

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH

CR No.1727 of 2022 (O&M)
Reserved on : 04.07.2022
Date of Decision : 21.07.2022

Nirbhay Singh Brar and Another

....Petitioners

VERSUS

Jagdeep Singh Dhindsa and Another

...Respondents

CORAM : HON'BLE MRS. JUSTICE ALKA SARIN

Present : Mr. A.K. Chopra, Senior Advocate with
Mr. Vidul Kapoor, Advocate for the petitioners.

Mr. Harsh Bunker, Advocate for respondent No.1.

Mr. Dharminder Singh Randhawa, Advocate
for respondent No.2.

ALKA SARIN, J.

The present revision petition has been preferred by the defendant-petitioners challenging the order dated 20.01.2022 passed by the lower Appellate Court whereby the application under Order XXXIX Rules 1 and 2 read with Section 151 of the Code of Civil Procedure, 1908 (for short 'CPC') filed by the plaintiff-respondent No.1 has been allowed and the order passed by the Trial Court has been set-aside.

2. The brief facts relevant to the present *lis* are that on 02.04.2021 the plaintiff-respondent No.1 filed a suit for declaration and perpetual injunction seeking the following reliefs :

"It is therefore prayed that the suit of the Plaintiff for Declaration to the effect that the site plan submitted by Defendants No.1 & 2 to Defendant No.3 and the sanction granted by Defendant No.3 pertaining to the

construction of Commercial Complex in the abadi area of Village Mundi Kharar is illegal, null & void against the notifications building by law issued by the State Govt. and the rules & master plan prepared by Greater Mohali Area Development Authority and other relevant laws dealing with the area falling within the periphery of Chandigarh and governed by Greater Mohali Area Development Authority as well as Municipal Council, Kharar, Tehsil Kharar, Distt. SAS Nagar (Mohali).

AND

for Perpetual Injunction restraining the Defendants No.1 & 2 from raising any kind of commercial construction over the plot compressed in Khewat/Khatauni No.103/119, Khasra No.50, Khewat/Khatauni No.109/108/125, 126, Khasra No.51/1 & 51/2 situated in the abadi area of Village Mundi Kharar, Tehsil Kharar, Distt. SAS Nagar (Mohali), be decreed, in the interest of justice. Any other relief which this Hon'ble Court may deem fit and proper be also granted."

The plaint was accompanied by an application under Order XXXIX Rules 1 and 2 read with Section 151 CPC for grant of temporary injunction.

3. Paras 5 and 11 of the plaint read as under :

"5. ...Moreover, the house of the Plaintiff is an old constructed house and the construction of the basement

adjoining or nearby the house of the Plaintiff will damage the existing construction of the Plaintiff. And that construction of commercial complex will also cause nuisance in the village Abadi. But the Defendants refused to listen to the request of the Plaintiff and told that they have the requisite sanction and permission for the construction of the Commercial Complex including the basement from the Municipal Authorities as well as from other Govt. Agencies. But Defendants No.1 & 2 failed to show any such sanctioned site plan by Municipal Council or any permission from any other Govt. Agency. It is important to mention that earlier in the suit property purchased by the Defendants No.1 & 2 the residential houses of the previous owners were in existence. After purchasing those houses Defendants No.1 & 2 demolished the same with an intention to convert this property into commercial one.

11. That since the activity of the Defendant will cause irreparable damage to the residential house of the Plaintiff and the Plaintiff is affected specially. Moreover, it is also against the rules & acts of the Govt. then it also effects generally. In case the Defendants are able to raise the construction of Commercial Complex as explained above it will harm the interest of the

Plaintiff. Therefore, the Plaintiff is entitled to the injunction prayed for.”

