

Navid Hussain and Ors.

v.

City District Government, Karachi and Ors.

High Court of Karachi

23 May 2005

Suit No.728 of 2004, C.M.As. Nos.4624, 4625 of 2004

Citation: 2007 C L C 912

Judges: Maqbool Baqar, J

Order

MAQBOOL BAQAR, J.---

1. This is an application under Rule 76 of the Sindh Chief Court Rules (O.S.) read with section 151, C.P.C. filed by the Plaintiffs seeking an order restraining the Defendant No.5 from raising any construction on Plot No.151-A, Block-II, PECHS Karachi or parting with the physical possession or creating any third party interest therein.
2. According to the Plaintiffs the subject plot is a residential plot but the Defendant No.5 is raising an illegal multi-storeyed commercial building thereon, which is violative of the lease conditions, the land sale condition and the building and zoning regulations. It is submitted that the lease deed executed in favour of the residents of PECHS including the Plaintiffs and Defendant No.5 are prototype containing the same terms and conditions and such terms are enforceable under the Karachi Building and Town Planning Regulations, 2002. It is specifically pointed out that as per clause 7 of the lease conditions the change of land use cannot be done without the written and express consent of the Ministry of Housing and Works, the Defendant No.4, who is the lessor of the land. However, in violation of law, rule, and regulations, and the terms of lease the Defendant No.5, on 20-11-2003 succeeded in obtaining approval of a building plan for construction

of a commercial building on the subject plot consisting of a basement plus ground plus five floors complex. It is claimed that with the proposed construction the original low density residential character of the neighbourhood would be completely destroyed resulting in violation of civil, statutory and the constitutional rights of the Plaintiffs to life as envisaged in Articles 9, 14, 23 and 25 of the Constitution as the quality of life of the Plaintiff as also of the other inhabitants of the area would become progressively worse. It is further alleged that the impugned construction would violate easementary rights and shall be a source of perpetual nuisance for the Plaintiffs. Amongst the various adversities which according to the Plaintiff shall be faced by them on account of the impugned construction, are, depletion in the electric and water supply due to unplanned overloading of the system, overflowing sewerage, traffic jam and parking problems, noise and air pollution and break down in municipal services etc. It is alleged that despite protest by the Plaintiffs and other concern, Defendant's Nos.1 to 3 have ignored the illegality being perpetuated by Defendant No.5 and have failed to carry out their public statutory duty by not stopping the construction and initiating action against such illegal construction.

3. In his counter-affidavit Haji Muhammad Amin, the proprietor of Defendant No.5, has submitted that the suit is not maintainable as the Plaintiffs have no locus standi to file the above suit and that no cause of action has accrued to them. It is submitted that the subject plot which is situated at the junction of Khalid Bin Walid Road and Allama Iqbal Road, PECHS, Karachi, has been purchased by Defendant No.5 in an open auction conducted by the official assignee in pursuance of an order passed by this Court in J.M. 31 of 1991. The Official Assignee invited sealed offers for purchase of the subject plot through advertisement in the daily newspapers "Dawn" English and "Dawn" Gujrati dated 13-10-1995 and 4-10-1995, as a commercial plot. It is further submitted that in response to the aforesaid advertisements the, Defendant No.5 offered to purchase the plot as a commercial plot for a sum of Rs.4.25 crore and after approval of the offer the official assignee handed over possession of the said plot through his letter dated 11-7-1997 which clearly describes the same as a commercial plot. It is further claimed that K.D.A., vide letter dated 3-7-1987, has issued no objection for commercialization of the plot to the Section Officer Ministry of Works, Government of Pakistan and by letter, dated 19-3-

