

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

Present:

Nadeem Akhtar, J
Yousuf Ali Sayeed, J

HCA No. 135 of 2022

Pakistan Telecommunication Company Limited..... ..Appellant

Versus

Province of Sindh and others..... ..Respondents

Haider Waheed, Advocate, for the Appellant.

Tufail H. Ibrahim, Advocate, for the Respondent No.2. Iqbal
Khurram, Advocate, for the Respondent No.3.

Dhani Bux, Advocate for the Sindh Building Control
Authority. Mehran Khan, AAG, Sindh.

Date of hearing : 05.10.2023

ORDER

YOUSUF ALI SAYEED, J. - The captioned Appeal arises out of Suit No. 2554 of 2017 pending before this Court on the Original Side, with the Appellant impugning the Order made by a learned Single Judge on 18.03.2022, dismissing two miscellaneous applications, both having been filed by the Appellant under Order XXXIX Rules 1 & 2 CPC.

2. Succinctly stated, the Appellant claims to be the lawful owner of Plot St # 1, Sector 24-E, measuring 6001.38 square yards, in Shah Latif Town Scheme 25-A, Malir Development Authority, Karachi by virtue of an allotment order issued by said Authority (i.e. the Respondent No.3) dated: 29.03.2011, with a Possession Order having then apparently been issued on 26.04.2011.

3. The grievance of the Appellant lies against the Respondent No.2 (i.e. Ghandhara Nissan Limited, arrayed in the Suit as the Defendant No.2), with it being alleged that said Respondent has encroached upon part of its land so as to initiate construction thereon and create an obstruction to the Appellants ingress and enjoyment thereof.

4. As such, the Appellant instituted the aforementioned Suit, *inter alia* seeking a declaration as to its title, as well as a permanent injunction restraining the Respondent No.2 from causing interference in its possession and from raising such construction. It is in that context that the miscellaneous Applications under Order XXXIX Rules 1 & 2 CPC were filed, bearing CMA Nos. 17139 of 2017 and 37 of 2018 respectively, whereby it was firstly sought that *status quo* be maintained over the Subject Property until final disposal of the Suit, and then, more specifically, that the Respondent No.2 be restrained from raising further construction.

5. The Respondent No.2 filed its counter-affidavit in respect of both those Applications, and upon culmination of the hearing that then took place thereon, the same came to be disposed of vide the impugned Order in the following terms:-

- i. Ghandhara Nissan Limited [Defendant No.2], at its risk and cost, may continue with the construction of the subject plot strictly in accordance with the approved documents, however, the construction shall be subject to final outcome of the present proceedings. Needless to state that the official Defendants would be at liberty to take action against Defendant No.2, if any violation is found during the construction.
- ii. The Defendant No.2, and/or anyone else, on its behalf, are restrained from creating any further third party interest in respect of the property till final disposal of the case.”

6. The relevant excerpt from the impugned Order reflecting the reasons that prevailed to the mind of the learned Single Judge reads as follows:

“From the records it appears that a plot bearing No. ST-1, Sector 24-E, measuring 6001.38 Sq.Yds in Shah Latif Town, Scheme 25-A, MDA in lieu of plot No. ST-1, Sector 18-A, Shah Latif Town Scheme 25-A, was allotted to the plaintiff. In this regard initially, MDA, Commercial Cell, issued an Allotment Order/License bearing No. ST-1/Sector 24-E/Sch-25A(SLT)/Comm./2011/ 167 dated 14.02.2010 (sic), however, subsequently, it issued another Allotment Order bearing No. ST-1/Sector 24-E/Sch-25A(SLT) /Comm/2011/106 dated 29.03.2011. Although pursuant to the said allotment order, on 26.04.2011 a possession order was also issued to the plaintiff however, admittedly physical possession of allotted land was never handed over to the plaintiffs. A site plan annexed with the plaint also mentioned ‘subject to demarcation at site’ which apparently has not been done.

