

Order Sheet

IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1744 of 2022

Date	Order with Signature of Judge
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1. For order on CMA No.10254/23 (urgent)
2. For order on CMA No.10255/23 (u/s 114)

14.07.2023

Mr Salman Hamid, Advocate for Plaintiff
Sardar Ali Sher Khan, Assistant AG

1. Urgency granted.
2. This is an application for review of this Court's Order dated 13.07.2023. Counsel has filed a similar application in Suit No.1795/2022. Learned AAG is present and waives notice of the applications. On 13.07.2023, this Court took up Plaintiff's CMA No.10182/23 (and 10183/23 in Suit 1795 of 2022) seeking an urgent hearing of CMA No.9283/2023 (Contempt) and 9284/2023 (Section 94 CPC) and Nazir Reference dated 05.07.2023. After the hearing, the Court modified the ex-parte ad-interim Order dated 17.11.2022 in Suit No.1744/2022 and 15.11.2022 in Suit No.1795/2022. Plaintiff's Counsel has today filed a review application being aggrieved with the following Order (the portion Plaintiff Counsel is aggrieved with is underlined):

“To be taken up on 03.08.2023. Meanwhile, interim Orders passed on 17.11.2022 shall continue to operate, including status quo between all parties, i.e. there will be neither any further demolitions by Defendants nor any construction raised by Plaintiff. No coercive action detrimental to the rights of the Plaintiff will be taken (underline added).”

Counsel for Plaintiff argues that based on impugned letters available on pages 73, 75 to 81 (legible typed copies on pages 83 to 89), and 91 of the suit file, Plaintiff was never restrained from raising any construction as per this Court's Order. He contends that there was no order prevailing since the filing of this suit that denied Plaintiff from raising construction; hence, there is/was no need for this Court to modify the previous orders and restrain him from construction on his property. He submits that Plaintiff has not sought any declaration regarding construction and that reliance on the Division Bench Judgment dated 02.02.2022 in C.P.No. D-5359/2019 is misconceived. The Caution Reference under Section 23 of the NAB Ordinance mentioned in the CP No. D-5359/2019 has been disposed of vide the Accountability Court No. IV at Karachi Order dated 27.01.2023 in Cr. Misc. Application in Ref. No.5 of 2021

(Copy of the said Order is taken on record). Plaintiff's Counsel pleads that given the above submissions, the Order of 13.07.2023 may be reviewed by removing the phrase "nor any construction raised by Plaintiff" from the said Order.

Learned AAG vehemently opposes Plaintiff Counsel's submissions. He submits that the Plaintiffs in the two suits seek declarations to raise construction on their property in their prayer clauses "A" and "B" of their Suit. He argues that if there were no fetter to raise construction, then Plaintiffs would not have sought such declaration as set out in prayer Clauses "A" and "B". He submits that pages 73, 85 to 89 and 91 of the suit file are impugned because they restrain the Plaintiff from raising construction. That's why the Plaintiffs approached the Court. The Plaintiffs have been raising construction under the garb of the ex-parte ad-interim orders of 17.11.2022 (15.11.2022 in Suit 1795/2022). He contends that Nazir's Report dated 05.07.2023, which is attached to the Mukhtiarkar Report dated 23.06.2023, in turn, refers to the Judgment of the Division Bench of this Court dated 02.02.2022 in C.P.No.D-5359/2019. He submits that as per paragraph 3 of the said Judgment, it is evident that the Petitioners were very much interested in raising construction on the Suit Property when they filed the Petition. The learned Division Bench was not ultimately pleased with such a prayer and dismissed the Petition. Learned AAG relies on paragraph 7 of the Judgment, which he read aloud and is reproduced below.