1987, KBCA also issued such no objection to P.W.D. and that the sale certificate, issued by the official assignee after obtaining permission of this Court, also describes the plot as a commercial plot. It is contended that in view of the foregoing all the allegations made by the Plaintiffs with regard to the subject plot and the impugned construction are incorrect and mala fide. It is further averred that no right to sue has accrued to the Plaintiff No.6, as neither any of its legal right has been effected nor can it plead any grievance or any rights on behalf of any individual. It is alleged that the Plaintiff No.6's office itself is situated in a residential bungalow in Block 2 PECHS Karachi and further that its Chairman is also conducting his business as an architect in the said bungalow and thus the Plaintiff No.6 is itself using a residential bungalow in the said block for commercial purposes. It is further alleged that a ground plus five storeyed building already exists on Plot No.206-E, which is next to the office of Plaintiff No.6 ground floor whereof extends to the entire area of the plot and is being used for commercial purposes whereas on Plot No.206-F there is another high-rise building. It is stated that Plaintiffs Nos.1 to 5 are residing far away from the subject plot and are not likely to be affected by the impugned construction in any manner. It is alleged that a large number of commercial high-rise buildings already exist in the area and that Allama Iqbal Road and Khalid Bin Walid Road have been commercialized by the governing body of the K.D.A. It is contended that the question of user of a plot is a matter exclusively between the lessor and the lessee and no other party can raise any objection in that regard. It is claimed that the impugned approval of the building plan is in accordance with law and that no illegality has been committed in that regard. In the affidavit-in-rejoinder filed on behalf of the Plaintiffs it is claimed that the Plaintiffs 1 to 5 are old residents of PECHS some of whom live within about 100 yards of the subject plot, it is submitted that the official assignee of this Court was misinformed about the status of the plot. It is contended that the subject plot being a residential plot and having been sold on "As is where is basis", as evident from the advertisement published by the official assignee, the commercial tag would not change the nature of the plot and that KBCA is/was not competent to issue no objection for change of land use. It is further contended that Defendant No.5, being a commercial builder ought to have verified the status of plot before purchasing the same.

4. Mr. Muhammad Sharif, the learned counsel for Defendant No.5 at the very outset raised objection to the maintainability of the Plaintiff's suit. He submitted that no. cause of action has accrued to the Plaintiffs in respect of the impugned construction and Plaintiffs have no locus standi to file the present suit. He submitted that no legal right of the Plaintiffs has been violated by the conversion of the subject plot into a commercial plot and that the impugned construction shall not infringe any of the Plaintiff's right, as Plaintiffs Nos.1 to 5 are residing far away from the subject plot whereas Plaintiff No.6, being a registered society cannot even otherwise, espouse the alleged cause of the Plaintiffs and the other residents of the area. He submitted that neither any nuisance shall be caused to the Plaintiffs as a result of the impugned construction nor shall any of their easementary rights be curtailed or affected as a result thereof. He submitted that the right of action, if any, to enforce the restrictive covenant of the residential use of the property in dispute and of those in the area vest in the Defendant No.4, who is the common lessor. In support of his contention, the learned counsel relied on a Division Bench judgment of this Court in the case of Tariq Construction Company (Pvt.) Ltd. v. Razzak Adamjee And others 1995 CLC 846.
5. As regards the merits of the case Mr. Sharif submitted that the subject plot, which is situated at the junction of Khalid Bin Waleed Road and Allama Iqbal Road, PECHS, Karachi was purchased by Defendant No.5 in an open auction, conducted by the official assignee in pursuance of order passed in J.M. No.31 of 1991, and referred to the advertisements inviting offers for the purchase of the subject plot published in the Daily Newspapers "Dawn" English and "Dawn" Gujrati on 14-10-1994, 13-10-1995 and 16-8-1996 (Annexures "A" to "D" to "C/A") to show that the plot was described in such advertisements as a commercial plot. The learned counsel submitted that it was in response to the above advertisements that the Defendant No.5 submitted its offer for the purchase of the plot as a commercial plot for a sum of Rs.4.25 crores. He also referred to the letter dated 11-7-1997, (Annexures "J" to "C/A"), whereby possession of the plot was delivered to Defendant No.5, in the said letter also the plot was described as a commercial plot. He further claimed that the sale certificate issued by the official assignee in respect of the subject plot, after seeking approval of this Court, also describes

the plot as a commercial plot. The learned counsel submitted that K.D.A. also, vide letter dated 3-7-1997 has issued no objection for the commercialization of the subject plot to the Section Officer Ministry of Works, Government of Pakistan and such no objection was also granted by KBCA to the Public Works Department, through its letter dated 17-11-2003 (Annexures "L" to "C/A"). He submitted that in view of the foregoing, the subject plot cannot now be said to be a residential plot nor can the construction being raised thereon be said to be illegal or violative of any law, rule or regulation, as the building plan for such construction has been approved by KBCA vide letter, dated 17-11-2003. The learned counsel, in support of his contentions relied on the following cases:

