

ORDER SHEET

THE HIGH COURT OF SINDH, KARACHI

Suit No. 1009 of 2023

Before: Mohammad Abdur Rahman, J

M/s. Pakistan National Building Material
Display Center Foundation (PNBMDCF)

Versus

Aqsa Suleman Bawany & Others

Dated: Order with signature of Judge(s)

For hearing of CMA No. 9533 of 2023

Date of Hearing : 14 October 2023 and 24 February 2024

Plaintiffs : Pakistan National Building Material Display Center Foundation represented by Mr. Zubair Ahmed, Advocate

Defendant No.1 : Aqsa Suleman Bawany represented by Mr. Noor Muhammad holding brief for Ms. Rizwan Ismail, Advocate

Defendant No.2 : Shaista Estate (Pvt.) Ltd. represented by Ms. Sehar Rana, Advocate

Defendant No.3 : Cantonment Board Clifton represented by Syed Zaeem Hyder, Advocate

ORDER

MOHAMMAD ABDUR RAHMAN, J. This order will decide **CMA No. 9533 of 2023**, being an application under Order XXXIX Rule 1 & 2 read with Section 151 Code of Civil Procedure, 1908, which has been maintained by the Plaintiffs seeking injunctive orders to be issued by this Court to restrain construction that is being undertaken by the Defendant No. 2 constituting two storeys above the fifth floor of a building known as "The Plaza" that is constructed on Plot No. G-7, Block 9, Karachi Development Authority Scheme No. 5, Karachi (hereinafter referred to as the "Said Property".)

2. The facts that are relevant to deciding this application are not in dispute. The Defendant No. 2 was conveyed "leasehold" rights by the Karachi Development Authority (hereinafter referred to as the "KDA") in the Said Property under a registered Indenture of Lease dated 21 April 1980. Permission was originally granted on 16 October 1998 by the Cantonment Board Clifton (hereinafter referred to as the "CBC") for the construction of a basement and ground plus three storey structure and which was subsequently, on an application by the Defendant No. 2, revised on 2 March 2009 by the CBC to a basement and ground plus five storey structure.

3. The Defendant No. 2 caused to be registered a Sub-Lease in favour of Defendant No. 1 for:

- (i) Office No. 508, Plot No. G-7, Block-9, KDA Scheme No.5, Karachi admeasuring 1994 square feet;
- (ii) Office No. 509, Plot No. G-7, Block-9, KDA Scheme No.5, Karachi admeasuring 1662 square feet;
- (iii) Office No. 510, Plot No. G-7, Block-9, KDA Scheme No.5, Karachi admeasuring 1662 square feet;
- (iv) Office No. 511, Plot No. G-7, Block-9, KDA Scheme No.5, Karachi admeasuring 1385 square feet;
- (v) Office No. 512, Plot No. G-7, Block-9, KDA Scheme No.5, Karachi admeasuring 1568 square feet; and
- (vi) Office No. 513 Plot No. G-7, Block-9, KDA Scheme No.5, Karachi measuring 1442 square feet

(hereinafter collectively referred to as "the Plaintiff's Property")

The Defendant No. 1 had thereafter conveyed her rights under the Sub-Lease in the Plaintiffs Properties through a registered Conveyance Deeds in favour of the Plaintiff.

4. The Defendant No. 2 has now, after issuing sub-leases to the Plaintiff and other persons in respect of units constructed on the Said Property, applied for a revision to the approval sanctioned for construction on the Said Property and has on 2 June 2023 obtained an approval from the CBC for the construction of an additional two storeys and which once constructed will make the construction on the Said Property a Basement and Ground plus Seven Storey structure.

5. The Plaintiff in this Suit contends that they have rights of a tenancy over a space which is in respect of the roof of the fifth floor and also had an agreement with the Defendant No. 2 whereby they had pre-emptive rights to purchase the units constructed on the sixth floor. The tenancy rights, as claimed by the Plaintiff are being adjudicated before the Rent Controller and which also became the subject matter of a Civil Suit No. 763 of 2022 before the Vth Senior Civil Judge Karachi (South). That suit was disposed of on an undertaking given by the Defendant No. 2 that the Plaintiff would not be dispossessed of their possession of the Space on the roof of the fifth floor “without due course of law”.

6. The Plaintiff also maintains this Suit claiming that under the Sub-Lease issued by the Defendant No. 2 in respect of the Plaintiff's Properties he, having been conveyed an undivided share in the Said Property, is a Tenant in Common of the Head Lease of the Said Property and that being the case no construction could have been approved by the CBC without his consent. The Plaintiff has maintained this application which was listed on 20 June 2023 and on which date an order was passed directing the parties to maintain status quo in respect of the construction on the Said Property.

