IN THE HIGH COURT OF SINDH AT KARACHI

Present:
Muhammad Iqbal Kalhoro, J.
Agha Faisal, **J**.

HCA 375 of 2023

Zahidullah Khan
vs.
Pakistan Defence Officers Housing Authority & Others

Mr. Salahuddin Ahmed & Mr. Nadeem Ahmed (appellant)
Mr. Abid S. Zuberi & Mr. Ayan Mustafa Memon (respondent 1)
Mr. Khawaja Shams-ul-Islam (respondent 2)
Mr. Omer Soomro & Mr. Danish Nayyer (respondent 4)

Date/s of hearing : 12.09.2024; 19.09.2024; 23.09.2024; 07.10.2024.

Date of announcement : 16.10.2024

ORDER

Agha Faisal, **J**. Suit 1169 of 2013 ("Suit") was filed by the appellant assailing the development of Creek Terraces, Creek View and Creek City in Phase VIII DHA Karachi ("Project"); upon the averment that such development was taking place on an amenity plot. CMA 9983 of 2013 ("Application") was filed therein, seeking interim restraint with respect to the Project. Hearing of the Application started in earnest on 02.09.2014, when it was *part heard*, and labored until 08.04.2023, when it was *last*[1] reserved for orders. Almost six months later, the Application was dismissed, albeit vide short order dated 06.10.2023. The detailed reasons were announced more than four months later, on 19.02.2024[2]. The dismissal of the Application has been assailed herein and the primary ground pleaded is *inordinate delay*[3].

Factual context

2. It was articulated that in 2003 the respondent no. 1 ("DHA") launched its Creek City Project. Expressions of interest were said to have been solicited in October 2004 via recourse to publication is newspapers. Bidding for the Project is suggested to have taken place in April 2005; where after letter of intent was issued to the respondent/s. Objections from the public to the Project are said to have been invited in August 2007 and upon none having been received, from the public or the appellant, the Project was launched.

[1] Learned counsel placed on record certified copies of order sheets demonstrating numerous instances in the past when the Application was reserved for orders, however, was subsequently directed to be fixed for re-hearing.
[2] The short order dated 06.10.2023 and the detailed reasons dated 19.02.2024 shall be collectively referred to as the impugned order.
[3] Ground (A) of the memorandum of appeal; at page 1-A/16.

3. The Suit was filed in 2013 and on 20.09.2013, while issuing notice of the Application, the respondents were restrained from launching the Project and directed to maintain status quo. On 09.10.2013, the interim order was modified and construction of the Project was allowed at the respondent / defendants' risk; in accordance with the approved building plan. This order was never assailed by the appellant.

4. The Application remained pending for over decade, with *ad interim* orders subsisting, until it was determined, as aforesaid, hence, this appeal.

Respective arguments

5. Mr. Salahuddin Ahmed articulated the case of the appellant and insisted that the appeal be allowed and as a consequence thereof the Application be granted. The crux of his submissions was that the Project was being constructed on an amenity plot, hence, was illegal *ab initio*.

6. It was the respondents' case[4] that this appeal merited dismissal forthwith as appellant had no *locus standi*, the Suit was patently time barred and notwithstanding the foregoing, the Project was demonstrably *not* being constructed on an amenity plot.

Scope of determination

7. Heard and perused. It is imperative to denote at the onset that this is an appeal against the dismissal order rendered in an interlocutory application. The matter of *locus standi* in the present dispensation would perhaps have to be read as an issue of *entitlement* per section 42 of the Specific Relief Act 1877. The question of *limitation* would require to be addressed with reference to the First Schedule to the Limitation Act 1908. The deliberation upon these issues would go beyond adjudication of an order in an interim application and would impact the very existence of the Suit.

8. The Supreme Court has maintained in *Florida Builders*[5] that the very tenability of proceedings ought to be determined by a court at the very onset, irrespective of whether triggered by an application. However, such a

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[4] Articulated by Mr. Khawaja Shamsul Islam, Mr. Omer Soomro & Mr. Abid S. Zuberi in seriatim.

