

IN THE HIGH COURT OF SINDH AT KARACHI**SUIT NO. 126 of 2015****Muhammad Javed & others ----- Plaintiff's****Versus****Shumaila Asim and Others ----- Defendants****For hearing of CMA No. 1044/2015****Date of hearing: 06.05.2015****Date of order: 15.05.2015****Plaintiff's: Through Mr. Arshad Iqbal Advocate.****Defendants
No. 1 & 2: Through Mr. Khalid Javed Advocate.****Defendants
No. 3 to 5: Through Mr. Khalil Ahmed Siddqui
Advocate.****ORDER**

Muhammad Junaid Ghaffar, J. Through this order I intend to dispose of application bearing CMA No. 1044 of 2015 filed under Order 39 Rule 1 & 2 CPC, through which the plaintiffs have prayed for restraining the defendants No. 1 & 2 from selling or creating any third party interest in any manner whatsoever, including selling or dealing in flats, shops, etc. on property bearing Plot No. 5 admeasuring 1000 square yards in Block 3, Delhi Cooperative Housing Society, Karachi ("Suit plot"). It has been further prayed that they may also be restrained from raising construction on the Suit Plot. On 29.1.2015 when this application was placed before this Court, an order was passed, whereby, the defendants No. 1 & 2 were directed to maintain status quo with regard to the subject property as identified in the application however, such order was

subject to interim orders already made or as may further be made in C.P. No. D-4537 of 2014.

2. Through instant Suit the plaintiffs have sought a Declaration that they are the lawful owners of the property in question. It is the case of the plaintiffs that their late father Muhammad Yamin Lutfi who was a member of defendant No. 3, (Delhi Mercantile Co-operative Housing Society) was allotted the Suit plot on 26.3.1951 through an allotment order, however, thereafter the defendant No. 3 denied possession of the said plot on the ground that some alteration had been made in the layout plan due to which the location and numbering of the plot was disturbed and another plot bearing No. 48 was offered, but neither the possession of plot No. 5 nor of plot No. 48 was handed over. It is further stated that against such refusal of possession the father of the plaintiffs filed an Arbitration case bearing No. 132 of 1966 under Section 54 of the Cooperative Societies Act, 1925 ("Societies Act"), wherein, an Award dated 10.2.1966 was passed in favour of their late father. It is further stated that the defendant No. 3 with ulterior motives, allotted the Suit plot in the year 1952 to one Abdul Basit and subsequently in the year 1954 the Suit plot was also allotted to one Muhammad Idrees as well, against which Abdul Basit had filed an Arbitration case under Section 54 of the Societies Act against Muhammad Idrees and others including defendant No. 3, whereas, their father was not arrayed as a party in such proceedings. It is further stated that defendant No. 3 had filed an Appeal bearing No. 3 of 1967 against the Award in favor of plaintiff's father under Section 66 of the Societies Act, however, the said appeal was dismissed on 29.8.1967 and the Award passed in favour of the plaintiff's father was confirmed. Subsequently, on 24.5.2012 the Registrar Cooperative Societies at Karachi, issued certificate for Execution under section 59(1) (a) of the Societies Act, to plaintiff No. 3 for filing a proper Execution application. The plaintiff No. 3 thereafter filed Execution Application No. 9 of 2012 in the Court of IVth Senior Civil Judge, Karachi East, which was allowed vide order dated 21.2.2013 against which the defendant No. 3 filed a Civil Revision Application bearing No. 29 of 2013 before the Court of Vth Additional District & Sessions Judge, Karachi East, which was dismissed vide order

dated 16.8.2014. The defendant No. 3 against such dismissal of Civil Revision, filed a Constitutional Petition bearing No. D-4537 of 2014 and vide order dated 10.9.2014, the operation of impugned order(s) passed in Execution as well as in Civil Revision have been suspended.

