ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT No. 13 / 2010

DATE	ORDER WITH SIGNATURE OF JUDGE

1) For hearing of CMA No. 11694/2009
2) For hearing of CMA No. 718/2012
3) For hearing of CMA No. 7037/2016
4) For hearing of CMA No. 7038/2016
5) For hearing of CMA No. 7039/2016
6) For hearing of CMA No. 12313/2016
7) For hearing of CMA No. 12314/2016
7) For hearing of CMA No. 13149/2016
9) For hearing of CMA No. 13471/2016
10) For hearing of CMA No. 13472/2016
11) For examination of parties / settlement of issues.

09.04.2018

Mr. Khawaja Shamsul Islam along with
Mr. Shahzad Mehmood Advocates for Plaintiff.
Mr. Haider Waheed Advocate for Defendant.
Mr. Khalid Javed Advocate for Interveners.

9 & 10) These two applications have been filed on behalf of Applicants / Interveners under Order 1 Rule 10 CPC, for arraying them as defendants in this Suit and learned Counsel for the applicants submits that Plot Nos. 2, 3, 4, 9, 10 and 11 in Sector D-5 Karachi Export Processing Zone Authority were granted to Applicant in CMA No. 13471/2016 on 04.11.2015 for 30 years and license was also issued. He further submits that thereafter, possession order was issued and building plan was also approved and when construction was in advance stage, suddenly a receiver was appointed by the Court vide order dated 29.8.2016, and thereafter, the Applicants have approached this Court for joining them as parties. He submits that Applicant in CMA No. 13472/2016 was similarly allotted Plot No. 5, 6, 7, 12, 13 & 14. Per learned Counsel if any orders are passed in this Suit they will seriously

affect the Applicants and will prejudice their valuable rights as they have invested substantially.

On the other hand, learned Counsel for the Plaintiff has opposed both these applications and has referred to orders dated 30.12.2009 and 19.04.2010, whereby parties were directed to maintain status quo and not to take any coercive measures, and submits that during validity of these orders, the Defendant which is a Government Organization in a contemptuous manner has made allotments of the plots in question to the Applicants. He submits that in the written statement the Defendant had accepted the stance of the Plaintiff and had shown willingness to hand over possession in response to which an application was filed under Order 12 Rule 6 CPC for passing of Judgment, when suddenly, it transpired that the plots in question have been allotted to the Applicants. He submits that in one day the exercise of allotment, payment, possession etc. has been completed which speaks of the malafides on the part of the Defendant. Per learned Counsel, the Applicants are neither a necessary party nor a proper party as the Plaintiff's case has no concern with them and even otherwise, it is a case of *lis-pendens*. According to the learned Counsel if these applications are allowed, it will frustrate the cause of plaintiff for no fault on his part, whereas, such allotment has been done knowingly and purposely for this very reason. In support he has relied upon ***2012 SCMR 983 (Mst. Tabassum Shaheen V. Mst. Uzma Rahat and others), PLD 2011 SC 905 (Muhammad Ashraf Butt and others V. Muhammad Asif Bhatti and others), and 2010 SCMR 18 (Muhammad Shamim V. Mst. Nisar Fatima and others).***

Counsel for Defendant has supported the Applicants case and submits that instant Suit is merely for recovery of the alleged amount of

deposit / security and Godown rent only, whereas, the ownership was never claimed nor could it be done, as the land is owned by the Defendant and is only allotted to parties on license; therefore, the concept of *lis-pendens* does not apply. According to the learned Counsel, since past many years the Defendants have been deprived of its ground rent, and therefore, once the Plaintiff himself filed CMA No. 718/2012 seeking refund of his money, there was nothing left in the Suit in respect of the plaintiff's claim; hence, the plots were allotted to the Applicants, therefore, the Applicants to be joined as Defendants.

I have heard all the learned Counsel and perused the record. Though extensive arguments were made on behalf of the plaintiff even in respect of merits of the case and it would suffice to observe that instant Suit was filed on the ground that after allotment of plots, and signing of Licence Agreement, possession was not handed over, whereas, time and gain demand of Annual Rent was raised which according to the plaintiffs case, could only be demanded once possession is handed over. On 30.12.2009, an order was passed to maintain status quo till 14.01.2010. On 14.01.2010 a Counsel appeared on behalf of the Defendant and undertook to file Vakalatnama and then it was observed that interim orders passed earlier to continue. Subsequently, on 19.04.2010 again an order was passed and the Defendant was restrained from claiming any demand invoking Clauses 29, 30 and 31 of the License Agreement and it was further ordered that no coercive action is to be taken against the Plaintiff till next date of hearing. These two orders were and are in field, and it is not the case of the defendant that they were ever recalled. Thereafter, it appears that CMA No. 718/2012 was filed on behalf of the Plaintiff seeking directions to the Defendant to pay the amount of US$ 78,000 on the ground that

since no plots have been allotted and no possession has been given, therefore, the money be returned. On this counter affidavit was filed wherein, the request of the Plaintiff has been disputed and no offer was ever made to refund the amount. In such circumstances, on the one hand admittedly the possession was not handed over, and thereafter, when the Plaintiff sought refund of his money, the same was also disputed, therefore, the stance of the learned Counsel for Defendant that Plaintiff has abated its claim is not appropriate and justified. Even otherwise such application is pending and no order(s) have been passed.