[5] Per *Saqib Nisar J* in *Haji Abdul Karim & Others vs. Florida Builders (Private) Limited* reported as *PLD 2012 Supreme Court 247*.

conclusive exercise remains to be undertaken in the Suit and propriety demands that we stay our hand in such respect[6].

9. The Application, seeking interim relief, was filed per Order XXXIX Rules 1 & 2 CPC, hence, it is considered appropriate that we remain circumscribed to the precepts of the said provision in order to determine the fate thereof. Therefore, the solitary point for determination, framed in pursuance of *Order XLI Rule 31 of the Code of Civil Procedure 1908*, is as follows:

> "*Whether the appellant had manifestly qualified at the anvil of prima facie case, irreparable loss and balance of convenience for grant of the Application.*"

Inordinate delay in rendering the orders impugned

10. The first ground pleaded in the memorandum of appeal is that the *short order* was rendered nearly six months post the order on application having been reserved and the reasons were not delivered for more than four months hence. Reliance was placed on *MFMY Industries*[7] to plead that such delay weakens a judgment in quality and efficiency, therefore, the same is liable to be set aside on the simple and short ground of inordinate delay.

11. Settled law demonstrably disapproves of inordinate delay in rendering orders / judgments; as consistently seen in *Ghulam Fatima*[8], *M K Zaman*[9], *Bashir Ahmad Khan*[10], *Muhammad Bakhsh*[11], *Walayat Hussain*[12], *Iftikhar Gardezi*[13] and *Muhammad Ovais*[14]; recently reiterated by the Supreme Court in *Sui Northern*[15] and *Shahtaj Sugar Mills*[16].

12. Order XX rule 1(2) CPC prescribes that judgments should be written within thirty days. *MFMY Industries* read the said stipulation as mandatory in the case of a trial court. The timeline was read somewhat expansively in the

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[6] *1989 MLD 4605*; *1989 MLD 332*; *PLD 1983 Lahore 46*.
[7] Per *Saqib Nisar J* in *MFMY Industries vs. Federation of Pakistan* reported as *2015 SCMR 1550*.
[8] *Fatima vs. Sardara* reported as *PLD 1956 (WP) Lahore 474.*
[9] *M. K. Zaman v Matiar Rahman* reported as *1969 P.Cr.L.J. 361.*
[10] *Bashir Ahmed Khan vs. Mumtaz Begum* reported as *1979 CLC 114.*
[11] *Muhammad Bakhsh vs. State* reported as *1989 SCMR 1473*.
[12] *Walayat Hussain vs. Muhammad Hanif* reported as *1989 MLD 1012.*
[13] *Iftikhar-Ud-Din Haidar Gardezi vs. Central Bank of India Ltd* reported as *1996 SCMR 669*; pp. 674 and 675.
[14] *Muhammad Ovais vs. Federation of Pakistan* reported as *2007 SCMR 1587*; p. 1590.
[15] *CIR Lahore vs. Sui Northern* reported as *PLD 2023 Supreme Court 241*.
[16] *Shahtaj Sugar Mills vs. Federation of Pakistan* (Civil Appeal 749 of 2013); https://www.supremecourt.gov.pk/downloads_judgements/c.a._749_2013.pdf.

context of appeals etc., however, irrespective thereof the present matter pertains to exercise of original civil jurisdiction.

13. The Suit was filed in 2013 and eleven years later it is still at the nascent stage of merely an interlocutory application having been determined. The opening paragraph herein chronologically catalogs the delay in determination of the Application. *Prima facie* the impugned order does not survive the anvil of the law, as illumined by the Supreme Court. Therefore, on the said ground alone, in *mutatis mutandis* application of the authority cited supra, the impugned order[17] is set aside. However, to remand the matter back would set the entire eleven year proceedings in the Suit at naught. Mr. Omer Soomro graciously assisted us with the ambit of our jurisdiction with particular reference to section 107[18] read with Order XLI rule 33 CPC 1908[19] and in due compliance therewith, we hereby proceed with deliberating the issue framed supra in order to *de novo* determine the fate of the Application; on merit.