9. Insofar as the claim of defendant No.2 that it is the owner of the plot of land bearing Survey No. 158, measuring 4-21 acres Deh Kanto, Tapo Landhi, Taluka Ibrahim Hyderi, District Malir, Karachi [Survey No. 158] is concerned, from the record it appears that in the year 1994, a 99-years industrial/commercial/residential lease in respect of 35 Acres N.C. No.89 of Deh Khanto was executed in favour of one Muneer Mushtaq. Although the said land was cancelled upon promulgation of Sindh, Government Land (Cancellation of Allotments, Conversion and Exchanges) Ordinance of 2000, however, subsequently, the same was regularized upon payment differential malkano. Later on, Muhammad Muneer sold out 4-21 Acres out of above 35 Acres to M/s. Muhammad Raees and Muhammad Tahir, both sons of Muhammad Yousuf, vide registered Sale Deed No.2516, dated 01.08.2009, thereafter, the survey property was mutated vide Entry No.95/213 dated 29.10.2009 maintained by the Mukhtiarkar, Ibrahim Hyderi and they were also granted permission to construct a boundary wall on the said Survey [No.158/4-21, Acres Deh Khanto]. M/s. Muhammad Raees and Muhammad Tahir, had sold out the Survey No.158/4-21, Acres of Deh Khanto to Defendant No.2 [M/s. Ghandhara Nissan Limited], vide Conveyance Deed registered under No.346, dated 02.12.2015 and mutated in the Property Register as per entry No.130/2016 dated 20.06.2016.

10. Having considered the arguments advanced at the bar, it merits consideration that the rival claims of the parties more particularly the location of plaintiff's property is a substantive matter that could be decided at the final stage, on the basis of the evidence that may be brought on record. Hence, suffice it to say that, at this stage, in the face of the documents underpinning the chain of title filed and relied by defendant No.2, as well as the entries in its favour in the Revenue Record, coupled with the factum of possession, prima facie, justifies the possession of defendant No.2, being owner of the property. Moreover, defendant No.2, who has been put into possession of the land under a registered instrument after completing legal formalities would be put to more inconvenience in the event if its enjoyment and/or utilization of the land is denied. In such circumstances, in my opinion, at the moment, it will not be fair to deny defendant No.2 to have the benefits of its possession till such time the matter is finally resolved between the parties.”

7. Proceeding with his submissions, learned counsel submitted that essentially the Appellant and Respondent No. 2 espoused distinct claims to what were ostensibly separate parcels of land, with the case advanced through the Suit turning on an allegation of encroachment by the Respondent No.2 over the land of the Appellant under the garb of being in possession of its own land. He submitted that it had therefore been earlier ordered in the Suit that a demarcation be carried out so as to address that dispute and determine the overlap, if any, but the learned Single Judge had decided the Subject Applications without awaiting the outcome of that exercise. However, on query posed as to what error or infirmity afflicted the approach of the learned Single Judge in allowing the Respondent No.2 to utilize the land in its possession in view of its *prima facie* title while recording that any construction raised would be at its risk and cost and remain subject to the final outcome of the Suit, the only response forthcoming was that once extensive construction of a permanent nature was raised by the Respondent No.2, it was unlikely to be demolished so as result in possession being ceded to the Appellant.

8. Conversely, for his part, learned counsel for the Respondent No.2 stated unequivocally that the Respondent No.2 remained bound under any circumstances by the subsisting orders made by a Court of law and would abide by the impugned Order in letter and spirit.

9. Whilst considering the matter, it has to be borne in mind that the impugned Order is of an interlocutory nature, and that the decision to grant or refuse an interlocutory injunction is a discretionary exercise, with an appellate court not being required to interfere solely because it feels that the discretion could have been exercised differently. As such, the scope of our inquiry is not to second guess the exercise of judicial discretion by the learned Single Judge, but to merely satisfy ourselves that such exercise was judicious, in terms of being reasonable.

10. On that very subject, a learned Divisional Bench of this Court observed in the case reported as Roomi Enterprises (Pvt.) Ltd. v. Stafford Miller Ltd. and others 2005 CLD 1805 that:

“The Court at this stage acts on well-settled principle of administration on this form of interlocutory remedy which is both temporary and discretionary. However, once such discretion has been exercised by the trial Court the Appellate Court normally will not interfere with the exercise of discretion of Court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely or where the Court has ignored certain principles regulating grant or refusal of interlocutory injunction. The Appellate Court is not required to reassess the material and seek to reach a conclusion different from one reached by the Court below solely on the ground that if it had considered the material at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the trial Court reasonably and in a judicial manner, same should not be interfered in exercise of appellate jurisdiction.”