- (i) Datari Construction (Pvt.) Ltd. and others v. A. Razzak Adamjee and others 1995 CLC 846, (ii) A. Razzak Adamjee and others v. Messrs Datari Construction (Pvt.) Ltd. 2005 SCMR 142, (iii) Shehri C.B. and others v. KBCA 2003 YLR 1086.
6. The fact that Defendant No.4 is the common lessor in respect of the PECHS area including the subject plot and those owned/occupied by the Plaintiffs is not disputed. It has not been denied that the leases issued by the Defendant No.4 in respect of the said plot and all other plots in the area, including those owned/occupied by the Plaintiffs contain a clause (clause 7) spelling out a restrictive covenant that the said plots and the buildings or erection built or to be built thereon shall be used for residential purposes only and shall not be diverted to any other use without any express consent in writing of the lessor. Clause 8 of such common leases stipulates that the sale, assignment or transfer of the lessee's right under the lease shall in every case take effect subject to the aforesaid covenant and with the obligation of observing and fulfilling the same. It is, therefore, evident that the entire area/vicinity in question is a residential locality. The Defendant No.5 has neither claimed to have obtained a commercial lease in respect of the subject plot nor has he produced any such lease. The said Defendant has claimed that KDA has, vide letter dated 19-3-1987 issued a no objection certificate to the Chief Engineer, Pak PWD, Karachi, for commercialization of the subject plot. However, a photocopy of a purported document relied on by the Defendant No.5 in that regard is merely an approved

draft of a letter proposed to be signed and sent by the Administrator of PECH Society, the Defendant No.3, to the Section Officer of Defendant No.4, (Annexure "E" to "C/A") wherein it is stated that KDA through its letter dated 19-3-1987, has issued such NOC to the Chief Engineer PWD and such purported draft letter also seeks from the said Section Officer, advise on whether the proposed commercialization has been approved by the Ministry so that the society may take further action in the matter. However, no NOC from KDA has been filed or produced by Defendant No.5 in support of his claim. In any event, at the relevant time i.e. the year 1987, conversion of a residential plot into a commercial plot was permissible only under and in terms of Article 40 of Karachi Development Authority Order, 1957. Clause (4) whereof provides that if any person desires to use any land for any purpose other than that laid down in the zonal plan scheme notified under clause (3), he may apply to the authority for permission to do so and the authority may order a public hearing and give notice to all persons it deems effected. But it is not even claimed by Defendant No.5 that objections were invited in terms of the above provisions of the order. Therefore, even if such NOC, would have been issued, as claimed by Defendant No.5, the same would have been wholly illegal and ineffective. Whereas, and as evident from certificate dated 7-6-2004, issued by Defendant No.4, the Ministry of Housing and Works, the lessor of the land, (Annexures "14/b" to plaint), the plot is still a residential plot and has not been converted into a commercial plot. No doubt the official assignee, has, in the advertisements for sale of the subject plot, and the possession letter/memo, described the plot as a commercial plot. So also in the letter dated 6-3-1997, whereby Defendant No.5, submitted its offer for the purchase of the subject plot (Annexure "H" to counter-affidavit), the plot is described as a commercial plot, but such description would not change the nature or character of the plot. Indeed the plot was sold by the official assignee in the process of liquidation of Samad Housing Development Corporation in J.M. No.31 of 1991, but neither the nature or character of the subject plot was in question before this Court in the above proceedings, nor has there been any judicial pronouncement in that regard. Even by order dated 3-7-1997 (Annexure "K" to counter-affidavit), a learned single Judge of this Court merely allowed the official assignee to issue a sale certificate in respect of the subject plot, without any reference to its nature or character. Although Defendant No.5, has claimed that the sale certificate

issued by the official assignee in pursuance of the aforesaid order, describes the subject plot as a commercial plot but has not filed or produced any sale certificate. Even otherwise such certificate, as observed above, would have been inconsequential insofar as the established residential nature of the plot is concerned. The Defendant No.5, is a professional builder and on this own showing has been engaged in a chain of litigation, he ought to have verified the nature and character of the subject plot before buying the same. The advertisements inviting offers for the purchase of the subject plot were published by the official assignee in Daily Newspapers "Dawn" English and "Dawn" Gujrati in the years 1994, 1995 and 1996. The Defendant No.5 offered to purchase the said plot in March 1997. (Annexure "G" to counter-affidavit) and initially deposited a sum of Rs.42,50,000 towards the sale consideration of the plot. An amount of Rs.82,50,000 was deposited by him vide receipt dated 27-3-1997, whereas he deposited the balance amount of Rs.3,00,00,000 under cover of his letter dated 10-6-1997 (Annexure "I" to counter-affidavit) and thus, had ample time and opportunity to verify the nature of the plot, and had in fact, through the aforementioned letter, and at the time of making final payment of Rs.3,00,00,000 sought such verification by demanding delivery of all title documents; and more particularly amongst others, the Registered Commercial Lease deed, approved building plans for commercial project and all NOCs, however, since none of the aforesaid B three documents ever existed, Defendant No.5 has not even claimed that such or any other document of commercialization, issued by any competent authority, was delivered or even shown to him by the official assignee and that undisputedly all the title documents that existed at the time of aforesaid sale, were of a residential plot and thus it would have become patently obvious to the Defendant No.5 that the plot contrary to its description in the advertisement, was a residential plot and he could have lawfully refused to accept the same, and would have been lawfully entitled to seek refund of the amount from the official assignee. However, despite the above the Defendant No.5, had chosen otherwise and therefore, cannot now insist on claiming the subject plot as a commercial plot. The unreported order of a learned Single Judge of this Court in Suit No.290 of 1991, relied upon by Mr. Sharif is clearly distinguishable and is not applicable to the fact and circumstances of the present case. The property involved therein was proven to be a residential cum commercial building, situated in Rafa-e-Aam

