IN THE HIGH COURT OF SINDH, AT KARACHI

Present:
Yousuf Ali Sayeed &
Arbab Ali Hakro, JJ

HCA No.321 of 2024

Muhammad Yahya & others----------Appellants

Versus

Province of Sindh & others----------Respondents

HCA No.322 of 2024

Muhammad Yahya & others----------Appellants

Versus

Kutchi Memon Cooperative
Housing Society Limited & others----------Respondents

Rizwana Ismail, Advocate for the Appellants, along with Noor Muhammad, Advocate.
Munir A. Malik and Ch. Atif Rafique, Advocates, for the Cutchi Memon Housing Society.
Ali T. Ebrahim, Advocate for Nixor College (Private) Limited.
Khursheed Javed, Advocate, for the KDA, alongwith Shaikh Fareed, Director Planning (Urban), KDA.

Dates of hearing : 25.09.2024 and 08.10.2024

ORDER

YOUSUF ALI SAYEED, J. - These Appeals stem from the Order made by a learned Single Judge of this Court on 03.09.2024 in Suit Numbers 757 and 795 of 2024 pending before this Court on the Original Side, deciding the respective applications under Order 39 Rules 1 and 2 CPC preferred in both matters.

2. The subject matter of both Suits is common, being the use of Plot No. ST-1 (the "**Plot**"), situated within the Karachi Development Authority's Scheme No. 7, and forming part a 23-acre tract of land allotted to the Cutchi Memon Housing Society (the "**Society**") by the Ministry of Housing and Works, Government of Pakistan, in 1954.

3. The Plaintiffs in Suit 757 are the Society and Nixor College (Private) Limited ("**Nixor**"), who are said to have entered into a Tenancy Agreement dated 29.01.2024, envisaging the development and use of the Plot for purpose of a school, with construction having since been commenced thereon as per a building plan approved by the Sindh Building Control Authority (the "**SBCA**") on the endorsement of the Karachi Development Authority (the "**KDA**"). The Suit has been brought on a cause of action said to arise from interference by several private persons arrayed as defendants in an attempt to hinder such construction, with declarations having been elicited as to the plaintiff's entitlement to such use and to raise construction accordingly as per the approved building plan whilst seeking a restraint against further interference.

4. Conversely, the Plaintiffs in Suit 795, who are three residents of the neighbouring Delhi Mercantile Cooperative Housing Society (the "**Residents**"), two of whom are also defendants in the prior Suit, contend that the Plot was designated as the site of an open market and cannot be used otherwise. Through their Suit, they have sought declarations to that effect whilst also seeking cancellation of the building plans approved contrarily, in an endeavour to essentially forestall further construction.

5. In that backdrop, the applications under Order 39 Rules 1 and 2 CPC that thus came up for determination before the learned Single Judge were CMA No. 9972/24 filed by the Society and Nixor in Suit 757 to restrain interference or obstruction with the construction activities being undertaken on the Plot, and CMA No. 10508/24 filed by the Residents in Suit 795 seeking that the Society and Nixor be restrained from raising further construction on the Plot or using the same for a school or any purpose other than as an open market.

6. In support of their rival contentions as to the permitted land use of the Plot, reliance was placed by the Society and Nixor on the one hand on a Layout Plan of 1972 showing the Plot to be earmarked for a school and the Residents on the other on a similar document of 1973 showing the same as being designated for an open market. After hearing the parties, the learned Single Judge was pleased to allow CMA No. 9972/24 and dismiss CMA No. 10508/24, with both the appeals accordingly being preferred by the Residents against the impugned Order, the relevant excerpts of which read as follows:

> "7. The 1972 map shows that the area where the school is being constructed was earmarked for a school. The 1973 map shows that the same area is allocated for an open market. To tentatively settle this controversy, the Court directed the concerned Director in the KDA to verify its record and confirm which of the two maps was the official one. Mr. Shaikh Fareed, Director of Planning & Urban Design, swore an affidavit on 17.08.2024 confirming that the plot of land was earmarked for a school since 25.11.1972 and that since that date, no correction, amendment, or conversion has been made on the said map. Ms. Ismail, however, was of the view that the Director had sworn a false affidavit as in certain proceedings in the Supreme Court of Pakistan (Naimatullah Khan vs Federation

of Pakistan C.P. No. 09 of 2010), KDA had made a representation that the map dated 08.05.1973 (upon which she relies) was the correct map. However, in the documents filed by Ms. Ismail in support of her contention is a report filed by Shehri, which itself states that "The 1973 map given to the Director Land, KMC by the Master Plan Department was not authenticated and the Director Land, KMC agreed upon using the 1973 map given by the Nazir High Court." Without commenting on what the situation was in the Supreme Court, prima facie, it seems that even at that stage, the KDA had not authenticated the 1973 map relied upon by Ms. Ismail but that the Karachi Metropolitan Corporation (KMC) had agreed to rely on it to remove encroachments. One gets a sense from the partial record file by Ms. Ismail that the 5 proceedings in the SC focused on encroachments in the Kidney Hill area. Anyhow, I have no reason at this stage to believe that the Director Land has sworn a false affidavit. If the residents claim the 1973 map is official, they must show it at trial. Prima facie, the Society, and Nixor have made out a case that the 1972 map is the official map and ST-1 was earmarked for a school.

8. Next comes the issue of Rule 13 of KDA's Land Disposal Rules, 1971. Ms. Ismail has relied upon it in her arguments. The rule says, "No allotment in any running Scheme of the Authority shall be made to any housing society." Mr. Ahmed, on the other hand, says that the current rule was passed in 1971, whereas allotment to the society was passed in 1954. The rule cannot have a retrospective effect. I am inclined to agree with the learned counsel's point of view. The 23 acres were prima facie allocated to the Society in 1954. Parliament did not envisage the 1971 rule to have a retrospective effect. Even if, for the sake of argument, it is said that it did have a retrospective effect, even then, the memorandum of association of the Society depicts that it exists for the welfare of its members. Ms. Ismail has also stressed the commercial nature of the School. She probably relied upon Rule 11(1) of the 1971 Rules. This Rule states, "All amenity plots, including sites for schools, other educational institutions, hospitals, maternity homes, mosques, in bazaars, in all running Schemes of the Authority, including the Clifton Scheme, will be allotted to deserving, registered and charitable institutions. Apart from the retrospective aspect, it is also to be noted that the land in question has been allotted not to Nixor but to the Society. The memorandum of association of the Society appears to show that it exists for the

benefit and welfare of its members. Rule 11(1) prima facie does not prohibit allotment to the Society. Ms. Ismail has also vociferously argued that the Society is taking a large amount of rent from the School and thus cannot rent the land to it. Perhaps she is correct about the rent. Even then, whether or not the money derived by the Society from Nixor will be used for the welfare of the Society members, as envisaged by its bye-laws, is an issue between the Society and its members that must be decided by the courts set up under the Societies Act. In this regard, the locus standi of non-members of the Society, like the residents in this case, is doubtful.

9. As I have already concluded that the Society and Nixor have made out a prima facie case, the requirement of irreparable loss and balance of convenience becomes less critical. Yet, these two factors also favor the Society and Nixor. Prima facie, it seems from the record that substantial investment has already been made in the building of the School. Construction began after the Society and Nixor had prima facie obtained the requisite permissions from the competent authorities. No law, rule, or condition violation by the Society and Nixor was pointed out by the Advocate General's office, SBCA, or KDA. I further understand from Mr. Ebrahim that several students have already enrolled, and the commencement of regular classes is imminent. Where the State has failed is the private sector and establishments such as Nixor, which have filled the gap. Mr. Ebrahim has submitted that Nixor has been in the education sector for a considerable time. Thus, its reputation is at much greater risk. If, at the end of the trial, it is shown that Society and Nixor were in the wrong, they are the ones who will lose the most.

10. Regarding Ms. Ismail’s assertion that the Society is not the owner of the 23-acre tract of land, the same, apart from being an afterthought, also remained unsubstantiated. It is pertinent to mention that no prayer regarding the title has been made in the plaint. While the question of an amenity plot not being used for the purpose it has been earmarked for in the layout plan has the potential of being a public interest issue, thus giving the residents locus standi to file the suit, strangers challenging the title of a person or entity, would not fall within the same ambit. The Society does seem to have documents that show that the 23-acre land was allotted to them as far back as 1954.

