

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

**SUIT NO.1463/2015**

**PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR**

Plaintiffs : Mst. Farzana Khalid,  
Through: Mr. Haider Waheed, advocate.

Defendants : Federation of Pakistan,  
Through: Minister of Housing and Works,  
And others,  
Through: M/s. Arshad M. Tayebaly and Amel  
Khan Kanshi, advocates for defendants No.4 & 5.

Date of hearing : 21.12.2015

Date of announcement : 22.12.2015

**ORDER**

This order will dispose of application under Order 39 Rules 1 and 2 read with Sections 94 and 151 CPC (CMA No.11392/2015) filed by plaintiff in Suit No.1463/2015, with prayer for direction to defendants to maintain status quo in respect of construction and third party interest on Plot No.29, Modern Cooperative Housing Society (MCHS), Block 7/8, Tipu Sultan Road, Karachi, till pendency of suit.

2. Plaintiff pleaded that she is owner/resident of Plot No.26/27, Modern Cooperative Housing Society, Karachi; defendant No.1 is lessor of properties falling within the jurisdiction of defendant No.3 which is a housing society, defendant No.2 is regulatory body for town planning and building laws, defendant No.3 is a housing

society and licensee of defendant No.1 to develop areas allotted to it; defendant No.4 is owner of Plot No.29, MCHS which is surrounded by and adjacent to the property of the plaintiff; defendant No.5 is builder who entered into an agreement with defendant No.4 to build 18 storied commercial cum residential project on Plot No.29; that in 2012 Council of Karachi Metropolitan Corporation vide resolution No.51 dated 21.12.2012 accorded approval for declaration of Tipu Sultan Road where plots of defendant No.4 and plaintiff are located, as open for conversion from residential to commercial but such conversion is subject to observance of provisions of law attracted and thus such properties as mentioned in resolution did not become commercial ipso facto but change of land use is subject to process as provided in regulations 18-4 to 18-5.1.1 of Karachi Building and Town Planning Regulations (KBTPR) and further that as per regulation 18-4.2.1 no plot can be converted into commercial without approval of master planning group office and upon recommendation of concerned authority mentioned at serial NO.5 of schedule 1A of KBTPR; that in addition to above, section 17 of Sindh Environmental Protection Act 2014 no commercial construction can take place nor high rise can be built without approval and NOC of Environmental Protection Agency; that plaintiff came to know that defendant No.4 and 5 without observing required formalities/process of law, started commercial activity upon Plot No.29 whereupon billboards of defendant No.5 building a commercial cum residential complex of 18, were displayed; that impugned construction of "Roshan Towers" or any commercial activity on Plot No.29 of defendant No.4 will severely affect living conditions of plaintiffs including but not limited to resulting in insufficiency of amenities and cause nuisance; raising building opposite the building of plaintiff's residence will also affect

the pardah of the plaintiff's family, that to aggravate the matters all such interference and nuisance caused will be on the basis of amalgamation/change of land use/commercialization contrary to the provisions of law, that such illegalities committed by defendants No.4 and 5 were in active collusion of officers of defendant No.2 who had accorded NOC for sale and advertisement of residential flats/showrooms for the subject project.

3. Learned counsel for plaintiff has contended that concerned authority has withdrawn its notification whereby Tipu Sultan Road was made open for commercialization hence defendants have no right to erect a building on the subject; easement rights of plaintiff and neighbourhood would be disturbed, admittedly plaintiff is neighbourer of defendant and his case is a little bit different from other case which was heard by this Court however he has adopted whole arguments as made in Suit No.1029/2015 as in that case, subject matter property, issue and defendants are same.

4. Conversely, Learned counsel for defendant has argued that albeit this Court has heard issue involved in the suit which is also involved in Suit No.1029/2015, his arguments are same. With regard to withdrawal of notification, such subsequent notification he is not aware but in case that is the situation, even then commercialization effected within that period would not be declared as illegal, therefore, plaintiff is not entitled for injunction on easement rights.

5. Heard arguments, perused the record.

6. Before dilating upon merits of the case, it would be proper and relevant to say that what is not disputed from the pleading of the plaintiffs and even arguments, raised in support of

the application, are that *there exists no absolute bar over amalgamation and commercialization use of the amalgamated plots* however the 'authority', empowered for such purpose, are to follow certain legal procedure. The object for vesting the authorities with such powers *prima facie* appears to be nothing but an affirmation that the *authorities* are to ensure a *balance* between personal right, arising in favour of one to enjoy his/her property, and *easement rights* of inhabitants. To follow a certain procedure is also meant to ensure examination of such *balance* by the 'authority'. In short, it is the 'authority' to determine such *balance* and one shall be denied his/her *otherwise* guaranteed right to use his property for his/her benefits if such use *prima facie* is at the cost of *inconvenience* to public. Needless, to add that *an inconvenience* can well be compensated / redressed by certain adjustment and this is spirit for not *putting an absolute bar over amalgamation & commercialized use of land*.