11. The relevant principles in that regard were also dilated upon by the Supreme Court of India in *Wander Ltd. and another v. Antox India P. Ltd* 1990 Supp (1) SCC 727, where it was observed that:

“8. On a consideration of the matter, we are afraid, the Appellate Bench fell into error on own important propositions. The first is a misdirection in regard to the very scope and nature of the appeals before it and the limitations on the powers of the Appellate Court to substitute its own discretion in an appeal preferred against a discretionary order...

9. The appeals before the Division Bench were against the exercise of discretion by the Single Judge. In such appeals, the Appellate Court will not interfere with the exercise of discretion of the court of first instance and substitute its own discretion except where the discretion has been shown to have been exercised arbitrarily, or capriciously or perversely or where the court had ignored the settled principles of law regulating grant or refusal of interlocutory injunctions. An appeal against exercise of discretion is said to be an appeal on principle. Appellate Court will not reassess the material and seek to reach a conclusion different from the one reached by the court below if the one reached by the court was reasonably possible on the material. The appellate court would normally not be justified in interfering with the exercise of discretion under appeal solely on the ground that if it had considered the matter at the trial stage it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. After referring to these principles Gajendragadkar, J. in *Printers (Mysore) Private Ltd. v. Pothan Joseph* :

... These principles are well established, but as has been observed by Viscount Simon in *Charles Oseption & Co. v. Johnston* the law as to the reversal by a court of appeal of an order made by a judge below in the exercise of his discretion is well established, and any difficulty that arises is due only to the application of well settled principles in an individual case.”

12. The function of an appellate court in such cases had also been considered by Lord Diplock in *Hadmor Productions Ltd. v. Hamilton* [1983] 1 A.C. 191, where it was observed that:

“An interlocutory injunction is a discretionary relief and the discretion whether or not to grant it is vested in the High Court judge by whom the application for it is heard. Upon an appeal from the judge’s grant or refusal of an interlocutory injunction the function of an appellate court, whether it be the Court of Appeal or your Lordship’s House, is not to exercise an independent discretion of its own. It must defer to the judge’s exercise of his discretion and must not interfere with it merely upon the ground that the members of the appellate court would have exercised the discretion differently. The function of the appellate court is initially one of review only.

It may set aside the judge’s exercise of his discretion on the ground that it was based upon a misunderstanding of the law or of the evidence before him or upon an inference that particular facts existed or did not exist, which, although it was one that might legitimately have been drawn upon the evidence that was before the judge, can be demonstrated to be wrong by further evidence that has become available by the time of the appeal; or upon the ground that there has been a change of circumstances after the judge made his order that would have justified his acceding to an application to vary it. Since reasons given by judges for granting or refusing interlocutory injunctions may sometimes be sketchy, there may also be occasional cases where even though no erroneous assumption of law or fact can be identified the judge’s decision to grant or refuse the injunction is so aberrant that it must be set aside upon the ground that no reasonable judge regardful of his duty to act judicially could have reached it. It is only if and after the appellate court has reached the conclusion that the judge’s exercise of his discretion must be set aside for one or other of these reasons, that it becomes entitled to exercise an original discretion of its own.”

13. Considering the principles laid down in the aforementioned cases in light of the factors circumscribing the factual matrix presented before the learned Single Judge in the matter at hand, the exercise of discretion cannot be said to be incorrect or untenable and the reasons that prevailed, as aforementioned, do not indicate that the view taken was not sustainable. On the contrary, the impugned Order reflects a well-reasoned approach that appears to be in consonance with the principles laid down by the superior Courts relating to the grant of temporary injunctions.

14. As such, no case for interference stands made out. Accordingly, the Appeal fails and is hereby dismissed, along with all pending miscellaneous applications, with no order as to costs.

JUDGE

JUDGE

Karachi
Dated