will include the costs of construction, payments for purchase of materials/ equipment, estimated payments to be made to the*

contractors and administrative/operating expenses (hereinafter collectively referred to as "the Costs"). The Consultant will scrutinize such budget on the following touchstones:

- a) The Costs should have a direct nexus to the Project; and*
 - b) The Costs should be in line with the prevalent market values for a Project of this size, complexity and Quality.*
- 6. Provided that the requirements set out in paragraphs 3(a) and (b) are fulfilled, the Consultant shall approve the projected budget submitted by the Defendant No.1 within a period of (5) working days of submission thereof and be presented to the Steering Committee for final approval who will do so within three (3) working days. The Defendant No.5 shall release the amount upon receiving the approval by the Steering Committee.*
 - 7. The Defendant No.1 shall be allowed to transfer to its operating account, the approved budget amount from the account maintained by it with the Defendant No.5 once the projected budget is approved by the Consultant and the Steering Committee and use these funds to pay the Project Costs.*
 - 8. In addition to the aforementioned report, the Project Consultant will submit a detailed progress report to the Steering Committee on a monthly basis with respect to the construction work being carried out at the Project. This will include a re-conciliation of the approved budget with the actual payments made out from the previous month budget.*
 - 9. It is further clarified that while the Committee may, by majority vote, make recommendations for implementation of construction work it shall not ordinarily interfere with the release of funds maintained with the Defendant No.5, except in case where the budget is disapproved partially or entirely where it will make the final decision as per paragraph 6.*
 - 10. The Defendant No.1 shall endeavor to resume the construction work at the Project expeditiously and in any event such resumption will commence within 30 days from the day on which the funds are released to the Defendant No.1.*
 - 11. The aforementioned tentative arrangement has been agreed for the purpose of resuming works at the Project and is completely without prejudice to the rights and/or case of either side.*

7. At the very *outset* it is necessary to mention that instant *joint application* (CMA No.7791/2015) *itself* speaks the cause thereof as:

'...since the mechanism provided by means of the Order dated 15.07.2011 has so far not been implemented and cannot be practically implemented under the present circumstances, the defendant No.1...

From the above, it is quite clear that through instant *joint application* the defendant nos.1 to 4 and interveners seek an *escape/exception* to order of this Court dated 15.7.2011 which, *in my view*, is not the scope of Section 94 of the Code of Civil Procedure 1908 . I would *however* come to this *later* but feel it quite necessary and within meaning of fairness, equity and good conscious to refer the relevant portions of this Court's order dated 11.5.2011 (in CMA No.5286/2011) wherein, having considered all points, a *frame-work* was provided with reference to documents and claims of respective parties, which are:-

'After having considered the record and the submissions of learned counsel for the contesting parties, and in light of the foregoing discussion, I have come to the conclusion that the relief sought by the plaintiff by means of its two applications is somewhat broader than what is warranted in the facts and circumstances of the case, as presently made known to the Court. At the same time there does appear to be weight to the plaintiff's concern regarding how the project funds, including the monies received from the allottees, are being dealt with and utilized. What does appear to be common ground between the contesting parties is that the project should be completed in the shortest possible time so that the position of both the plaintiff and the defendants stands vindicated. Accordingly in my view, it would appropriate to dispose of the pending applications in terms of certain directions, which are as follows:

a) *The funds lying in the account of the defendant No.1 with the defendant No.5 shall continue to remain*

in the said account and shall be dealt with as hereinafter stated.

b) Within seven days, the defendant No.1 shall provide a list of all its accounts, whether in its own name or under its control, and both onshore and offshore, to the plaintiff and a copy of the same shall be placed on the record of this file and those funds shall also be dealt with in the manner hereinafter stated. No other or further accounts shall be opened or operated by the defendant Nos.1 and 2 in relation to the project, except as stated in these directions or otherwise permitted by the Court.

c) *By the 20th of each month the defendant No.1 shall submit a budget for the next coming month in respect of expenditures and outlays to be incurred and made by it in respect of the project and shall identify the sources (including the bank accounts herein referred) from which such expenditures and outlays are to be met and such budget shall be certified by the auditors of the defendant No.1.*

d) *By the 25th of each month the plaintiff shall communicate to the defendant No.1 any objections to any item in the proposed budget and shall also specify exactly why, according to the plaintiff, the proposed outlay or expenditure is not for the purposes of the project and all such objections shall be certified by a reputable firm of chartered accountants to be engaged by the plaintiff at its own cost for the time being, but the plaintiff may be reimbursed by the defendant Nos. 1 and 2 if the Court subsequently so deems appropriate.*

e) *In case any objection is taken as above, the auditors of the defendant No.1 and the chartered accountants acting for the plaintiff, and the concerned officers of the plaintiff and the defendant No.1 shall meet immediately to resolve the situation. In case they are unable to do so, then a reference may be made to the Court, but the parties are put to notice that heavy costs, payable immediately, will be imposed in respect of each objection (such costs being not less than Rs. 25,000 for each objection) on the party found, as the case may be, to have raised or resisted the same without reasonable cause.*

f) *On and from the first day of the month for which the budget has been proposed and scrutinized as above, the defendant No.1 may make payments from the accounts referred to herein above (payments in respect of outlays objected to being subject to the foregoing), and shall in respect of each such payment provide to the plaintiff details of the same duly certified by its auditors and supported by*

copies of bank statement(s) by the 7th of the next succeeding month.

