

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Before: Justice Muhammad Shafi Siddiqui
Justice Mrs. Rashida Asad.

High Court Appeal No.210 of 2022

Haji Ibrahim & others
Versus
Abdul Qadir Lakhani & others

Date	Order with signature of Judge
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1. For orders on CMA 1914/22
2. For orders on office objection.
3. For hearing of main case
4. For hearing of CMA 1908/22

Date of hearing: 01.07.2022

Mr. Ahmed Ali Hussain for appellants.
Mr. Ahmed Masood for respondents No.1 and 2.
Mr. Muhammad Najeeb Jamali for respondent No.3.
None for respondent No.4.
Mr. Asad Iftikhar, AAG for respondents No.5 and 6.

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Muhammad Shafi Siddiqui, J.- In this appeal appellants have impugned orders dated 03.06.2022, 20.06.2022 and 23.06.2022 passed by learned Single Judge in a suit for rendition of accounts, recovery of damages, cancellation and permanent injunction filed by respondents No.1 and 2 against respondents No.3, 5 and 6, without impleading the appellants who claim to be allottees in occupation on payment of full sale consideration of the apartments in question, nomenclatures of which were not provided in the suit.

2. The suit was filed on 03.06.2022 and was taken up on an urgent application on the same day when an injunctive order was passed by learned Single Judge restraining the respondent No.3 from blocking respondents No.1 and 2's (plaintiffs') entry in the office premises whereas in respect of nine apartments, particulars of which have not

been disclosed either in the memo of plaint or injunction application, the respondents No.5 and 6 here, defendants No.1 and 3 in the suit, were restrained from registering conveyance deed of any of the apartments, whose number were then disclosed only in the order. This order was then followed by an order dated 20.06.2022 when again on an urgent application along with other miscellaneous applications, the matter was taken up by learned Single Judge as defendant No.2/respondent No.3 was alleged to have broken the locks of apartment No.102 and has attempted to dispossess respondents No.1 and 2 i.e. plaintiffs of the suit. The Nazir was thus directed to replace the lock of the said apartment and to put his own lock and seal the said apartment and to file a report to such an effect on the next date i.e. 24.06.2022.

3. Before such report could be filed, on 23.06.2022 again on an urgent application with additional applications, the matter was taken up by learned Single Judge and on a statement of plaintiff's/respondents No.1 and 2's counsel that the respondent No.3 has broken more locks to dispossess the plaintiffs/respondents No.1 and 2, Muhammad Saad Khan, the Library Attendant of the learned Single Judge was directed to do the needful instead of Nazir (as he was on leave) and that he shall put his own locks, seal the apartments, handover keys to Nazarat and file his report within one week at a cost/fee of Rs.7000/- per apartment.

4. The appellants here, who claimed to be in possession of their respective apartments have filed this appeal as they have virtually been dispossessed before they could be made party in suit or even receives a notice.

5. With the above background I have heard learned counsel who appeared for appellants, respondents No.1 and 2 as well as respondents No.3, whereas for respondents No.5 and 6 Mr. Asad Iftikhar, Assistant

Advocate General appeared who stated it to be a dispute between private parties. Since the counsels, particularly for respondents No.1 and 2, are adamant for an early decision in the instant appeal, all counsel have argued the matter on the basis of record already available.

6. The facts of the case as well as consequential orders, as passed by learned Single Judge, are very important and material for the purposes of deciding the question involved which concerns with the “mandatory injunction” passed by learned Single Judge while taking up fresh matter/applications on an urgent application of respondents No.1 and 2 (plaintiffs of suit). The first order is of 03.06.2022 and is very material, paragraph 3 of it is relevant and reproduced as under:-

3. Learned counsel for the plaintiffs has moved an application under Order XXXIX Rule 1 & 2 CPC R/w Section 94 and 151 CPC praying therein that the defendant No.2 may be restrained from blocking the plaintiffs’ entry into his office. Learned counsel for the plaintiffs further prays that the defendant No.2 and 3 may be restrained from registering any of the 09 apartments/units i.e. G-1, G-6, G-7, G-8, 102, 107, 207, 308 and 405 against the law. Let the notice be issued against the defendants and learned A.G. Sindh for 24.08.2022. Till the next date of hearing, the defendants are hereby restrained from blocking plaintiffs’ entry into their office. Defendant No.2 & 3 are also restrained from registering the conveyance deeds of 09 apartments i.e. G-1, G-6, G-7, G-8, 102, 107, 207, 308 and 405 of Kulsoom Residency except in accordance with law.