It is also a matter of record that the two orders as above passed by the Court were and are in field and have never been recalled. The conduct of the defendant in this matter appears to be not only unwarranted but apparently reflects a contemptuous mindset as if the pendency of the Suit before this Court is of no consequence. It is immaterial for the present purposes that what relief is being sought and what relief will be ultimately granted (as the Court can always mould the relief). It may be of relevance to state that clause 30 of the Licence Agreement even provided for cancellation of licence if there is a default. This resultantly would mean depriving the plaintiff from any claim of possession of the plots and for that a restraining order is already in filed. Such conduct and attitude of a public functionary has to be deprecated by the Court, as it is the primary duty and responsibility of such functionaries to act in a fair and non-partisan manner. There wasn't any exigency in the matter, and even if it was, then the proper course would have been to seek leave from the Court as admittedly the matter is pending and is being contested by the plaintiff since long. The defendant should not have acted in haste and without following the due

process of law. The defendant is well aware that restraining / status quo orders were operating since filing of the suit. Now merely for the fact that some application has been filed by the Plaintiff seeking return of the money, the orders to maintain status quo must not be construed by the defendant as to have been withdrawn or vanished. This is not for the defendant to do so and the only recourse was to approach the Court. It is settled law that when notice of the injunction application is issued it is expected that the Government Institution and their functionaries will assist the Court in administration of justice and they will not try to change the factual position unilaterally to their advantage, in normal circumstances. Reference in this regard may be made to the case of ***Noor Muhammad Vs. Civil Aviation Authority and another*** reported in **1987 CLC 393** upheld in ***Civil Aviation Authority Vs. Noor Muhammad*** reported as **PLD 1988 Karachi 401** by observing that it is desirable that a defendant should not take any action after the service of notice of a stay application with the intention to render the stay application infructuous, as it may create complications for him. This was later followed by another Division Bench of this Court in the case of ***Muhammad Naved Aslam v E.D.O Revenue*** (**2016 CLC Note 132**).

From the overall assessment of the facts as above it appears that an attempt has been made to frustrate the entire Suit of the Plaintiff and in my considered view, the Defendant ought to have approached the Court before making any allotments to the Applicants. Now due to this act an applicant is before the Court for its impleadment in terms of Order 1 Rule 10 CPC. In this case only Sub-Rule(2) of Rule 10 ibid is relevant, and it is trite law that the Court has wide discretion to fill in a defect relating to necessary or proper party and this can be done even

without an application to that effect. It is needless to state that a necessary party is one, without whom no proper order can be made effectively, whereas a proper party is one, in whose absence, although, effective order can be made but presence of such party is a necessity for a complete and final adjudication of the questions involved in any proceedings. The exercise of such powers is the judicial discretion of the Court which has to be exercised after examining the peculiar facts and circumstances of each case as there is no hard and fast rule for such exercise of discretion which is mostly dependent on facts. The Hon'ble Supreme Court in a case reported as **PLD 2002 SC 615** in the case of ***Ghulam Ahmad Chaudhry v. Akbar Hussain*** has been pleased to hold as under:-

> "A wide judicial discretion is vested in the Court to add parties at any stage of the suit in whose absence no effective decree can be passed. It may be observed that where a necessary party is not impleaded, the decree may not be binding on it. Likewise, a person against whom no relief is asked for, may not be a necessary party but he may be a proper party. For the purpose of addition of parties, the Court is governed by provisions of Order I, Rules 1 and 2 and Order II, Rule 3, C.P.C. In law a Court is empowered to bring on record only necessary or proper parties. Once a suit has been instituted, parties can be added only with the leave of the Court and not otherwise. Power of adding parties is not a question of initial jurisdiction but of judicial discretion, which has to be exercised having regard to all the facts and circumstances of the case.....) (underlining is ours) In this case, though the Hon'ble Supreme Court has upheld impleading of a party at the appellate stage by the Court keeping in view the peculiar facts of the case, whereas, in the instant case, by applying the principle as laid down by the Hon'ble Supreme Court, appellant is neither a necessary nor a proper party."