g) If any payments in respect of any monthly budget are to be made to the defendants No.2 to 4 or to any entity controlled by any of these defendants or associated with them then such payments shall be made into a special foreign currency account to be opened onshore with the defendant No.5 by the defendant No.1 and disbursement from this account shall not be made without the prior orders of the Court.

h) The defendant No.5 shall, in respect of the last mentioned account, and on a monthly basis, file a statement showing the inflows into such account and, in the case of any outflows, shall certify that the same were made only after receipt of the written orders of the Court.

i) From the funds now lying with the defendant No.5 in the account of the defendant No.1 first above mentioned, a certain sum shall always be kept available unless otherwise permitted by the Court, such sum being, in aggregate, equal to the amounts paid by those allottees who have filed suits in any court of law, and in which such allottees' only claim (whether by way of damages or otherwise) is for repayment of the amount paid to the defendant No.1, but it is clarified that the amount to be retained by the said defendant shall only be in respect of the exact amount paid to it by the allottee concerned, and not in respect of any additional amount being claimed, whether by way of damages, profit etc.

j) The defendant No.1 shall open an account with the defendant No.5 which shall be, and deemed to be, the Escrow Account for the purposes of the Main Agreement and all payments made by any allottees at any time hereafter shall be paid into this account (the details of which shall also be placed on record of this file) and the plaintiff shall be entitled to all its rights under the Main Agreement as amended in respect of this account.

k) Once the Escrow Account as above has been opened, any monies paid into it may be dealt with in terms as stated in the foregoing but the defendant No.5 shall in any case, with specific reference to this account, also place on record on a monthly basis a duly certified statement of all inflows and outflows to and from the said account.

l) As a transitional measure, the budget for the month of August, 2011 may be submitted by 25.07.2011, and any objections thereto by the plaintiff may be taken by 30.07.2011; all other directions as above shall apply mutatis mutandis to such budget.

*The three applications stand disposed of in the above terms.”
(emphasis supplied)*

The above *comprehensive* order of this Court not only covered the interests, rights and obligation of parties to *contract* i.e plaintiff and defendants but also of allottee(s). It is pertinent to mention that *Main Agreement* is in between plaintiff, defendant No.2 wherein defendant No.1 *later* joined. The terms, *detailed* in above order, *nowhere* put any restriction in *progress* of the project but only provides a mechanism; which is evident from observation made before formulating the terms in the order dated 15.7.2011 i.e:

‘..What does appear to be common ground between the contesting parties is that the project should be completed in the shortest possible time so that the position of both the plaintiff and the defendants stands vindicated.’

8. I do not find any *provision* in the Code of Civil Procedure 1908 which could be taken to maintain the *prayer* (CMA No.7791/2015) when it, *in all manner*, shall amount to effect the earlier order of this Court. An Order may be modified by exercising jurisdiction of *review* which too has a *limited* scope which, *however*, is not the case of the application *in hand* because the present applicants of CMA No.7791/2015 (*i.e defendant Nos.1 to 4 and interveners*) do not claim themselves to be aggrieved with such order as they have not challenged the order, *sought* to modified. The defendant Nos.1 to 4 and interveners *though* have filed the instant application *jointly* yet their move *even* shall not vest this Court with a jurisdiction which it (Court) does not possess *legally*. It is a well settled principle of law that *‘jurisdiction is subject to the Law & not to the consent of the parties’*. I would also make it clear that it is not the *interveners* only but

'all the allottees' whose rights have been protected as is evident from term (i) of the Order dated 15.7.2011 therefore an exception thereto in absence of all *allottees* legally cannot be allowed as it may result in defeating rights of those *even* who have not consented to the instant application (CMA No.7791/2015) which, I am sure, *legally* cannot be done. Let me insist that rights and interest can *well* be protected even in absence by a Court if justice so demands, being *ultimate* guardian of rights of individuals, but it (Court) can't vice-versa.

9. Reverting to the CMA No.12763/2013, it would suffice to say that this would also amount to prejudicing the terms (a) to (c), *in particular*, of order dated 15.7.2011 therefore, and in view of above discussion cannot be accepted.

10. As regard the CMA 14912/2015, through which intervener M. Ameen Bandukda sought his impleading as a party to the proceedings, it would be sufficient for its disposal that status of such person as *allottee* is not disputed therefore, it would be in all fairness to put him in same queue of CMA No.6229/2014.

11. In view of above, discussion both the above CMAs i.e 7791/2015 and 12763/2013 are *hereby* dismissed being misconceived and not sustainable while the CMA No.14912/2015 is allowed.

12. While parting, it is material to mention here that builder is not *legally* justified to keep it avoiding to complete the project with complete financial plan and should show vigilance so that the *project*

could be completed as per mechanism, provided by order dated 15.07.2011 which, *however*, has not moved ahead despite lapse of about five (5) years because lapse of every single day might change the cost of the *project* which would cause complications at the cost of allottee(s).

Imran/PA

J U D G E