4. The defendant-petitioners filed separate written statements and contested the suit and the application for interim relief. The defendant-respondent No.2 (Municipal Council, Kharar) also filed a written statement defending the sanction granted by it. The Trial Court vide order dated 18.10.2021 dismissed the application under Order XXXIX Rules 1 and 2 CPC filed by plaintiff-respondent No.1 on the ground that none of the ingredients of Order XXXIX Rules 1 and 2 CPC were made out. The Trial Court *inter-alia* held that :

“Defendant No.1 and 2 are raising construction over the property purchased by them as per the site plan approved by M.C. Kharar. It is contention of the ld. counsel for the plaintiff that MC does not have power to sanction the site plan of the said premises. However, the Ld. counsel for defendant has argued that as per the Law the MC is the appropriate authority to sanction the site plan for construction over the suit land. Which authority has power to sanction the site plan over the land in dispute is matter of evidence and can not be decided at this stage. Furthermore, it is an admitted fact by the plaintiff that the site plan of his house cum shops has been sanctioned by the MC. Therefore, he could not show as to how the MC does not have power to sanction

the site plan of the property of defendants, but, power to sanction site plan of his own property”.

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Furthermore, it is plea of the Ld. Counsel for plaintiff that there is imminent threat to the property of plaintiff as by construction of basement adjacent to the property of the plaintiff, the house of the plaintiff might collapse. However, perusal of the file and site plan produced on record by the plaintiff as well defendants shows that adjoining the house of the plaintiff, there is SCO NO.1 which is owned by defendant No.1 and the same does not have any basement. It is only SCO NO.2, 3, 4 that have basement but the same are not adjacent to the property of the plaintiff and therefore, the threats felt by the plaintiff is merely over apprehension of the plaintiff.

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Thus, by sanctioning of the site plan of the property of the defendant a presumption arises in favour of the Act of Municipal Council that site plan have been regularly performed. It is now, for the plaintiff to rebut the presumption which again is a matter of evidence. Also, prima facie, plaintiff can not restrain the true owner of the property for raising construction over their property. Furthermore, plaintiff have not been able to show what irreparable loss or injury will be caused to

the plaintiff if the injunction is not granted in his favour. Rather, it is the defendants who shall pay irreparable loss and injury if injunction is granted in favour of the plaintiff. Defendants have legally purchased the property have applied to the MC for sanction of their site plan, which has been sanctioned by the MC. As such, every thing and every step has been performed by the defendants. They have also spent considerable amount of money for raising construction over the property. If now at this stage, the construction over the property is stayed it shall cause irreparable loss to the defendants. Furthermore, whether there is any illegality over the suit property and the site plan issued qua the property is a matter of evidence and can not deliberate upon this stage.

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At this stage, temporary injunction only three essentials have to be complied with i.e. prima facie case, balance of convenience and irreparable loss and injury. In the present case, plaintiff could not establish even a single ingredients in his favour.”

5. Aggrieved by the said order passed by the Trial Court, the plaintiff-respondent No.1 preferred an appeal. Vide the impugned order dated 20.01.2022 the lower Appellate Court accepted the appeal and

restrained the defendant-petitioners from raising construction of commercial showrooms over the suit property during the pendency of the suit.

6. Learned senior counsel appearing on behalf of the defendant-petitioners has contended that the impugned order passed by the lower Appellate Court is illegal and arbitrary and contrary to the settled principles of law governing Order XXXIX Rules 1 and 2 CPC. It is argued that in the present case the ownership of the defendant-petitioners has been admitted by plaintiff-respondent No.1 himself in the plaint. It is also an admitted fact that the defendant-petitioners had started the construction activities as per the sanctioned plans. On a complaint by the plaintiff-respondent No.1, the defendant-petitioners submitted a revised building plan wherein the basement of the first Shop-cum-Office, adjoining to the property of the plaintiff-respondent No.1, was removed since the plaintiff-respondent No.1 had raised an apprehension that the construction of a basement adjoining to his house would cause damage to his house. Learned senior counsel has further argued that injunction cannot be issued against the true owner as has been held in the case of **Premji Ratansey vs. Union of India [(1994)5 SCC 547]**. He further drew the attention of the Court to the order passed by the Trial Court to show that the Court, by a detailed and reasoned order, had held that none of the ingredients for grant of injunction were made out and had dismissed the application under Order XXXIX Rules 1 and 2 CPC. The lower Appellate Court has set aside the order of the Trial Court while allowing the application under Order XXXIX Rules 1 and 2 CPC and has virtually decreed the suit of the plaintiff-respondent No.1. It is further the contention that the findings recorded by the lower Appellate Court on the