Prima facie case

14. The appellant / plaintiff's case is that the Project has been constructed on an amenity plot. The pleadings in the Suit demonstrate that reliance in such regard was placed primarily upon a private realtor's map / sketch[20]. Respectfully, a private document could not be demonstrated to have any overarching precedence in this matter.

15. Mr. Salahuddin Ahmed placed dependence upon a subsequent statement submitted by DHA[21] along with certain documentation. The documents listed at serial numbers 1 till 3 are diametrically opposed to the appellant's averment and the lease deed mentioned thereafter[22], relied upon by DHA in assertion of its rights, apparently find no mention in the prayer clause / pleadings in the Suit.

16. It is the respondents' case that the land whereupon the Project was constructed, without cavil from the appellant as denoted vide the un-assailed order dated 09.10.2023 rendered in the Suit, is not and was never an amenity

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[17] Being the short order dated 06.10.2023 and the detailed reasons dated 19.02.2024.
[18] Subject to such conditions and limitations as may be prescribed, an Appellate Court shall have the power (a) to determine a case finally; (b) to remand a case; (c) frame issues and refer them for trial; (d) to take additional evidence or to require such evidence to be taken…
[19] The Appellate Court shall have power to pass any decree andmake any order which ought to have been passed or made and to pass or make such further or otherdecree or order as the case may require...
[20] Paragraph 3 of the memorandum of plaint.
[21] Apparently on 15.02.2014; available at page 667.
[22] With reference to the Port Qasim Authority.

plot. The juxtaposition of the three respective leases demonstrated before this Court, and the remit of rights of DHA, remains to be determined in the Suit or in other appropriate proceedings, therefore, no opinion is proffered thereon. However, no *prima facie* case has been made out to befall the Project within the confines of an amenity plot.

Irreparable loss

17. The appellant / plaintiff remained obliged to demonstrate that irreparable loss would be caused to *him* unless the Application was allowed. Paragraph 3 of the memorandum of appeal states that the appellant *filed the suit as a pro bono publico and in representative capacity on behalf of other DHA residents*. Surprisingly, such an assertion is alien to the memorandum of plaint filed in the Suit. We also remain unassisted as to whether the appellant ever sought recourse to Order 1 rule 8 CPC 1908 in order to institute representative proceedings.

18. The Project is situated in Phase VIII DHA and the appellant has represented himself to be a resident of Phase II DHA. While the respondents have raised serious reservations regarding whether the appellant resides at the address pleaded, it is apparent that he is not a neighbor or a resident in the immediate vicinity. Although empirical apprehensions with regard to the Project were articulated by the appellant's learned counsel, however, we were not assisted with enunciation of any loss, irreparable or otherwise, that was apprehended by the appellant personally. A cursory perusal of the affidavit in support of the Application also did not highlight this aspect.

19. Suffice to state that the plea of representative capacity, taken in appeal, does not find mention in the Suit and even otherwise could not be substantiated. Respectfully, no aspect of loss to the appellant, irreparable or otherwise, was discerned from the arguments or the pleadings.

Balance of convenience

20. The learned counsel for the developers have argued at length regarding the cost of the Project and the consequence of placing the same under perpetual interlocutory restraint. DHA's learned counsel has articulated that the assertion of an amenity plot is a mere illusion and it is nobody's case that the development of the Project is anything but in accordance with approved building plans, as envisaged vide the un-assailed order dated 09.10.2023

rendered in the Suit. In the manifest absence of a discernible *prima facie* case and / or irreparable loss, the appellant also remained unable to displace the tilt of balance of convenience favoring the respondents.

Conclusion

21. In view hereof, the question framed for determination supra is answered in the negative, in favor of the respondents and against the appellant, hence, CMA 9983 of 2013 in Suit 1169 of 2013 is dismissed. This appeal is disposed of accordingly.

Judge

Judge