3. Learned Counsel for the plaintiff's has contended that the plaintiff's being legal heirs of Muhammad Yamin Lutfi are the lawful owners of the Suit plot, whereas, Execution proceedings as well as the Civil Revision filed against such Execution proceedings, have been decided in favour of the plaintiff's; hence, the defendants No. 1 & 2 have no lawful authority to either raise any construction or create any third party interest in respect of the Suit plot. Learned Counsel further contended that pursuant to Arbitration Award dated 10.12.1966, the defendant No. 3 was required to hand over peaceful possession of the said plot or plot No. 48 or any other plot of 1000 square yards or more in the Society's area, to the plaintiff's, however, the defendant No. 3 has instead allotted the said plot to the predecessor in interest of defendants No. 1 & 2, who are now raising construction on the said plot. Learned Counsel further contended that though the dispute between Mr. Abdul Basit and Muhammad Idrees went up to the Hon'ble Supreme Court, however, the plaintiff's came to know about such proceedings for the first time on or about 10.6.1968, whereafter, the plaintiff's father made an application in Constitutional Petition bearing No. 194 of 1969 pending before the Sindh & Baluchistan High Court and was arrayed as a respondent. Learned Counsel further submitted that the Hon'ble Supreme Court in its judgment dated 18.1.1984 had observed that the defendant No. 3 was bound to implement the Award given in favour of the plaintiff's father, whereas per learned Counsel, the defendants No. 1 & 2 are not in possession of any title documents and have no claim in respect of the Suit plot, which had been allotted to the plaintiff's father and since legal proceedings in respect of the said plot are pending in a Constitutional Petition before this Court, the defendants No. 1 & 2 may be restrained from proceedings any further in respect of the Suit plot including raising any construction or creating any third party interest.

4. Conversely, learned Counsel for defendants No. 1 & 2 contended that the Suit plot was allotted to one Abdul Basit vide allotment certificate dated 18.12.1952 who was also issued a share certificate in the Society bearing No. 73 dated 6.4.1957 and a Site plan in respect of the said plot was also issued on 23.9.1966, whereas, a certificate dated 3.3.1992 has also been issued by defendant No. 3 confirming that said Abdul Basit is the owner of the Suit plot. Learned Counsel further submitted that the Suit plot was thereafter transferred in favour of Dr. Shahnaz Sikandar on 24.11.1997 and then to Mrs. Yasmeen Hanif from whom the said plot was purchased by defendant No. 1 and after proper advertisement in the newspaper daily JESSARAT dated 30.3.2007, the Suit plot was mutated in favour of the defendant No. 1 vide mutation letter dated 28.4.2007 issued by defendant No. 5. Learned Counsel further contended that the said mutation was also approved by the Ministry of Housing and Works vide letter dated 13.8.2007, whereafter, the defendant No. 2 purchased a 25% share in the Suit plot from defendant No. 1 through a registered agreement of sale dated 20.12.2013 and such purchase of shares has been duly approved by defendant No. 3 and defendant No. 5 in favour of defendant No. 2. Per learned Counsel, thereafter, the defendant No. 1 & 2 have also purchased plot No. 6 admeasuring 830 square yards in Block 3, Delhi Cooperative Housing Society Limited, Karachi, from its owners through registered agreement of sale dated 4.10.2013 and after purchase of such plot the defendant No. 1 & 2, sought amalgamation of plot No. 5 and plot No. 6 in Block 3, Delhi Cooperative Housing Society Limited, Karachi, which was duly approved by the defendant No. 5 and a recommendation letter dated 7.5.2014 was issued to the Master Plan Department of Karachi Development Authority. Per learned Counsel the Master Plan Department KDA, vide NOC dated 6.6.2014 approved such amalgamation of plots No. 5 & 6 which was renumbered as plot No. 6 having area of 1820 square yards in Block 3, Delhi Mercantile Cooperative Housing Society, Karachi, and in view of such amalgamation, a Site plan was also issued on 6.6.2014. Learned Counsel further contended that after amalgamation the defendants No. 1 & 2 have also sought approval of such amalgamation from the Ministry of Housing and Works vide letter dated 25.11.2014. Learned Counsel further submitted that after amalgamation the master plan department