merits of the case amounts to pre-deciding the suit itself at the stage of deciding an application for *ad-interim* relief. Learned senior counsel has further referred to the written statement filed by the defendant-respondent No.2 (Municipal Council, Kharar) wherein it has been stated that village Mundi Kharar falls within the municipal limits of Municipal Council, Kharar and that Municipal Council, Kharar is the competent authority to sanction the building plans for construction in the said area. According to the senior counsel, the defendant-respondent No.2 sanctioned the building plan on 04.02.2020 and, thereafter, on a complaint made by the plaintiff-respondent No.1, revised building plans were submitted by the defendant-petitioners for sanction in which there was no basement in the SCO to be constructed adjoining to the house of the plaintiff-respondent No.1. The revised building plan was sanctioned on 24.03.2021 as per rules. Further reference was made to the affidavit filed on behalf of defendant-respondent No.2 in this Court pursuant to order dated 20.05.2022 wherein it has been stated that the building plans have been sanctioned as per provisions of Punjab Municipal Building Byelaws, 2018; that no record of sanctioned plan of the commercial complex owned by the plaintiff-respondent No.1 was available but the Assessment Record of the Property Tax Branch showed evidence of shops and house since 1998 being owned by the plaintiff-respondent No.1; and that most of the commercial buildings on either side of the road have been constructed after sanctioning of building plans from Municipal Council Kharar.

7. Learned senior counsel has further contended that the plaintiff-respondent No.1 is the owner of the adjoining house and in the front of his

house he has four commercial shops. A perusal of the photographs appended with the petition reveals that the said shops in front of the house of the plaintiff-respondent No.1 are also commercial establishments. In one shop the business of 'Bhinder Sound Mohali' is being conducted, in another shop the business of 'Absolute Sports Agency Pvt. Ltd.' is being carried out and in a third shop the business of tenting and catering is being carried out. According to learned senior counsel, the photographs appended with the petition also show that the entire surrounding area, on either side of the road, has commercial establishments and that the defendant-petitioners are being deprived of their right to construct on their property as per the sanctioned building plan only due to the whims and fancies of the plaintiff-respondent No.1. It has also been submitted that on a one-page cryptic application filed under Order XXXIX Rules 1 and 2 CPC, the impugned order has been passed by the lower Appellate Court virtually prejudging the issues as well as virtually decreeing the suit. Further reference has been made to the plaint to contend that the only grounds given in the plaint were that the house of plaintiff-respondent No.1 was an old constructed house and the construction of a basement adjoining or nearby the house of the plaintiff-respondent No.1 would damage the existing construction of the plaintiff-respondent No.1 and that the construction of a commercial complex would also cause nuisance in the village *abadi*. Learned senior counsel has referred to para 11 of the plaint wherein it has been stated that the activity of the defendant-petitioners would cause irreparable damage to the residential house of the plaintiff-respondent No.1 and that raising of the construction of a commercial complex would harm the interest of the plaintiff-respondent No.1.

8. It has further been contended that the lower Appellate Court has proceeded as if it was sitting in appeal over a judgment and decree passed by the Trial Court and not deciding an application under Order XXXIX Rules 1 and 2 CPC. Learned senior counsel submitted that irreparable loss and damage would be caused to the defendant-petitioners in case the impugned order passed by the lower Appellate Court is not set aside.

9. *Per contra*, learned counsel appearing on behalf of the plaintiff-respondent No.1 has argued that *prima facie* case and balance of convenience are in favour of plaintiff-respondent No.1 and in case the construction is not stayed, irreparable loss and injury would be caused to the plaintiff-respondent No.1. It was contended that the defendant-petitioners had purchased a residential house falling within the *abadi/phirni* of village Mundi Kharar within the municipal limits of Municipal Council, Kharar and after purchasing the house they demolished the same and thereafter obtained sanction for construction of a commercial complex from the defendant-respondent No.2 (Municipal Council, Kharar). It is further the contention that condition No.3 in the building permit dated 04.02.2020 is illegal and runs contrary to the express provisions of Section 81(5) of the Punjab Regional and Town Planning and Development Act, 1995 (hereinafter referred to as the '1995 Act') wherein it has been laid down that it is the duty of the competent authority to ensure that the proposed building plan is in conformity with the provisions of the master plan and that the defendant-respondent No.2, in contravention of the said provision in Section 81(5) of the 1995 Act, has illegally delegated its statutory obligation to the defendant-petitioner No.1. It is further the contention that as per Section