7. The subsequent orders of 20.06.2022 and 23.06.2022, which are in fact mandatory injunctions apparently passed on an application for appointment of Receiver, are also reproduced as under:-

Order dated 20.6.2022

- “1. For Orders on CMA No.9727/2022 (Urgent application)
- 2. For Orders on CMA No.9728/2022 (Contempt application)
- 3. For Orders on CMA No.9729/2022 ((Inspection application)
- 4. For Orders on CMA No.9745/2022 (Receiver Application)

20th June, 2022

Mr. Rehan Kayani advocate for the plaintiffs

- 1. Urgency granted.

Learned counsel for the plaintiffs states that this Hon'ble Court through its order dated 03.06.2022 restrained the defendants from blocking plaintiff's entry into their office or from registering the Conveyance Deed of 09 apartments, which order is still holding the field. Defendant No.2, per learned counsel, in utter disregard of the said order has broken the locks of Apartment No.102 and has attempted to dispossess the plaintiff.

Issue notice to defendant No.2. In the meanwhile Nazir of this Court is directed to replace the locks of said apartment and put his own lock and seal the said apartment and file a report before the next date of hearing. Nazir's fee would be Rs.15,000/- to be paid by the plaintiffs to the Nazir in advance.

To come up on 24.08.2022.

Order dated 23.6.2022

- “1. For orders on CMA No.9943/2022 (Urgent Application)
2. For orders on CMA No.9944/2022 (Contempt Application)
3. For orders on CMA No.9945/2022 (U/O 40 Rule 1 CPC)

23.06.2022

Mr. Rehan Kiyani, Advocate for the plaintiffs

1. Urgency granted.
2. Notice.
3. Learned counsel for the plaintiffs submits that this Court vide order dated 20.06.2022 for the reason detailed therein directed Nazir of this Court to replace the locks, put his own lock and seal the said Apartment No.102, as defendant No.2 had broken the lock thereof, and was trying to create third party interest.

Counsel contends that the defendant has broken two more locks and will break more locks, and will also try to dispossess the plaintiffs.

In the given circumstances, this Court's above order is extended to all the nine apartments being G-1, G-6, G-7, G-8, 102, 107, 207, 308 and 405 and Mr. Muhammad Saad Khan, Library Attendant is directed to do the needful instead of Nazir (as Nazir is on leave), put his own locks, seal the apartments, handover keys to the Nazarat, and file his report within one week, at the cost of Rs.7,000/- per Apartment payable by the plaintiffs. SHO Jamshed Quarter, East is directed to provide police aid/security needed.”

8. The first order of 03.06.2022 carries no element of any mandatory directions/injunctions. It apparently restrains respondent No.3 only from blocking the entry of respondents No.1 and 2 into the office premises, followed by an order restraining respondents No.3 and 6 from registering

the conveyance deeds of nine apartments, numbers of which were only disclosed in the order dated 03.06.2022 (not disclosed in the pleadings/ complaint etc.).

9. The issue cropped up when on an urgent application the matter was again taken up on 20.06.2022 when learned Single Judge made up his mind that in utter disregard of order dated 03.06.2022, respondent No.3 has broken the locks of apartment No.102 and has attempted to dispossess the plaintiffs/respondents No.1 and 2.

