ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No.1433 of 2018

Date	Order with signature of Judge

1. For hearing of CMA No.10184/2018.
2. For hearing of CMA No.16927/2018.
3. For hearing of CMA No.18151/2018.
4. For hearing of CMA No.210/2019.

22.01.2019.

Mr. Javed Ahmed Qazi, Advocate for the Plaintiffs.
Mr. Salman Talibuddin, Advocate General, Sindh along with Ali Safdar AAG and Ms. Fatima Jatoi, Advocate for the State.
Mr. Naeem Ahmed Rana, Advocate for the Defendant No.1.
Mr. Ali Nawaz, Advocate for the Defendant No.2.

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1. The case of the Plaintiffs is that they have been running their respective restaurants on premises situated on Gulshan-e-Jamal, Dalmia Road, Karachi since 2014, under permission said to have been granted in terms of Trade Licenses issued by the Defendant No.1, and have been utilizing an open stretch of land in front of their premises for placing 'takhats' for the purpose of seating and serving their patrons. It is the usage of such open stretch of land that forms the subject of dispute underpinning the Suit, in as much as Notices dated 30.03.2018 and 11.06.2018 have apparently been issued to the Plaintiffs by the Defendant No.1, calling upon them to remove their takhats and desist from such usage.

Apparently, the aforementioned Notices dated 30.03.2018 and 11.06.2018 were earlier assailed through C. P. No. D-4215/2018, which was dismissed by a learned Division Bench of this Court vide order dated 28.06.2018, whereafter the instant Suit was filed along with the application under reference filed under Order 39, Rules 1 and 2 CPC, seeking that the Defendants be restrained from taking any coercive action against the Plaintiffs and implementing the directions given therein.

The said application having been taken up for hearing today, learned counsel for the Plaintiffs contended that the Plaintiffs had been paying a 'Takhat Fee' to the Defendant No.1 from 2015 to 2017 at the rate of Rs.20/- per "Takhat" per month, and that a cumulative amount of Rs.1.855,800/- had accordingly been paid over such period. He pointed out that the particulars of payment made towards such 'Takhat Fee' had been disclosed in Paragraph 5 of the Plaint, and had not been denied by the Defendant No.1 in its Written Statement, hence the usage of the land for placements of 'takhats' did not constitute an encroachment, and as such land was not otherwise required for any immediate use, did not cause or constitute a nuisance. Learned counsel contended that the scope and effect of the arrangement between the Plaintiffs and Defendant No.1 was a matter that could only be properly determined once evidence was led in the matter, and submitted that the right of the Plaintiffs to utilize the land for placement of 'takhats' ought to be preserved until final determination was made. Nonetheless, on conflicting notes, it was contended that the Defendant No.1 lacked the capacity to issue the impugned Notices, as the land fell within the domain of Defendant No.2, whilst it was also submitted that the Plaintiffs were amenable to vacating the land in question, but simply required reasonable time for such purpose.

Albeit that the Province of Sindh is not a party to the Suit, the learned Advocate General of Sindh was in attendance and sought permission to address the Court, explaining that the impugned Notices had been issued in pursuance of the judgment of the Honourable Supreme Court of Pakistan in the case reported as **Mst. Yawar Azhar Waheed vs. Khalid Hussain (2018 SCMR 76)**, and the exercise being carried out for removal of encroachments was also subject to the further orders being made from time by a learned Implementation Bench of the Apex Court formed for the purpose of ensuring compliance, and reports were periodically being presented in that regard through his office.

With permission, the learned Advocate General addressed the Court on the matter and pointed out that the Impugned Notices themselves contained reference to Public Notices that had been published earlier on 09.02.2018 in the Daily Newspapers 'Jang' and 'Express', Karachi in compliance of the decision of the Honourable Supreme Court of Pakistan, which was binding on all the concerned, including the Defendant No.1, which was required to implement the same in letter and spirit, which exercise was said to be ongoing and was said to encompass the open land being used for placement of 'takhats' by the Plaintiffs. It was submitted that the receipt of a fee did not of itself serve to give rise to any interest in the land or to a continued use thereof, and that as such land was part of the area reserved for expansion of the road, the same fell in the public domain, and no vested right existed or could be conferred in favour of the Plaintiffs in respect thereof, not had any alleged right even been articulated in terms of the Plaint. Learned counsel appearing on behalf of the Defendants adopted the arguments advanced by the learned Advocate General, and submitted further that the open stretch of land in front of the premises of the Plaintiffs was being wrongfully occupied by them and the Defendant No.1 in its capacity as a municipal authority was fully competent to take action in that regard, and was in fact obligated to do in terms of the Orders made by the Honourable Supreme Court. It was submitted that no prima facie case had been made out by the Plaintiffs, hence the Application merited dismissal.

Having examined the pleadings and documents and considered the arguments advanced at the bar, it merits consideration at the outset that there is neither a specific agreement nor any particular terms which have been identified by the Plaintiffs as marking their use of the land in question, and the professed right of usage is not reckoned with reference to any document or even a specific time period. Indeed, the entire case of the Plaintiffs is predicated on the receipt of a fee over an earlier period coupled with the assertion that they were led to believe that their use would be allowed to carry on subject to further payments being made in future, without it even being mentioned for how long.

In this regard, it is noteworthy that Paragraph 5 of the Order made by the learned Division Bench on 28.06.2018 dismissing C. P. No. D-4215/2018 reads as follows:

> "5. Admittedly, Petitioner has no locus standi or lawful claim to occupy such land, which does not belong to the Petitioners, nor there is any lease, allotment, license in their favour or lawful permission by the competent authority for the use of such land, which is admittedly meant for open space, whereas, no permission appears to have been issued by competent authority for such open space, which is across the road in-front of Petitioners' Restaurants. Moreover, in view of disputed facts agitated through instant Petition, and keeping in view the nature of claim of the Petitioners, the same cannot be decided by this Court, while exercising its constitutional jurisdiction under Article 199 of the Constitution, as it requires recording of evidence and determination by competent Court of Civil Jurisdiction."

Turning then to the pleadings of the Plaintiffs in the instant Suit, it is pertinent to observe that in Paragraphs 4 and 6 of the Plaint the case of the Plaintiffs is set up as follows:

> "4. That in front of the Plaintiff's Restaurants, an open land presumably for car parking and for public use is available. The Plaintiffs have first right over this land. The Customers for the sake of open air prefer to sit and enjoy the bar-b-que food of Plaintiffs' Restaurants. The Plaintiffs are also paying monthly challan fees to Defendant No.1 for utilization of the said premises to serve food to their Customers.
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> 5. …
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> 6. That the Plaintiffs inquired for the challan for the year of 2018 in this respect. The Vice Chairman of Defendant No.1 replied that these challan will be given to Plaintiffs. Plaintiffs are ready to pay whenever such challan is provided."

From a plain reading of the plaint, particularly the paragraph cited, it is evident that no better case than what was presented in C. P. No. D-4215/2018 has been set up in the Suit, and no vested right is discernible.

As such, it is apparent that the listed Application is devoid of merit and no prima facie case for injunctive relief stands made out, hence the same is dismissed accordingly.

2&3. No demonstrable case of contempt stands made out, and in view of the foregoing discussion on CMA No.10184/2018 as well as the dismissal thereof, these applications are also similarly dismissed.

4. Deferred.

JUDGE

MUBASHIR