2(m) of the 1995 Act, the competent authority is the Municipal Committee except for giving permission for change of land use under Section 81 of the 1995 Act. It is further argued that the defendant-petitioners had purchased a residential house within the *abadi deh/phirni* of village Mundi Kharar and now they were constructing a commercial complex and that the same amounted to change of land use and it was not in conformity with the master plan enforced in that area. It is further the contention that the Punjab Municipal Building Bye-Laws, 2018 were framed on 22.11.2018 and it was stated therein that the said Bye-Laws were to be read in conjunction with the master plan and that the Bye-Laws would have effect only if they were not inconsistent with the provisions contained in the master plan. It is, thus, the argument that the master plan along with the relevant notifications takes precedence and once it is stated that no development is permissible and the villages are to be left untouched then the Municipal Council, Kharar had no authority to permit and sanction plans for the construction of a commercial complex within the village *abadi*. It is further the contention of learned counsel for the plaintiff-respondent No.1 that the plot in dispute is situated in the periphery area of the *abadi/phirni* of the village Mundi Kharar falling within the municipal limits of Municipal Council, Kharar and also coming within the notified Master Plan Area and consequently the area where the suit property is situated is amenable to the following Acts :

- (a) Punjab Regional and Town Planning and Development Act, 1995;
- (b) The New Capital (Periphery) Control Act, 1952;

- (c) Notification No.18/35/2002-1HG2/499 dated 20.01.2006 issued by the Department of Housing and Urban Development;
- (d) Punjab Municipal Building Bye-laws, 2018;
- (e) Master Plan, 2031 of Kharar prepared under the Punjab Regional and Town Planning and Development Act, 1995.

10. It is contended that construction of showrooms/commercial complex by the defendant-petitioners within the *abadi/phirni* of village Mundi Kharar without obtaining change of land use and being non-conforming to the Master Plan, 2031 and the building permit issued by the defendant-respondent No.2 being in violation of the above said Acts/2018 Bye-laws/Notification the construction by the defendant-petitioners could not be permitted and, hence, the balance of convenience lay in favour of the plaintiff-respondent No.1. Learned counsel has relied upon judgments in **Shanti Sports Club & Anr. vs. Union of India & Ors. [2010(2) RCR (Civil) 900]**; **K. Ramdas Shenoy vs. The Chief Officers, Town Municipal Council, Udipi & Ors. [AIR 1974 SC 2177]**; **Pratibha Co-op. Housing Society Ltd. vs. State of Maharashtra [AIR 1991 SC 1453]**; **Dipak Kumar Mukherjee vs. Kolkata Municipal Corporation & Ors. [AIR 2013 SC 927]**; **Nazir Hussain vs. Neeta Goel & Ors. [2010(33) RCR (Civil) 474]**; **Arya Vidya Mandir School Mandi Dabhwali vs. Dr.Ram Sarup Agnihotri [1990(2) CurLJ 485]** and **Atma Singh vs. Hari Singh [1983(1) LLR 631]**.

11. I have learned counsel for the parties and perused the paper-book as well as documents placed on the record by the counsel.

12. In the present case the plaintiff-respondent No.1 approached the Trial Court by filing a suit for declaration to the effect that the site plan submitted by the defendant-petitioners to defendant-respondent No.2 (Municipal Council, Kharar) and the sanction granted by defendant-respondent No.2 pertaining to the construction of the commercial complex was illegal, null and void and against the Notification/Building Bye-laws issued by the State Government and the Rules and Master Plan prepared by the GMADA and other relevant laws, as also for grant of perpetual injunction restraining the defendant-petitioners from raising any kind of commercial construction over the plot in dispute. As per averments made in the plaint, the defendant-petitioners are undoubtedly owners of the plot in dispute and after purchasing it they started the construction of a commercial complex after obtaining the permission from the defendant-respondent No.2 (Municipal Council, Kharar). The plaintiff-respondent No.1, aggrieved by the construction being carried out by the defendant-petitioners, approached the defendant-respondent No.2 and GMADA Authorities regarding sanctioning of the site plan for construction of a commercial complex including the basement. It is further averred that the activity of carrying out the construction for a commercial complex by the defendant-petitioners was illegal and against the notification issued by the State Government and against the master plan. Further allegation has been made *qua* connivance between the defendant-petitioners and defendant-respondent No.2. Besides the averments that the construction is illegal and against the