10. There was neither any interim order on the subject of possession nor any arguments with regard to retaining the possession of the premises was made which could reflect in the order dated 03.06.2022. It was however ordered by learned Single Judge on 20.06.2022 that Nazir should replace the locks of the subject apartments and put his own locks, seal the said apartments and file report before next date i.e. 24.08.2022. It appears that before such report could be filed again an urgent application was moved on 23.06.2022 and the matter was taken up when on solitary statement of plaintiffs' counsel, who are respondents No.1 and 2 here, the above order of 20.06.2022 was extended to all nine apartments and instead of Nazir, Muhammad Saad Khan, Library Attendant was directed to do the needful as the Nazir was on leave. Library Attendant of learned Single Judge was directed to put his own locks, seal the apartments and handover keys to Nazarat at the cost/fee of Rs.7000/- per apartment and file his report within one week time.

11. The question here are; (i) whether there was enough evidence/ material available before the learned Single Judge to pass order, on an application for appointment of Receiver, of mandatory nature which has to see and enforce replacement of the locks and virtually possession being handed over from one hand to another without hearing the actual

persons/individuals having interest in the apartments as they were never arrayed as parties to the proceedings. Even the defendants who have been arrayed and have no interest left, were not served or heard. (ii) Whether there was enough evidence to adjudge respondents No.1 and 2's possession over nine apartments? The third question that arises out of the impugned orders is, (iii) what could be the compelling circumstances to issue a mandatory injunction of the nature, as highlighted above.

12. Commissioner's report dated 25.06.2022, which is subsequent to the order dated 20.06.2022, is however available on record. It was conducted on 24.06.2022 and record shows that it was placed on record on 25.06.2022. The report shows that the Commissioner reached the site on the pointation of respondent No.1 who is plaintiff No.1 in the suit and his counsel Muhammad Altaf Advocate along with one police mobile of Jamshed Quarters, its attendants and female police officer. The SHO of Jamshed Quarters however intervened on the ground that the area does not fall within their territorial jurisdiction as it, per SHO, falls within the limit of police station of Soldier Bazar however since it was a Court order, SHO was compelled to appear and provide security. Para 6 disclosed that the lock of Flat 102 was not opened from the key or keys provided by plaintiff No.1 i.e. respondent No.1 here as according to him lock was changed. Now, how did he ascertain this fact about change of locks, is not disclosed except that the plaintiff informed him. Without replacing the locks, the Commissioner however wrote on the wall as well as on the handle that the premises has been locked (sealed) as per Court order dated 23.06.2022. In terms of paragraph 7 of the report it is stated that some labour were working in Apartment No.G-6 and 308 whereas rest of the apartments were lying vacant and no interference caused vis-à-vis sealing the apartments except that two men named Shahzad and

Raheel who claimed to be owner of Flat No.308 and Ghulam Muhammad son of Haji Ebrahim who claimed to have ownership of Flat No.G-1 caused some interference and used abusive language (per report). G-1 claimed to be occupied by family of Ghulam Muhammad and the Commissioner could not seal this apartment. The report was submitted along with photographs taken by the Commissioner. The order was not complied for any of the apartment as locks were not removed or replaced, instead it was sealed by wrapping white tape only. So the original locks as found on the day of inspection are still there. (This was stated by Commissioner when he appeared).

13. There was an earlier suit i.e. Suit No.NIL of 2022 filed by respondents No.1 and 2 being plaintiffs of Suit No.899 of 2022. In the earlier suit, referred above, the dispute was with regard to community center of the project and also that respondent No.3 had no right to transfer the units/flats to any party and on the same day i.e. 20.06.2022_ the suit was taken up and an order was passed, substantive part of which is as under:-

“Learned counsel is also requesting that since he is in danger of the defendant’s illegal dispossession, Nazir of this Court be appointed as commissioner and have arms guards posted and have installed appropriate sign boards at the cost of plaintiffs and take all necessary measures to protect and preserve the property. Nazir is accordingly directed to inspect the property and to make inventory of the various units constructed thereon and to file a report as to their possession on or before the next date of hearing. Nazir’s fee would be Rs.25,000/- to be paid by the plaintiffs to the Nazir in advance.”