7. The grievance of the plaintiffs *appears* to be relating to their rights of easement in result of some alleged illegalities/irregularities towards approval of the project in question. The rights of the easement are *recognized rights* in law but such rights *nowhere* bring a permanent full stop over the use of ownership over one's own property but such ownership is required to be exercised in the manner so as to avoid certain prejudice to the rights of immediate neighbours such as *light, air* etc. The *project* is still at initial stage with clear undertaking of the defendants that no violation or departure shall be carried out but the construction of the project shall continue strictly in accordance with rules, procedural and approval thereof which *undeniably* is from competent authorities. The matter *at this stage* is requiring assessment of the material only

to find out availability of required ingredients in favour of the plaintiff to maintain their plea of an *injunctive order*. Reference can be made to the case of *Marghub Siddiqui vs. Hamid Ahmed Khan & 2 others* (1974 SCMR 519) wherein it is held that

*'It is well settled law that an injunction is not to be granted only on the basis that a prima facie case exists in favour of the plaintiff. The Courts are required to take into consideration whether the question of balance of convenience or irreparable loss to the party seeking such relief co-exists or not.'*

The record shows that defendants have specifically claimed the conversion of the status of the plots into *commercial* with under a legal *resolution* confirmed by the notification dated 22.5.2008 by the *City District Government* with reference to Section 40(a) of *Sindh Local Government Ordinance, 2001* which reads as:

*'(a) approve master plans, zoning, land use plans, including classification and reclassification of land, environment control, urban design, urban renewal and ecological balances;*

since it is *specifically* claimed that no violation of the rules and procedure shall be carried out and quarters concern shall ensure observance and compliance of all the relevant rules, procedure and *approval* even hence *balance of convenience* also appears to be floating in favour of the defendants at this juncture it would be conducive to refer case of *Sheri C.B.B v K.B.C.A* (2003 YLR 1086), wherein it was held:

'9. After hearing the learned counsel and perusal of the record, the admitted position which emerges is that the construction has been raised in accordance with the approved building plans; no additional construction in violation to the building plans has been raised; the defendant no.6 is already enjoying the title under duly executed document; the property is situated on a main

road already commercialized to a good extent though the plaintiffs are residents of the same society they are not the immediate neighbours; the regularization plan has already been submitted. The case law cited by learned counsel for the plaintiffs pertain to unauthorized structure raised without approved building plans which is not attracted to the facts and circumstances of the present case and are distinguishable as in the instant case the provisions of law has not only been complied with but in pursuance of the objections. The construction was sealed on more than one occasion. It was only after a detailed inquiry and consideration that it was *desealed* even during construction stage and the plaintiffs were fully aware of the conversion of the plot throughout but allowed significant time to elapse. In view of the foregoing considerations, I am of the humble opinion that by allowing present application to restrain the defendants from exercising the powers conferred upon them under the law would be contrary to the public purpose for which the special law i.e The Sindh Building Control Ordinance, 1979 has been enacted.

10. The facts lead to the conclusion that the defendants have from time to time complied with the objections and have raised construction according to the approved building plan except for minor deviation, not of a significant nature that are pending consideration in the shape of absence of partition walls for which a revised plan has been filed. Main road on which the property is situated is also subject to commercial activities and there is no likelihood of irreparable losses to the plaintiffs calling for interference.

8. Albeit plaintiff has claimed easement rights but he has not pointed out that under what manner, such project is effecting him plaintiff shall have to prove with reference to structure of the project, acts and omission of the defendants in completing the structure thereof which *prima facie* appear to be questions of facts and law requiring evidence hence even existence of such questions will not be enough for grant of an injunctive order as it would only be granted if one succeeds in establishing co-existence of all three requisite ingredients i.e *prima facie case, balance of inconvenience*

*and irreparable injury*. Not only this, but the project is at *initial stage* hence without proper evidence it would not be practicable to determine the future aspect (s) and impacts thereof.).

9. As regard the plea of subsequent withdrawal of notification regarding road in question i.e *Tipu Sultan Road*, it would suffice to say that subsequent withdrawal, if any, shall not be sufficient to nullify the acts done by authority or earned by an individual during subsistence of *functioning of such* notification as it is not claimed to be with retrospective effects.

10. The plaintiffs have failed in establishing *co-existence* of all three ingredients therefore, it would not be in the interest of equity to grant injunctive order restraining the defendants from continuing an action for which there is approval from quarter concerned. The authority (SBCA) *even otherwise* is the direct custodian of maintaining and keeping the balance between absolute rights of ownership and that of *easement rights* which duty continues from the day one intends to *raise construction* till it complete within satisfaction of such *authority*. Accordingly plaintiff has not been able to make out a case for grant of injunctive order. In consequence of such view, the instant CMA is hereby dismissed.

Imran/PA

**J U D G E**