Notification/Master Plan/Rules, it has also been averred that permission for grant of construction of a commercial complex including the basement would cause damage to the existing construction of the plaintiff-respondent No.1 and would also cause nuisance in the village *abadi*. It was further averred that the construction would harm the interest of the plaintiff-respondent No.1 and, hence, injunction was prayed for.

13. Written statement was filed by the defendant-petitioners as well as defendant-respondent No.2 (Municipal Council, Kharar). In the written statement filed by defendant-respondent No.2 the stand taken was that village Mundi Kharar falls within the limits of Municipal Council, Kharar that the defendant-respondent No.2 was competent to pass the site plans for construction in the said area. It is further averred in para 5 of the written statement as under :

“5. That in reply to this para of the plaint it is submitted that defendant No.1 and 2 have applied to the answering defendant for sanction of site plan to raise construction over their property. The MC Kharar had sanctioned the site plan on 04.02.2020 after due enquiry as per rules. The complaint was made to MC Kharar against the construction of basement adjoining to the house of plaintiff and thereafter revised site plan was submitted by defendant No.1 seeking permission to sanction the site plan without construction of basement adjoining to the house of the plaintiff so thereafter revised site plan was sanctioned on 24.03.2021 as per

rules with a direction to defendant No.1 and 2 to raise a construction strictly as per the revised site plan and after complying with the all terms and conditions imposed by MC Kharar regarding the said construction. Rest of the averments of this para of the plaint are not concerned with the answering defendant and are denied for want of knowledge.”

14. The defendant-petitioners in their written statements *inter-alia* took a stand that the site plan was sanctioned by the defendant-respondent No.2 and thereafter, on a complaint by the plaintiff-respondent No.1 to the defendant-respondent No.2, the defendant-petitioners submitted a fresh site plan without any basement in SCO No.1, which adjoins the house of the plaintiff-respondent No.1. It was further the stand that the revised plan was also sanctioned by the defendant-respondent No.2 and requisite fee was also deposited. It was further stated in the written statements that the entire area of village Mundi Kharar is falling with the jurisdiction of the defendant-respondent No.2 and commercial establishments were existing on either side of the road and that the plaintiff-respondent No.1 himself has constructed shops in the front portion of his plot, which were being used for commercial activities. It was further stated that a hospital building towards western side of the existing house of the plaintiff-respondent No.1 in the name and style of Mind Heal Hospital was functioning and the plaintiff-respondent No.1 had never raised any objection *qua* the same. The Trial Court vide order dated 18.10.2021 held that at this stage no relief of injunction could be granted to the plaintiff-respondent No.1 and the plaintiff-respondent No.1

had also failed to show the balance of convenience and *prima facie* case in his favour. Aggrieved by the said order, the plaintiff-respondent No.1 had approached the lower Appellate Court and vide order dated 20.01.2022 the appeal was allowed and injunction was granted restraining the defendant-petitioners from raising any construction of commercial showrooms over the property in dispute during the pendency of the suit.

15. Before adverting to merits of the present case, it is essential to notice some of the settled law pertaining to the grant of *ad-interim* injunction. In the case of **Makers Development Services Pvt. Ltd. vs. M. Visvesvaraya Industrial Research and Development Centre [2012(1) SCC 735]** the Hon'ble Supreme Court reiterated the principles for passing of an interim order of injunction under Order XXXIX Rules 1 and 2 CPC and held as under :

“11. It is settled law that while passing an interim order of injunction under Order 39 Rules 1 and 2 of the Code of Civil Procedure, 1908, the court is required to consider three basic principles, namely, (a) prima facie case, (b) balance of convenience and inconvenience, and (c) irreparable loss and injury. In addition to the abovementioned three basic principles, a court, while granting injunction must also take into consideration the conduct of the parties.