of KDA has also granted NOC for conversion of land use of amalgamated plot No. 6, from residential to commercial purposes, which has been duly approved by the Master Plan Department vide NOC dated 3.2.2015. Learned Counsel contended that insofar as the award given in favour of the plaintiff's father is concerned, the same was not exclusively in respect of plot No. 5, and also included alternative plots bearing No. 48 or any other plot of 1000 square yards or by purchase of the same from the open market in the Society's area. It has been further contended that the dispute between Abdul Basit and Muhammad Idrees had been finally decided by the Hon'ble Supreme Court in Civil Appeal No. K-45 of 1973 vide judgment dated 18.1.1984, wherein, the Hon'ble Supreme Court has categorically held that plot was lawfully allotted to Mr. Abdul Basit from whom the predecessor in interest of defendants No. 1 & 2 and thereafter the defendant No. 1 & 2 have purchased the said plot. Learned Counsel further contended that if the plaintiff's had any case it is against the Society (defendant No. 3) and not against defendants No. 1 & 2 who are the lawful owners of the plot in question on the basis of award in favour of Mr. Abdul Basit, and thereafter final culmination of the legal proceedings vide judgment dated 18.1.1984 passed by the Hon'ble Supreme Court. Learned Counsel prayed that listed application merits no consideration as neither any prima facie case has been made out by the Plaintiffs, nor any irreparable loss would be caused to them, whereas, ad-interim order passed on 29.1.2015 has seriously prejudiced the interest of Defendant No.1 & 2 and is causing irreparable loss to them.

5. Learned Counsel for defendant No. 3 has adopted the arguments of the learned Counsel for defendants No. 1 & 2 and further submitted that insofar as the Award in favour of the plaintiff's father is concerned, the same was not exclusively in respect of plot No. 5, whereas, the Execution which has been filed by the plaintiffs is hopelessly time barred and therefore, the orders passed by the Executing Court as well as the order in the Civil Revision have been suspended by this Court vide order dated 10.09.2014 in Constitutional petition No. D-4537 of 2014, therefore, the plaintiffs have no case for grant of any injunction.

6. I have heard all the learned Counsel and perused the record. It appears that the Suit plot was initially allotted to the plaintiff's father in the year 1951 and thereafter another plot bearing No. 48 was allotted to him, however, possession of neither of these two plots could not be handed over and the dispute was referred for Arbitration wherein, vide order dated 10.12.1966 an Award was made in favour of the plaintiff's father. It further appears from the record that in the year 1952 the Suit plot was also allotted to one Abdul Basit and thereafter in the year 1954 it was once again allotted to one Muhammad Idrees. Insofar as the award in favour of the plaintiff's father is concerned, it appears that an appeal was preferred against such award bearing No. 3 of 1967 by defendant No. 3, which was dismissed on 29.8.1967, whereas, on the other hand the litigation between Abdul Basit and Muhammad Idrees continued to proceed and finally ended up at the level of Hon'ble Supreme Court against the judgment of a Division Bench of Sindh & Baluchistan High Court dated 1.12.1972. The history of litigation between the parties has been set out in detail in the aforesaid judgment of the Hon'ble Supreme Court, however for the sake of brevity the relevant facts which could be extracted are that Abdul Basit was the appellant before the Hon'ble Supreme Court, in which it was claimed that the Suit plot was allotted in his favour on 18.12.1952, and physical possession was also handed over to him on 18.8.1956, whereafter he was informed that the said plot was already allotted to Muhammad Idrees on 6.5.1954 against which he had filed an application under Section 54 of the Societies Act, before the Registrar and the matter was referred for Arbitration. In Arbitration the Award was delivered on 3.5.1967 by a majority of 2 to 1 in favour of Abdul Basit and it was held that the allotment of plot was valid in favour of the appellant and that since the subsequent allotment of the plot in favour of Muhammad Idrees was without notice to the appellant and without cancellation of his allotment, hence was illegal. Such Award dated 3.5.1967 was impugned by filing an appeal under Section 56 of the Societies Act, by Mr. Muhammad Idrees which was accepted by the Deputy Registrar vide order dated 5.2.1968 in which it was held that Muhammad Idrees was the original allottee of plot No. 5 in question. This order dated 5.2.1968 was challenged by Abdul Basit by filing a Revision under Section 64-A of the Societies Act and such revision was accepted by