"Para 7. As regards the submission of learned counsel for the petitioners that petitioners may be allowed to raise construction over the subject land on their own risks and cost and they would not create third party interest in the subject land is concerned, record reflects that an inquiry was initiated against officers/ officials of Land Utilization Department and others regarding illegal allotment of State land to Mst. Bashiri Khatoon, from whom the petitioners allegedly purchased the subject land. During such inquiry, caution under Section 23 of the NAO 1999 was imposed upon the subject land on which project in the name of "Fatima Gul Residency" was being constructed by the petitioners. Such inquiry was converted into investigation, which translated into filing of Reference No. 05 of 2021, which is pending adjudication before Accountability Court No.III at Karachi. In the Reference, the title of the owner is under dispute and it is alleged that accused persons including the petitioners occupied the State land on the basis of forged and bogus documents in connivance with the officers/officials of the Board of Revenue, hence colossal loss is caused to the public exchequer. The very criminal charge is pending against accused before Accountability Court and in

order to protect the State land from alienation or transfer, caution under Section 23 of the NAO 1999 was invoked by the NAB Authorities. In such circumstances, the question arises why the petitioners are requesting for permission to raise construction at this stage, when the matter is pending adjudication before Accountability Court. In our humble opinion, such request cannot be taken lightly especially when the title of the land is under serious clouds, the repercussion of such permission would be farfetched as the apprehension of creating third party interest at least physically cannot be ruled out. And thus, such permission would defeat the very purpose of imposition of caution by the NAB Authorities over the subject land. The wisdom behind Section 23 of the NAO 1999 is that to preserve the property as it is, as such the petitioners cannot be allowed to alter the status prevalent over the subject land by making construction which may result into multiple litigations and would definitely change the complexion and ground reality of the subject land is not the scheme of law. We, in the present circumstances, while sitting in the constitutional jurisdiction would refrain from deciding such question and leave it for the trial court, especially when Reference has already been filed before Accountability Court, which has the ultimate authority to look into this matter and consider all the above aspects minutely, if approached at proper stage.”

Regarding withdrawal of the Caution under Section 23 of NAO, 1989, learned AAG submits that the cause/matter is still/remains in the field, which is evident from paragraph 23 of the Accountability Court No. IV at Karachi Order dated 27.01.2023 relied upon by Plaintiff, which he also read aloud and is reproduced herein.

“23. The accused persons namely Javed Iqbal, Ghulam Mustafa Phull, Iftikharuddin, Nazir Ameen Maqbool Memon, Anwar Ali Pahanwar and Iftikhar Ahmed Malik are on bail and they are directed to appear before the concerned agency/Court as and when required. The office is directed to transmit the entire record after retaining of this Court”.

Learned AAG contends that paragraph 23 of the Accountability Court’s above-cited Order implies that the matter remains alive and not dead. He submits that the Order dated 13.07.2023 modifying the Court’s earlier ex-parte ad-interim Orders is fair, given the information available with the Nazir’s Report dated 05.07.2023 at this interim stage of hearing the interlocutory applications. He submits that the Order of 13.07.2023 requires no review. He undertakes, once again, to file a Written Statement / Counter-Affidavits on behalf of the Defendants by the next date of hearing.

Heard Counsel and learned AAG.

This lis is currently being listed for hearing interlocutory applications, namely CMA Nos.17284/2022, 17286/2022, 9283/2023, and 9284/2023. Learned AAG has requested time to file Counter-Affidavits on the previous/last hearing date on 13.07.2023. When the Court took up the matter on 13.07.2023, it was submitted by learned AAG that the Caution against NAB was still in play and considering the same, to safeguard the interest of the public and noting the severe observations of the learned Division Bench cited above; Plaintiff should not be allowed to carry on construction. As per the recent amendment in the NAB law, the chairman is now empowered to transfer cases to ordinary Courts, and although these cases have been returned, the NAB at the moment is working out the exact modus operandi and a mechanism to enable it to send such cases to ordinary Courts. In this respect, there are apparently some difficulties being faced by NAB, which are expected to be resolved soon. As soon as this process is cleared up, the actions/matters against the Accused will re-commence. This is why the bail bonds furnished by the Plaintiffs have not been discharged. Therefore, the contention of the Plaintiffs' Counsel that the Accused are let off / released does not carry weight. Further, the Division Bench Judgement in CP No.D-5359/2019 dated 02.02.2022, paragraph 7, which refers to the Caution Reference and expressed doubt regarding granting permission to Petitioners/Accused to raise construction on their alleged property that has come on record due to the Nazir's Report dated 05.07.2023 merits consideration until the defence files its Written Statement / Replies in this lis.