12. It is also established law that the court should not interfere only because the property is a very valuable one. Grant or refusal of injunction has serious

consequences depending upon the nature thereof and in dealing with such matters the court must make all endeavours to protect the interest of the parties.”

In the matter of **Dalpat Kumar vs. Prahlad Singh [(1992)1 SCC 719]** it was *inter-alia* held that :

“5. Therefore, the burden is on the plaintiff by evidence aliunde by affidavit or otherwise that there is “a prima facie case” in his favour which needs adjudication at the trial. The existence of the prima facie right and infraction of the enjoyment of his property or the right is a condition for the grant of temporary injunction. Prima facie case is not to be confused with prima facie title which has to be established, on evidence at the trial. Only prima facie case is a substantial question raised, bona fide, which needs investigation and a decision on merits. Satisfaction that there is a prima facie case by itself is not sufficient to grant injunction. The Court further has to satisfy that non-interference by the Court would result in “irreparable injury” to the party seeking relief and that there is no other remedy available to the party except one to grant injunction and he needs protection from the consequences of apprehended injury or dispossession. Irreparable injury, however, does not mean that there must be no physical possibility of

repairing the injury, but means only that the injury must be a material one, namely one that cannot be adequately compensated by way of damages. The third condition also is that “the balance of convenience” must be in favour of granting injunction. The Court while granting or refusing to grant injunction should exercise sound judicial discretion to find the amount of substantial mischief or injury which is likely to be caused to the parties, if the injunction is refused and compare it with that which is likely to be caused to the other side if the injunction is granted. If on weighing competing possibilities or probabilities of likelihood of injury and if the Court considers that pending the suit, the subject matter should be maintained in status quo, an injunction would be issued. Thus the Court has to exercise its sound judicial discretion in granting or refusing the relief of ad interim injunction pending the suit.”

In Mandali Ranganna vs. T. Ramachandra [(2008)11 SCC 1] it was *inter-alia* held that :

“21. While considering an application for grant of injunction, the court will not only take into consideration the basic elements in relation thereto viz. existence of a prima facie case, balance of convenience and irreparable injury, it must also take into consideration the conduct of the parties.

22. Grant of injunction is an equitable relief. A person who had kept quiet for a long time and allowed another to deal with the properties exclusively, ordinarily would not be entitled to an order of injunction. The court will not interfere only because the property is a very valuable one. We are not, however, oblivious of the fact that grant or refusal of injunction has serious consequence depending upon the nature thereof. The courts dealing with such matters must make all endeavours to protect the interest of the parties. For the said purpose, application of mind on the part of the courts is imperative. Contentions raised by the parties must be determined objectively.”

In Rubinder Singh vs. Rajasthan Financial Corporation [(1995) Supp2 SCC 93] the Hon’ble Supreme Court held that a direction which amounted to practically decreeing the suit was beyond the purview of granting interlocutory orders. It was held as under :

“2. The respondent filed the suit on November 1, 1989 impugning the validity of the sale and also his liability to pay arrears as claimed by the Corporation. He also sought for an ad-interim injunction pending suit. Initially, interim injunction was granted but later it was dissolved. On appeal, the High Court in the impugned order allowed the appeal practically set aside the sale and has given certain directions to conduct the sale in the manner indicated therein. We have heard the

counsel for the parties. On the facts and circumstances of the case, we are of the view that the High Court was not justified at this stage to give those directions as indicated in the judgment. It would practically amounts to decreeing the suit which is beyond the purview of granting interlocutory orders. It is, therefore, clear that the High Court has committed an error of law in granting the relief at the stage of miscellaneous appeal.....”