7. Proceeding with the matter, learned counsel appearing on behalf of the protagonists, being the Residents on one hand and the Society/Nixor on the other, advanced their submissions in the same vein, relying on the layout plans that had been placed before and considered by the learned Single Judge. As regards those documents, a further Report was submitted by the KDA, reaffirming the correctness and applicability of the Layout Plan of 1972.

8. Having heard the arguments and examined the material placed on record, it merits consideration that the decision to grant or refuse an interlocutory injunction is a discretionary exercise, and an appellate court must not interfere solely because it would have exercised the discretion differently. As such, the scope of inquiry in the exercise of appellate jurisdiction is not to second-guess the exercise of judicial discretion by the trial Court, but to merely be satisfied that such exercise was judicious, in terms of being reasonable. On that very score, a learned Divisional Bench of this Court observed in the case reported as Roomi Enterprises (Pvt.) Ltd. v. Stafford Miller Ltd. and others 2005 CLD 1805 that:

> "The Court at this stage acts on well-settled principle of administration on this form of interlocutory remedy which is both temporary and discretionary. However, once such discretion has been exercised by the trial Court the Appellate Court normally will not interfere with the exercise of discretion of Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court has ignored certain principles regulating grant or refusal of interlocutory injunction. The Appellate Court is not required to reassess the material and seek to reach a conclusion different from one reached by the Court below solely on the ground that if it had considered the material at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner, same should not be interfered in exercise of appellate jurisdiction."

9. That judgment was followed by subsequent Division Benches (of which one of us was a member) in the cases reported as Syed Hamid Mir through Attorney and another v. Board of Revenue Sindh through Member/Secretary Land Utilization Department and 9 others 2021 YLR 1629 and Pakistan Telecommunication Company Limited v, Province of Sindh & others SBLR 2024 Sindh 32, with reference also being made Hadmor Productions Ltd. v. Hamilton [1983] 1 A.C. 191, where whilst considering the function of an appellate court in such cases, it was observed by Lord Diplock that:

> "An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge's grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship's House, is not to exercise an independent discretion of its own. It must defer to the judge's exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only.
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> It may set aside the judge's exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

10. The same view was taken in Garden Cottage Ltd. v. Milk Marketing Board (1984) 1 A.C. 130, where the House of Lords was seized of a matter where the Court of Appeal had interfered with the refusal of the commercial judge to grant an injunction in the exercise of his discretion. Again, Lord Diplock observed that an appellate Court must defer to the trial Judge's exercise of discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. Whilst discharging the injunction granted by the Court of Appeal, it was reiterated that:

> "... The function of an appellate court is initially that of review only. It is entitled to exercise an original discretion of its own only when it has come to the conclusion that the judge's exercise of his discretion was based on some misunderstanding of the law or of the evidence before him, or upon an inference that particular facts existed or did not exist, which although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstance after the judge made his order that would have justified his according to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes by sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge's decision to grant or refuse the injunction is so abhorrent that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge's exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own."

11. As such, it is manifest that where on a consideration of the respective cases of the parties and the documents laid before it, the Court of first instance has granted or refused an injunction, an appellate Court ought not to interfere with the exercise of discretion unless such exercise is found to be palpably incorrect or untenable. In other words, as long as the view of the trial Court is a possible view, the Appellate Court ought not to interfere with the same. In the matter at hand, the reasons that weighed with the learned trial Court, as noted, were grounded in law and do not indicate that the view taken for granting an injunction on the application of the Society/Nixor while withholding the same on the application of the Residents was capricious or untenable. As is apparent, the learned Single Judge has addressed all the relevant points arising for consideration while properly weighing the matter in light of the relevant test for determining whether or not a case stands made out for an interlocutory injunction, hence has exercised his discretion judiciously and it is not open to us on appeal to substitute our view in that regard.

12. It is for the foregoing reasons that we had dismissed the Appeals vide a short Order made in Court upon culmination of the hearing on 08.10.2024.

JUDGE

JUDGE