14. On the said date i.e. 20.06.2022 the learned Single Judge was not aware about possession of the parties having interest and in fact went on to appoint Commissioner with armed guards and to affix appropriate signboards, to take all necessary measures to protect and preserve the property/ subject flats. Nazir was further directed to inspect the property and to make inventory of the various units constructed thereon

and to file report as to their possession on or before next date of hearing. This order concludes that there was nothing which could establish that respondents No.1 and 2 who were plaintiffs of the two suits, were in an undisputed possession of the premises in question including nine flats.

15. On these facts learned Single Judge was pleased to pass mandatory injunction of removing the locks and to replace them with the new locks by a Library Attendant and to seal the apartments.

16. Now by applying settled rationale of law on these facts, leaves no doubt that an interlocutory order may either be of prohibitory nature or mandatory in character however such discretion as being exercised should reveal exercise of some sound principles and standards as already recognized. Relief of mandatory injunction is a discretionary relief and can be granted in the circumstances specified under Specific Relief Act. Standards of passing mandatory interlocutory orders, and that too *ex parte*, have now been settled conclusively. If a Court is called upon to grant any relief on any interlocutory application, which when granted would mean granting substantially the relief claimed in the suit and/or to restore the status as existed on the day suit was filed, the Court ought to be very careful and circumspect in the matter of granting any such prayer. Though in law there is no absolute bar in granting such relief and the Court should not lay down absolute proposition when such are not necessary and consequently forge fetters for itself, but such exercise of discretion should be limited to rare and exceptional cases. Such orders of injunctions or for that matter any interlocutory order of mandatory nature are passed where the rights sought to be protected are clear and/or based on comprehensive undisputed report and not where it is doubtful, cloudy or needed trial. An injunction cannot be granted to establish a new state of things differing from the state of

things which existed on the date when proceedings were instituted. Picture for an undisputed possession of plaintiffs of suit was not at all clear when suit was filed.

17. An interlocutory mandatory injunction could only under those compelling circumstances be granted in case the Court is satisfied that the matter is urgent one and an immediate assistance is needed to prevent irreparable injury being done to the legal or equitable rights of a claimant. In a situation where passing of mandatory injunction is inevitable the leading principle, which may be conducive for the situation, is to limit exercise of discretion to the extent it is needed. The leading rationale which ought, in normal circumstances, to be the guide of Court and to regulate its discretion in granting injunction is that only such restraint should be imposed or such powers be exercised as may suffice to stop the mischief complained of. Meaning thereby if a restraining order of an ex parte nature is sufficient to handle the given situation then it is not conceivable that a maximum cap of discretion be utilized, though it is within the Court's discretion. It was yet to be seen by the Court passing mandatory injunction, that the plaintiffs of the suit were really in possession of the property when it was filed and also when injunctive order was passed. Off course, once the parties are heard, then the mandatory injunction to restore status of the day when the suit was filed, could be passed, however lawless and outlawed orders or those not based on settled and ordained principles of law should not be ignored or let go just because guilt could be comprehended in the trial. There is no prohibition against granting of temporary mandatory injunction but it is to be issued only in rare cases where there are compelling circumstances which are lacking here.

18. If a mandatory injunction is likely to be granted on an injunction application, it is normally granted only to restore status quo and not to

establish new set of things. In Nandan Pictures¹ case the Division Bench depicted the reasonable circumstances that could compel a Judge for passing mandatory injunction. The relevant observation is reproduce as under:-