Almost eight (8) months ago, when this Court passed its order dated 17.11.2022, it was ex-parte ad interim. No one was heard except Plaintiff and Plaintiff's Counsel's version of the facts and background of the case. The Court had no information now available on record due to Nazir's Report dated 05.07.2023. Subsequently (after the ex-parte ad-interim Order), it had emerged that raising of construction is the key to this suit. Plaintiff's prayer clause seeking a declaration regarding the raising of building corroborates this position. It is a matter of record that the previous pleas for the continuation of construction on the suit property are/were not entertained positively by the learned Division Bench of this Court in para 7 of its Judgement in Writ Jurisdiction. The suit is at the trial stage, and the Interlocutory Applications since November 2022 have yet to be heard. Meanwhile, the ex-parte ad-interim Order has been continuing without much ado.

A trial court is a dynamic institution having the power to grant relief at the interlocutory stage. These powers are subject to jurisprudential principles that interim relief doesn't frog-leap the procedural requirements of the trial, such as evidence critical to the claim's success. At the same time, for the sake of equity and fairness, Courts also strive to preserve a status quo whereby parties remain on equal footing during the trial such that when legal proceedings finally conclude, the interlocutory relief doesn't favour one party over the other. In short, Courts consciously avoid granting relief at an interlocutory stage, which will amount to granting the entire relief before recording evidence.¹ In the present case, the Plaintiffs have to prove in their main suit why they should succeed in obtaining a declaration not to restrain them from construction given the documents impugned in the Plaint and the allegations and controversy which are yet to be pleaded by the defence but arise in respect of the suit property that has been placed on record consisting of judicial observations of a division bench. Notwithstanding, the judicial comments are not binding, and the Division Bench's omnibus clause explicitly leaves the matter to the trial court to decide whether or not construction should be allowed. The ex-parte ad-interim order is not unshakable or cast in stone at this interlocutory stage. There is no reason for the Court to wait until the final determination of the interlocutory applications before it curates an ex-parte ad-interim Order. The ex-parte ad-interim order before attaining finality remains subject to review as better particulars and further information becomes available during the day-to-day hearings, even at the interlocutory stage. The Court now knows about matters that it did not eight (8) months ago. Accordingly, the ex-parte ad-interim Order dated 17.11.2022 remains amiable to modification. In the facts and circumstances of the case discussed herein, while acknowledging that the defence has still to file its replies / written statement, yet to safeguard the interest of public, not to create third-party interest, and for fairness so as not to grant such relief that amounts to giving full and final relief before even evidence is recorded during the pendency of trial, at this interim stage, the Court's Order of 13.07.2023 modifying the Court's earlier ex-parte ad-interim order does not require interference. Accordingly, Plaintiff's review application stands dismissed in the above terms.

To be taken up on 03.08.2023. Meanwhile, interim orders passed on 17.11.2022 shall continue to operate, including the status quo between all parties, i.e., there will be no further demolitions by Defendants nor any

¹ Reliance is placed on reported judgments of the Supreme Court of Pakistan in 1997 SCMR 1508, 2020 SCMR 2119, and 2021 PLC (CS) 292.

construction raised by Plaintiff. No coercive action detrimental to the rights of the Plaintiff will be taken.

It is clarified that the observations made herein pertain to this Court's Order dated 13.07.2023, are confined to provide a background to decide the review application, and are without prejudice to parties' claims and defences, in the main suit and/or both current and future interlocutory proceedings.

Ashraf

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