7. Mr. Zubair Ahmed has entered appearance on behalf of the Plaintiffs and submitted that the sub-leases issued in favour of the Defendant No. 1 for the Plaintiff's Property contain a covenant whereby an undivided share **in the Said Property** has been transferred to the Plaintiff in the Head Lease of the Said Property and as such the Plaintiff is now a Tenant in Common of the Head lease of the Said Property. He further contends that since the Plaintiff is a Tenant in Common of the Head Lease of Said Property, no additional permission for construction can be sanctioned by the CBC, without the consent of all the owners including, but not limited to, the Plaintiff.

8. He further contended that the CBC is fully aware of the Plaintiff's right to the Said Property as they are regularly claiming a “property tax” from the Plaintiff and has therefore recognised the Plaintiff as a Tenant in Common of the Said Property. In the circumstances, he contended that after the execution of the Sub-Lessee, no approval for construction could have been sanctioned by the CBC without an application having been made to the CBC by all the Tenants in Common including, but not limited to, the Plaintiff. He relied upon the decision reported as **Ali Gohar Khan vs. Sher Ayaz**¹ and in which one of the co-owners of a property was attempting to

¹ 1989 SCMR 130

construct on a property without the consent of the other co-owners and in which the Supreme Court of Pakistan held that:

“ ... 6. The sole question which needs consideration in this case is whether in the facts and circumstances of the present suit a decree for perpetual injunction can be issued. As the record stands, the respondents had purchased a portion of the land from a joint Khata and dumped stones for raising construction over the same. The report of the Commissioner though may not be germane to the pleadings of the parties but is relevant to the extent that the suit property is jointly owned by the parties and no partition in any form has yet taken place. Furthermore, the fact that the property in suit is joint and no private partition amongst the parties has taken place stands finally decided by the Civil Judge vide his order dated 9-1-1975. Therefore, it can be said without any fear of contradiction that the parties are co-sharers in the suit property. The question now is whether a co-sharer in such a situation can deal with a joint property in the manner he likes without the express permission of other co-sharers and to their detriment. The answer obviously is in the negative as it is a settled principle of law that in case of joint immovable property each co-sharer is interested in every inch of the subject-matter irrespective of the quantity of his interest. A co-sharer thus will not be allowed to act in a manner which constitutes an invasion on the right of the other co-sharers. A co-sharer in possession of a portion of the joint property, therefore, cannot change the nature of the property in his possession unless partition takes place by metes and bounds. In the circumstances we think the learned District Judge was justified in law in passing a decree of perpetual injunction in favour of the appellant.

He contends that as the Plaintiff is a Tenant in Common of the Head Lease of the Said Property, the approval that has been issued by the CBC has been issued illegally and which should be suspended.

9. Ms. Sehar Rana has entered appearance on behalf of the Defendant No.2 and has contended that the Plaintiff's status in respect of his occupation of the roof top of the Fifth Floor of the construction that has been raised on the Said Property was that of a licensee and which right can be revoked unilaterally by the Defendant No. 2. With regard to the difference between the status of a licensee and a lessee, she referred to the decisions reported as Zaidi Enterprises & Others vs. Civil Aviation Authority² and Noorani Traders Karachi vs. Pakistan Civil Aviation Authority³ Alleging that as the status of the Plaintiff in respect of his occupation of the roof top of the Fifth Floor of the construction that has been raised on the Said Property was that of a licensee she contended that no injunction could be granted in her favour. In this regard she relied on the decisions reported as M.A. Naser vs. Charimant Paksitan Eastern Railways & Others,⁴ Zaidi Enterprises & others vs. Civil

² PLD 1999 Karachi 181 at pg. 191

³ PLD 2002 Karachi 83

⁴ PLD 1965 SC 83 at pg. 88

Aviation Authority,⁵ and **Sajeda Mustaq vs. Federation of Pakistan & Others**⁶ in support of her contentions.

10. Regarding the Plaintiff's contention that he was a Tenant in Common of the Head Lease of the Said Property Ms. Sehr Rana referred to a clause in the Sub-Lease which she contended permitted the Defendant No. 2 to exercise rights to alienate the rooftop of the building constructed on the Said Property. She contended that the Plaintiff having specifically having consented to such rights being retained by the Defendant No. 2 prevented the Plaintiff from seeking injunctive relief to restrain the Defendant No. 2 from undertaking further construction on the Said Property. She contended that the layout of a building is akin to "building scheme" whereby each unit is allotted and sold in accordance with a "scheme" and which permits covenants of the nature as indicated in the Sub-Lease to except rights in favour of the Defendant No. 2 such as the right to construct on the Said Property. She relied on a decision of this Court reported as **Ardeshir Cowasjee vs. Muhammad Naqi Nawab**⁷ in support of her contentions.