The Indian Supreme Court in the case of ***Messrs Vidur Impex and Traders (Private) Limited and others v. Tosh Apartments (Private) Limited*** reported as **AIR 2012 SC 2925**, after examining various judgments on the subject, reported in *(1992) 2 SCC 524 (Ramesh Hirachand Kundanmal v. Municipal Corporation of Greater Bombay), (1995) 3 SCC 147 (Anil Kumar Singh v. Shivnath Mishra), AIR 2010 SC*

3109 (Mumbai International Airport (P) Limited v. Regency Convention Centre and Hotels (P) Limited), AIR 2005 SC 2813 (Kasturi v. Iyyamperumal), AIR 1999 SC 976 (Savitri Devi v. D.J. Gorakhpur), has formulated certain broad principles and guidelines which should govern disposal of an application for impleading a party to a suit. In my view this guideline is relevant for a just decision of this case and reads as under;

> (a) The court can, at any stage of the proceedings, either on any application made by the parties or otherwise, direct impleadment of any person as party, who ought to have been joined as plaintiff or defendant or whose presence before the court is necessary for effective and complete adjudication of the issues involved in the suit.
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> (b) A necessary party is the person who ought to be joined as party to the suit and in whose absence an effective decree cannot be passed by the court.
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> (c) A proper party is a person whose presence would enable the court to completely, effectively and properly adjudicate upon all matters and issues, though he may not be a person in favour of or against whom a decree is to be made.
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> (d) If a person is not found to be a proper or necessary party, the court does not have the jurisdiction to order his impleadment against the wishes of the plaintiff.
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> (e) In a suit for specific performance, the court can order impleadment of a purchaser whose conduct is above board, and who files application for being joined as party within reasonable time of his acquiring knowledge about the pending litigation.
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> (f) However, if the applicant is guilty of contumacious conduct or is beneficiary of a clandestine transaction or a transaction made by the owner of the suit property in violation of the restraint order passed by the court or the application is unduly delayed then the court will be fully justified in declining the prayer for impleadment.

In this matter the guidelines at (e) and (f) fully applies to the facts of the case. This judgment was also followed by a learned Division Bench of this Court in the case reported as ***Mirza Afzal Baig v Mudabbir Ali Khan*** **2014 CLC 261**, (incidentally authored by me), and while doing so the following observations were also made which also apply to the case in hand and reads as under;

> 11. It is a settled principle of law that for a person claiming to be joined as a party in a suit for specific performance,

> the conduct of the purchaser (appellant in this case) must be above board, and the person who files such application to the Court, must approach the court within a reasonable time from the date when he acquired knowledge about the pending litigation. Similarly, while deciding an application under Order I, Rule 10, C.P.C., it is also to be kept in mind by the Court, that the applicant (appellant in this case) is not guilty of any contumacious conduct, or is a beneficiary of a transaction made by the owner of the property particularly by violating a restraining order already passed by the court in respect of the said property. In the instant case, by applying the above principle of law, it could easily be said that the conduct of the appellant is neither above board, nor the appellant approached the court within a reasonable time. Moreover, admittedly, the agreement purportedly entered into by the respondent No.2 (defendant in Suit No.1408 of 2008) with the appellant was made much after passing of restraining order, in the suit filed by the respondent No.1 bearing Suit No.1330 of 2005.
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> 12. It is a trite law that while considering the application under Order I, Rule 10, C.P.C., the court has to minutely examine the peculiar facts of each case, and after satisfying itself as to whether or not an applicant has made out a case to be impleaded as a party, either as a plaintiff or as a defendant, as the case may be, may pass necessary orders, by allowing or refusing such request. The discretion so vested in the court is very broad and wide. There cannot be a decisive binding precedent, so as to say the least, which the court has to follow in such matters due to peculiarity of the facts of each case. It is to be seen by the court, by itself, based on the facts of each case, how and when to exercise such discretion.

Insofar as the Applicants case is concerned, it may be observed that if they have any case it is against the Defendant and not against the Plaintiff. This Suit has no concern with their claim, and even if it has, the same does not necessarily mean that they ought to be joined as Defendant. There is no privity of contract between the Plaintiff and Applicant(s), whereas, the Applicants have only come into picture subsequent to filing of this Suit on the basis of some agreement with the Defendant. The Plaintiff was never put to notice in respect of such agreement nor was any leave of the Court obtained in this regard. Therefore, they are neither a necessary party nor a proper party to be joined in these proceedings. At the most their remedy lies against the

Defendant and not the Plaintiff for which if advised they may seek appropriate remedy in accordance with law.

In view of such position, in the earlier part of the day, both these applications were dismissed and these are the reasons thereof.

J U D G E

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