order dated 15.6.1968 on a legal ground that the appeal preferred by Muhammad Idrees under Section 56 of the Act was not competent. It appears that at that point of time the plaintiff's father, namely Muhammad Yamin Lutfi, had claimed that the plot in question was actually allotted to him long ago and had filed an application to be impleaded as party in the proceedings. In the suo moto proceedings under Section 54-A of the Societies Act, the plaintiff's father was allowed to participate and after hearing the parties concerned, the matter was decided by order dated 21.11.1968, whereby, the case was again remanded to the nominee of the Registrar in purported exercise of the powers conferred under Section 54-B of the Societies Act for fresh Arbitration.

7. Such order of the Registrar dated 21.11.1968 was again challenged in Revision by Abdul Basit under Section 64-A of the Societies Act which was accepted vide order dated 8.3.1969 which was thereafter challenged by Muhammad Idrees and others by filing a Constitutional Petition bearing No. 194 of 1969 in the High Court of Sindh & Baluchistan at Karachi, and the order dated 8.3.1969 was declared by the learned Division Bench vide judgment dated 1.12.1973, to have been passed without any lawful authority and to be inoperative, against which an appeal was preferred before the Hon'ble Supreme Court as referred to hereinabove. Insofar as the case of the plaintiff's father (who was respondent No.4 therein) and of the award in favor of Abdul Basit is concerned, there are certain observations of the Hon'ble Supreme Court at pg. 15 to 17 of the judgment, and it would be advantageous if the same are referred to, which reads as under:-

“So far as the contention of Mr. Brohi is concerned, we find that it is not tenable. The case of respondent No.4 was adequately dealt with in para 10 of the judgment of the High Court, wherein it was observed that:

“The arbitrators were neither called upon to determine the claim of respondent No.5 (Respondent NO.4 before us) nor was the respondent No.5 (Respondent No.4 before us) a party to the proceedings before them. The arbitrators were only concerned with the respective claim of the petitioners (respondent No.1 to 3 before us) and the respondent No.3 (appellant before us)”.

The learned Judges went on to add that:-

“It would appear from the observations in his order dated 21.11.1968 that the respondent No.5 (Respondent No.4 before us)

had "cropped up at the revisional stage" i.e. long after the majority award was made and that too in an independent proceeding."

In these circumstances, the contention of Mr. Brohi that the case of respondent No.4 had not received any attention at the hands of the learned Judges of the High Court cannot be sustained.

As for the finding of the learned Deputy Registrar in his order dated 21.11.1968 that the award of the arbitrator was incomplete also because of the fact that respondent No.4's case was not decided, suffice it to say that the award delivered by the Arbitrators would be incomplete only if it did not determine the matter/which was referred to Arbitration. Since the dispute between respondent No.4 and the other contestants was never referred to the Arbitration, the award could not be deemed to be incomplete if nothing was said therein about respondent No.4. In fact, not being a party before the Arbitrators there was no question of his claim being discussed or determined by them. He is holder of an award made on 10.12.1966 in his favour, which does not appear to have been even set aside. According to this award, he was entitled to the possession of Plot No.5 or Plot No.48 or another Plot of 1000 sq. yds or more in the Society's area or by purchase from the market which the Society was bound to provide him. In terms of this award, in case Plot No.5 or Plot No.48 cannot be given to him, resort can be had to the other options mentioned in the award. The Society, we may observe, is bound in law to implement this award and it is high time that it did so." (Underlining is mine)

8. From perusal of the above findings of the Hon'ble Supreme Court, it is crystal clear that the case of the plaintiff's father had been discussed and dealt with by the Hon'ble Supreme Court in the aforesaid judgment and it has been categorically held that insofar as the Award in favour of the plaintiff's father is concerned, the same was not exclusively in respect of plot No. 5 as the Award dated 10.12.1966 was categorical in nature that in case plot No. 5 or plot No. 48 cannot be given to the plaintiff's father, reference can be had to the other options mentioned in the Award, whereas, the Society i.e. defendant No. 3 was bound in law to implement the award and it is high time that it did so. Therefore, the claim of the plaintiff's insofar as in respect of the Suit plot is concerned, the same stands adjudicated upon to the extent that their entitlement on the basis of Award in their favour has to be implemented by defendant No. 3 for which the plaintiffs have already initiated the Execution proceedings and orders passed in the Execution proceedings as well as in the Revision proceedings have been impugned by defendant No. 3 and are subject matter in Constitutional Petition bearing No. D-4537 of 2014; hence, this Court cannot dilate upon any further in this regard. However, one thing which is clear, and it is, that insofar as the proceedings before the Hon'ble