Society, Malir Halt, consisting of ground, first, and second floor, with six shops on the ground floor, which were let out on rent and were being used by the tenants for commercial purposes. The building was ordered to be sold by this Court on "as is where is basis". It had come on record that the building was continuously being used as a residential cum commercial, building at least since 1979, if not from an earlier period. The Honourary Secretary of the society had at one stage appeared before the Court in the aforesaid suit and had admitted the fact that the property was converted by the society from residential to residential cum commercial building.

7. It may be noted that it has been alleged by Defendant No.5, that Allama Iqbal Road and Khalid Bin Walid Road have been commercialized by the governing body of KDA. But neither the date of the alleged resolution or any other particulars have been mentioned nor any such resolution, or any notification in that regard has been filed or submitted.

8. Now coming to the purported approval of the building plan (Annexure "L" to the counter-affidavit), it may be noted that the same was admittedly signed and issued on 19-11-2003, i.e. after the Karachi Building and Town Planning Regulations, 2002, (The Regulations) had already come into force, whereas Regulation 18-4.21 of the Regulations imposes complete bar on the conversion or usage of a residential plot, without the approval of the Master Planning and Environmental Control Department (MP & ECD) and regulation 18-4.22 to 18-4.2.6 spelt out the procedure, requirement and modalities for such conversion as follows:--
 - (i) 18-4.2.2 The applicant shall apply and pay necessary fee to the concerned authority for change of land use of the plot with full justification, which shall examine the application in the light of the planning of the area and forward it to the MP & ECD for consideration.

 - (ii) 18-4.2.3. The MP & ECD shall also issue a public notice for the change of land use of the plot/plots in accordance with the provisions of these Regulations and the expenses shall be borne by the applicant.

- (iii) 18-4.2.4. The MP & ECD shall give due consideration to the objections from the public before the final decision.
 - (iv) 18-4.2.5. The applicant shall pay the prescribed fees and other charges to MP & ECD.
 - (v) 18-4.2.6. Final NOC (No Objection Certificate) shall be issued by the concerned Authority, after approval of MP & ECD.
 - (vi) Whereas regulation 18-5.1.1. of the Regulations provides as under:-
 - (vii) 18-5 Commercialization of plots:
 - (viii) 18-5.1.1. Conversion of residential plot into commercial shall be allowed only according to a uniform commercialization policy formulated and revised from time to time by Master Plan and Environmental Control Department with approval of Government and notified in Sindh Department with approval on the basis of comprehensive study of various urban areas under pressure for commercialization. Individual plots outside the policy will not be considered for commercialization.
9. However, the Defendant No.5 has not even alleged that any of the foregoing was met, complied with or fulfilled in the present case. It is, therefore, evident that the purported approval of building plan was/is violative of the regulation. The same is also violative of and contrary to the terms of lease and is liable to be cancelled and no construction is permissible on the basis of such unlawful approval. It may be pertinent to note here that the aforesaid approval of the building plan, in terms of clause 20 thereof, was subject to the approval of the lessor, but no such approval was even alleged by Defendant No.5.

10. The Plaintiffs have brought the above suit for protection of their right against nuisance, their right of peaceful and noiseless enjoyment, of property, their right to enjoy fresh air free from pollution, and of a clean and healthy environment and against transgression of the lessee's covenant to exclusive residential use of the leasehold, and also for the protection of their fundamental rights guaranteed by the Constitution. Plaintiffs Nos.1 to 5 are the residents of PECH Society, two of whom, being Plaintiffs Nos. 1 and 2, claim to be residing within a 100 yards of the subject plot and in order to show the location of their residences, have annexed a copy of the lay out plan of the area (being Annexure 3 to the plaint). They have spelt out the details of the apprehended nuisance carrying peculiar stress in the neighbourhood, which is a prime residential Block of PECH Society some of which have been highlighted in the earlier portion of this order. It is alleged that with the construction of a multi-storeyed building on the subject plot the original low density character of the neighbourhood would be completely destroyed, degrading the environment and worsening the quality of their life as of the other residents of the neighbourhood.