“I consider it sufficient to point out that it is only in very rare cases that a mandatory injunction is granted on an interlocutory application and instances where such an injunction is granted by means of an “adinterim” order pending the decision of the application itself are almost unknown. I do not wish to say because it is not necessary for the purposes of this case to say so that in no circumstances will the court have any jurisdiction to issue an adinterim injunction of a mandatory character pending the disposal of an application for an injunction. Injunctions are a form of equitable relief and they have to be adjusted in air of equity and justice to the facts of each particular case. No court, therefore, ought to lay down absolute propositions when such are not necessary and forge fetters for itself. At the same time I may point out what the accepted principles have been and what has been according to reported cases, the practice of the courts. It would appear that if a mandatory injunction is granted at all on an interlocutory application it is granted only to restore the status quo and not granted to establish a new state of things differing from the state which existed at the date when the suit was instituted. The one case in which a mandatory injunction is issued on an interlocutory application is where with notice of the institution of the plaintiff’s suit and the prayer made in it for an injunction to restrain the doing of a certain act, the defendant does that act and thereby alters the factual basis upon which the plaintiff claimed his relief. An injunction issued in such a case in order that the defendant cannot take advantage of his own act and defeat the suit by saying that the old cause of action no longer survived and a new cause of action for a new type of suit had arisen. When such is found to be the position the court grants a mandatory injunction even on an interlocutory application directing the defendant to undo what he has done with notice of the plaintiff’s suit and the claim therein and thereby compels him to restore the position which existed at the date of the suit.”

19. Similarly, a mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in clear cases either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the

¹ (AIR 1956 Cal. 428) Nandan Pictures Ltd. v. Art Pictures Ltd.

defendant had attempted to steal a march on the plaintiff. Moreover, before granting a mandatory interlocutory injunction the Court had to feel a high degree of assurance that at the trial it would appear that the injunction had been rightly granted. Where the Court comes to the conclusion that a party in contravention of an order passed under Order XXXIX rules 1 and 2 CPC had done something to its advantage and to the prejudice of the other party, the court can exercise its inherent power to bring back the party to a position where it originally stood before such contravention since no party can be allowed to take advantage of his own wrong inspite of the order made by the court but that order is more likely to be passed after a served notice.

20. In the instant case however there was apparently no material available before learned Single Judge to pass an order of nature to remove locks and to have it replaced by the locks of Commissioner. For that matter the learned Single Judge had to be more than just satisfied that plaintiffs of the suit were in possession and were dispossessed after filing of the suit which fact cannot be decided on solitary statement of one counsel. The order for restoration of the status quo, had plaintiffs been in possession of the premises, could have been made after notice to all who are concerned and have interest over the subject property based on affidavits of rival parties but not on an urgent application as *ex parte* order. The Commissioner's report suggests that in some of the apartments labour were working which itself put the respondents No.1 and 2/plaintiffs of the suit in an embarrassing situation wherein they claim to be in possession of all nine apartments, which was found incorrect by report itself. If respondents No.1 and 2 claim to have been dispossessed after filing of the suit, they could have moved an application for the restoration of status quo ante as existed on the day of filing of the suit and only after a contest by the parties concerned

such order of restoration of the status quo ante could have been passed and not as an ex parte ad-interim mandatory injunction.

21. We have enquired from commissioner who stated that due to paucity of time existing locks were not removed, instead he only sealed doors of apartments by wrapping paper tape on it and marking of "Court's order compliance". Thus the locks are still there which were not opened from plaintiffs' keys and at this point of time there is no evidence that plaintiffs were in possession at the time of filing of suit. Appellants' counsel however stated that in their locks respondents have filled the sealing material (elfi) and though they have keys but they might not function.

22. For the purposes of present controversy we thus conclude as under:-

- I) That the seal, as ordered by learned Single Judge, shall be removed forthwith by the same Commissioner who sealed the apartments;
- II) Whosoever is holder of the keys of the locks affixed at the time of inspection and sealing, be restored possession (forthwith) i.e. in three days' time from the date of passing of this order; in case the locks are not opened due to sealing material (ELFI), it may be ascertained through an expert as to who is the holder of the keys to those locks and an expert be appointed in this regard by the Nazir of this Court;
- III) This exercising of finding rightful key holder of the locks should not take more than additional three days;
- IV) The rightful key holders, as stated above, shall be at liberty either to replace the locks or to continue with same on receipt of possession;

- V) Till the controversy is decided by learned Single Judge as to whether appellants came in possession after filing of the suit or that they (appellants) were in possession prior to the filing of the suit, no third party interest be created.

Instant High Court Appeal stands allowed in the above terms and pending applications stand disposed of accordingly.

Dated:

Judge

Judge