Supreme Court are concerned, the claim of the plaintiff's father as well as the predecessor in interest of defendants No. 1 & 2 was very much there when the said judgment was passed by the Hon'ble Supreme Court, and if the contention so raised on behalf of the plaintiff's in the instant case would have had any ground or justification, then the Hon'ble Supreme Court while passing the aforesaid judgment would have considered so and would not have passed an order in favor of the predecessor in interest of defendants No. 1 & 2, whereby, the award in their favour in respect of plot No. 5 i.e. Suit plot, has been held to be correct in law and the claim of other party i.e. Muhammad Idrees in respect of the same plot has been rejected. Similarly while dealing with the claims of plaintiff's father, it has been held that since Award of the plaintiff's father is not an exclusive Award in respect of plot No. 5, resort can be had to other modes for settling the Award. After having gone through the judgment of the Hon'ble Supreme Court, I am of the view that the controversy now being raised on behalf of the plaintiffs, with regard to their claim in respect of plot No. 5 is misconceived and cannot be entertained at this stage by this Court, as the matter already stands settled up to the level of Hon'ble Supreme Court, wherein, the present plaintiff's father was also a party and such judgment having attained finality cannot be disturbed by this Court, with regard to the claim of the plaintiffs in respect of Plot No.5.

9. Moreover, there is another point which has been raised by the learned Counsel for defendants No. 1 & 2 and needs to be examined and considered that during this period plot No. 5, no more exists, as it has been amalgamated into plot No. 6 and duly approved by the defendant No. 3 and defendant No. 5 as well as by the Master Plan Department of KDA Wing and the Ministry of Housing & Works and during this entire process of amalgamation and conversion from residential to commercial, the plaintiffs have not raised any objection with regard to any proceedings pending in their favour in respect of plot No. 5. Now since the plot no more exists, there cannot be any claim in respect of such plot. It has been further noted from perusal of the record that no satisfactory ground has been raised on behalf of the plaintiff's that as to why after having an Award in their favour, and the dismissal of appeal preferred on behalf of

defendant No.3, in the year 1967, they did not proceed with the Execution in respect of the said plot, whereas, the judgment was passed by the Hon'ble Supreme Court on 18.1.1984. In fact even after that, the Execution proceedings were not diligently proceeded with by them. While confronted the learned Counsel for plaintiff's also could not satisfactorily respond to such query of the Court, that as to why such delay had occurred. According to the record placed before this Court the certificate of Award was issued to them somewhere in 2012 and no justifiable reasons have been given in the entire plaint that as to why after the Award, the certificate for initiating Execution proceedings was issued to them in the year 2012, whereas the judgment of Hon'ble Supreme Court was passed in the year 1984.

10. In view of hereinabove facts and circumstances of the instant case, I am of the view that the plaintiffs have failed to make out any prima facie case to seek any discretionary relief from this Court, whereas the other factors which are required to be taken into consideration for grant of an injunctive relief i.e. balance of convenience and irreparable loss or injury, are also lacking in the instant case as no irreparable loss or injury would be caused to them if the injunction is refused, whereas, if any injunctive relief is granted to them, the defendants No.1 & 2 who have purchased the Suit plot from the allottee whose allotment has been approved up to the level of Hon'ble Supreme Court, would suffer irreparable loss and injury as the balance of convenience is in their favour. Accordingly, listed application bearing CMA No. 1044 of 2015 filed on behalf of the plaintiffs, being misconceived in facts and law is hereby dismissed, resultantly, the interim order of status quo passed on 29.1.2015 stands recalled / vacated.

Dated: 15.05.2015

J U D G E

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