11. The Plaintiffs, thus, have clear actionable right against the impugned construction and also to seek enforcement of the restrictive covenant of the lessees. In addition the suit is also maintainable, as the Plaintiffs have sought to enforce through the same, their fundamental rights. It is now well-settled that such suits are maintainable. Insofar as the Plaintiff No.6 is concerned it is an advocacy group in the environmental field and can at least be treated as a proper party. The Plaintiffs Nos.1 to 5 of course have a right to ensure that no construction in their vicinity be allowed in violation of law, rule and regulations, which may infringe on their right of enjoyment of life. The suit plot is subject to restrictive covenants to use it for residential purposes only and the Plaintiffs are in equity and quite apart from contract, entitled to the benefit of such covenant. As regards the Defendants' contention that certain multi-storey buildings are already constructed in the area and therefore, the Plaintiffs have lost their right against the impugned construction. It may be suffice to observe that two wrongs cannot make a right. In the words of the Honourable Supreme Court, in the case of *Messrs Excell Builders and others v. Ardeshir Cowasjee and others* [1999 SCMR 1089], the principle of Locus

poententiae cannot be pressed into service against the residents as they were not the authority, which had accorded the approval to the builder of the building plan in violation of the Regulations. Secondly the above principle cannot be invoked to perpetuate an illegal action which may be detrimental to the interest of public-at-large. Reference in this regard may also be made to *Ardeshir Cowasjee and others v. Karachi Building Control Authority* [1999 SCMR 2883]. In response to the Defendant's contention that the right of action to enforce the restrictive covenant of the residential use of the subject property and those in the area rest in the Defendant No.4, following passage from the case of *Mrs. Nazshauka Khan and 3 others v. Mrs. Yasmin R. Minhas and another* [1992 CLC 2540] is reproduced as follows:--

- (i) "for the more beneficial enjoyment of his own immovable property a third person has independently of any interest in the immovable property of another or of an easement there on a right to restrain the enjoyment in a particular manner of the latter property.
- (ii) An easement is a right which the owner or occupier of land possesses, as such, for the beneficial enjoyment of that land to do and continue to do something or to prevent and continue to prevent something being done in or upon or in respect of certain other land not his own, as inclusive of the right of ever owner of immovable property (subject to any law for the time being in force) to enjoy without disturbance by another the natural advantages arising from its situation."

12. The judgments in the cases of *A. Razzak Adamjee and another v. Datari Construction Co. (Pvt.) Ltd. and another* [2005 SCMR 142] and *Datari Construction Co. (Pvt.) Ltd. v. A. Razzak Adamjee and others* [1995 CLC 846] to the effect that the law is well-settled that mere violation of municipal rules or plan or a mere violation of Sindh Building Control Ordinance or Regulations or plan is not actionable per se unless an injury, real or apprehended, is established by the persons in whose interest and for whose protection the rules or regulations are framed.

- 13.** The Ordinance and the Regulations create an obligation in favour of the Plaintiffs if they prove such injuries which would be determined according to the facts and circumstances of each case; is of no avail to the Defendant No.5, as in the present case, the Plaintiffs have made out a prima facie case for the grant of injunction.
- 14.** The facts and circumstances in the case of *Shehri C.B.E. and others v. Karachi Building Control Authority and others* [2003 YLR 1086] are distinguishable and the same is not applicable to the present case, inasmuch as the plot in that case was, after approval from the lessor, converted to a commercial plot, upon payment of commercialisation' charges. KDA also had granted NOC in that regard and the construction of the building thereon had already been complete. A bank had already purchased and occupied the entire ground floor of the building for operation of its branch.
- 15.** In view of the foregoing discussion, undoubtedly the Plaintiffs have established a prima facie case for grant of injunction. The application is therefore granted, the Defendant No.5 is restrained from raising any construction on the subject plot and from parting with the possession thereof or creating any third party interest therein. It may however, be clarified that the views expressed above are merely tentative in nature and shall have no bearing on the final adjudication of the case after recording evidence.

M.B.A./N-16/K

Application allowed.