11. Ms. Sehr Rana concluded her submission by relying on the decision reported as **Mrs. Alba D'sa and others vs. Mrs. Naheen Pabani**⁸ to state that an owner of a property has a right to develop their property in accordance with law and on the decision reported as **Puri Terminal Ltd. vs Government of Pakistan & Others**⁹ to state that on the basis of the principles that have been settled for deciding an injunction application no case of injunctive relief had been made out by the Plaintiff.

12. Ms. Rizwana Ismail who has entered appearance on behalf of the Defendant No.1 adopted the arguments of Ms. Sehar Rana.

13. Syed Zaeem Hyder who appeared on behalf of the CBC conceded to the Plaintiff's contention that they are Tenants in Common of the Said Property on account of have been conveyed an undivided share in Said Property through the Sub-Lease Deed and also conceded that despite ownership rights having been conferred on the Plaintiffs to the Said Property, they nevertheless processed the application of Defendant No.2 for construction on the Said Property.

⁵ PLD 1999 Karachi 181 at pg. 195

⁶ 2019 YLR 2364 at pg. 2370

⁷ PLD 1993 Karachi 631 at 638 to 641

⁸ 2008 YLR 738 at pg.99-100

⁹ 2004 SCMR 1092 at 1099

14. I have heard Mr. Zubair Ahmed, Ms. Sehar Rana, Ms. Rizwana Ismail and Syed Zaeem Haider and have also perused the record.

15. There is no dispute that the Defendant No. 2 under a registered Indenture of Lease dated 21 April 1980 (hereinafter referred to as the “Head Lease”) is a Lessee of the KDA and as such in terms of Section 105 of the Transfer of Property Act, 1882 (hereinafter referred to as the “TPA, 1882”) holds a “ leasehold” right in the Said Property to “enjoy the land” for a term of 99 years and with a right to renew the lease at the expiry of that term. There is also no dispute that the Defendant No. 2 was under the terms of the lease with the KDA permitted to construct on the Said Property. It is also common ground that the Defendant No.2 is causing to be constructed an additional two storeys on the existing structure for which approval has been purportedly sanctioned by the CBC. There is also no dispute that the Plaintiff’s right in the Said Property derives from individual Indentures of Sublease for each of the Plaintiff’s Properties and each of which contain the following covenants:

“ ... 1. In consideration of the rent hereby reserved and of the covenants by the Lease herein contained the Lessee does hereby Sub-Lease and demise unto the Sub-Lessee ALL THAT 49/1000 UNDIVIDED SHARE in piece and parcel of land bearing Plot No. G-7, admeasuring 6921.66 sq.yds. Block 9, Scheme No. 5, located in the area of Kehakashan, Clifton, Karachi in the Registration District, Sub-District and City of Karachi as follows

ON THE NORTH BY Plot No. G-6/9
ON THE SOUTH BY 50' Wide Road
ON THE EAST BY G-9/9 AND G-10/9
ON THE WEST BY 200'Wide Road

“ ... 4. The Lessee shall be at liberty to rent out the Roof Top for display of neon sign or installation of any Communication, Tower/Dish of any cellular company thereon and assign or transfer the rights along with any undivided share in the property reserved for roof top by Sub-Lease or otherwise and the Sub-Lessee or his/her their Attorney has agreed to and assured the Lessee and/or their Attorney not to raise any objection or create any dispute of whatsoever nature in respect of the displaying of neon signs etc on the roof top of the said building.”

The provisions of these two Covenants are to be examined to consider the rights of the Plaintiff which it is seeking to enforce through this *lis*. Clause 1 makes for interesting reading. The covenant firstly purports to confer a sub-lease in favour of the Plaintiff. The covenant after using the conjunctive expression “and” demises an undivided share in the land comprising the Said Property. The question that therefore needs to be asked is what is being demised? The estate that the Defendant No. 2

has acquired from the KDA is a “leasehold” right as defined by Section 105 of the TPA, 1882 and not a “freehold” right in the Said Property, as the “freehold” right in the Said Property continues to vest in the KDA absolutely. The Defendant No. 2 is therefore not able to convey an undivided share “in piece and parcel of land bearing Plot No. G-7, admeasuring 6921.66 sq.yds. Block 9, Scheme No. 5, located in the area of Kehakashan, Clifton, Karachi” absolutely as in terms of Section 105 of the TPA, 1882 as it only holds a “leasehold right in the Said Property and nothing more. As the only right that can be demised by the Defendant No. 2 is that of its “leasehold” rights in the Said Property, to my mind that can only be done in two ways, the first would be to convey the rights held under the Head Lease and the Second would be by the creation of a Sub-Lease over the Said Property. When looked at in this light, what becomes apparent is that the language of the covenant does not even mention the Head Lease and hence cannot be considered in any manner to convey the rights held by the Defendant No. 2 under the Head Lease. The only logical conclusion that one can therefore reach when considering the words “the Lessee does hereby Sub-Lease and demise unto the Sub-Lessee ALL THAT 49/1000 UNDIVIDED SHARE in piece and parcel of land bearing Plot No. G-7, admeasuring 6921.66 sq.yds. Block 9, Scheme No. 5, located in the area of Kehakashan, Clifton, Karachi” is that the expression “Sub-Lease” and “demise” have to be read conjunctively and prima facie what is being created is a Sub-Lease of the rights held by the Defendant No. 2 in the Said Property including a Sub-Lease of an undivided share of the “leasehold” rights belonging to the Defendant No. 2; the Head Lease remaining untouched and which continues to be vest absolutely in the Defendant No. 2 along with a right as contained in Clause 4 of the Sub-Lease entitling the Defendant No. 2 to “*assign or transfer the rights along with any undivided share in the property reserved for roof top by Sub-Lease or otherwise*”. I am aware that the interpretation cast is contrary to what is perceived by a layman while entering into such a transaction and who believes that he is actually getting ownership rights over the unit in perpetuity and a right in the property as well, however, prima facie his rights as indicated in the covenant and when read in light of the provisions of the TPA, 1882 would seem to be otherwise.

16. There are also other practical issues which would arise when making a contrary interpretation as, aside from being conflicting with the language of the Covenant, the document would for the purposes of stamp duty have to be treated as a Conveyance of the Head Lease and not a Sub-Lease and which would mean that the document has in fact and in law been incorrectly

stamped and would, under the provisions of Section 33 of the Stamp Act, 1899 be liable to be impounded.

17. I have considered the rights of the Plaintiff in the Said Property on the basis of the covenants contained in the Indenture of Sub-Lease. To begin with prima facie on the reading of the Covenants the Defendant No. 2 remains the absolute holder of the Head Lease and the rights of the Plaintiff remain that of a Sub-Lessee and along with all the other Sub-Lesseees of the Said Property each of them holding a sub-lease of the undivided share of the “leasehold” rights belonging to the Defendant No. 2. If the Plaintiff had rights under the Head Lease as a Tenant in Common then clearly the decision of the Supreme Court of Pakistan reported as **Ali Gohar Khan vs. Sher Ayaz**¹⁰ would have been applicable. However, as the right of the Plaintiff in the Said Property is that of a Sub-Lessee there would be no question of the Plaintiff having a right to restrain the construction being undertaken by the Defendant No. 2 and which right, aside from being held by the Defendant No. 2 under the Head Lease, has also specifically been reserved in clause 4 of the Indenture of Sub-Lease by the Defendant No. 2.

18. Ms. Rana had also contended that such a right should be enforced on the basis of the nature of the right being claimed by the Plaintiff as being one of a licensee over the area comprising the roof of the fifth floor. Suffice to say that the Plaintiff has not pleaded this application on the basis of his arrangement with the Defendant No. 2 to the area comprised on the roof of the fifth floor and rather the Plaintiff was purporting to enforce his right in the Said Property and which is on the face of it one of a Sub-Lessee and not that as a Tenant in Common of the Head Lease. Similarly, Ms. Rana argument that the covenant contained in clause 4 should be treated as a restrictive covenant enforceable under Section 40 of the TPA, 1882, as part of a “building scheme” may have succeeded if the covenant was in the nature of a restriction and was one for the “common benefit” of each of the allottees of the building, which it clearly is not.

19. Having reached the conclusion that the Plaintiff does not have a right in the Said Property as a Tenant in Common and which rights vest absolutely in the Defendant No. 2 under the Head Lease, it would follow that the construction on the Said Property has prima facie been properly sanctioned by the CBC as the Defendant No. 2 alone is the sole holder of

¹⁰ 1989 SCMR 130

the Head Lease and is solely permitted to maintain his right to construct thereon.

20. The Plaintiff having not been able to demonstrate that it has a prima facie case as being a Tenant in Common under the Head Lease, I am of the opinion that to restrain construction on the Said Property would clearly cause irreparable loss to the Defendant No. 2 and for which reason the Balance of Convenience must also be found to exist in favour of the Defendant No. 2.

21. For the foregoing reasons, no case for an injunction having been made out, the interim order passed on 20 June 2023 is recalled and **CMA No. 9533 of 2023** is hence dismissed.

JUDGE

Karachi dated 5 March 2024

ANNOUNCED BY

JUDGE

Karachi dated 5 March 2024