16. In the present case the undisputed facts are that the defendant-petitioners are owners of the property in dispute. They have further started the construction only after the building plan was duly sanctioned by the defendant-respondent No.2 (Municipal Council, Kharar). On a complaint by the plaintiff-respondent No.1, the defendant-petitioners submitted a revised building plan whereby the basement of SCO No.1, which is adjoining to the property of the plaintiff-respondent No.1, was removed and thereafter the revised building plan was also approved and requisite fee was deposited. The defendant-respondent No.2 in an affidavit filed before this Court has stated as under :

“i) That the building plans have been sanctioned as per provisions of Punjab Municipal Building Byelaws 2018, which was implemented vide notification No.CTP(LG)/2018/3548 dated 22.11.2018 and its amendment was implemented vide Letter No.LG/(CTP)(LG)/2019/3977 dated 31.12.2019. There is no term ‘petty commercial’ used in above said Building Byelaws.

ii) *That no record of sanctioned plan of the commercial complex owned by respondent No.1 is available in the office of Municipal Council Kharar but the Assessment Record of the Property Tax Branch of Municipal Council Kharar shows the evidence of shops and house since 1998 being owned by respondent No.1.*

iii) *That most the commercial buildings on either side of the road have been constructed after sanctioning of building plans from Municipal Council Kharar. Regarding remaining constructed commercial buildings including old constructions, the record has to be scrutinized. Building Maps of three recently constructed commercial buildings adjoining to the building of petitioner on either side of road are annexed herewith as Annexures R-2/1 to R-2/3 respectively.”*

17. A perusal of the affidavit reveals that the construction being carried out by the defendant-petitioners is as per the sanctioned plan and further that most of the commercial buildings on either side of the road have been constructed after sanctioning of building plans from Municipal Council, Kharar. It is also an undisputed fact that shops have been constructed by the plaintiff-respondent No.1 himself in front of his house which are being used for running commercial activities. It is further an undisputed fact that on either side of the road, commercial buildings are in existence. Yet another fact which is undisputed is that on the western side of the property of the plaintiff-respondent No.1, a hospital is running *qua*

which no complaint was ever made by the plaintiff-respondent No.1 either at the time of its construction or *qua* its operation.

18. The argument raised by learned counsel for the plaintiff-respondent No.1 that construction being carried out by the defendant-petitioners is contrary to the Notification/Master Plan/various Acts cannot be gone into at this stage since all these points are matters to be determined after the parties lead evidence. The Trial Court arrived at a conclusion that no *prima facie* case was made out in favour of the plaintiff-respondent No.1 nor the balance of convenience was in favour of the plaintiff-respondent No.1. The lower Appellate Court, in appeal against the interim order passed by the Trial Court, went into minute details as to whether the building plan sanctioned by the defendant-respondent No.2 was contrary to the Notification/Rules/Acts/Master Plan which in the opinion of this Court amounts to prejudging the entire suit itself. A perusal of the impugned order leads to a conclusion that the lower Appellate Court while dealing with an application under Order XXXIX Rules 1 and 2 CPC has virtually decided the main the suit of the plaintiff-respondent No.1. The lower Appellate Court has pre-decided issues even before the trial has commenced in the Trial Court. It is trite that the grant of an *ad-interim* injunction order cannot be such which virtually amounts to decreeing the suit. Moreover, the lower Appellate Court has not even observed that nothing stated in the impugned order would have no bearing on the merits of the suit while finally deciding the same.

19. The lower Appellate Court has committed an error of law in setting aside the order dated 18.10.2021 passed by the Trial Court. It is well

settled that once a reasoned order has been passed by the Trial Court then unless those reasons are held to be irrelevant, the lower Appellate Court cannot interfere in such an order. Without adverting to the reasons disclosed by the Trial Court the lower Appellate Court has set-aside the order passed by the Trial Court. An order passed by the Trial Court cannot be lightly set aside as long as the view of the Trial Court is a possible view. In **Mohd. Mehtab Khan vs. Khushnuma Ibrahim Khan [(2013)9 SCC 221]** it was held that :

“20. In a situation where the learned trial court on a consideration of the respective cases of the parties and the documents laid before it was of the view that the entitlement of the plaintiffs to an order of interim mandatory injunction was in serious doubt, the appellate court could not have interfered with the exercise of discretion by the learned trial Judge unless such exercise was found to be palpably incorrect or untenable. The reasons that weighed with the learned trial Judge, as already noticed, according to us, do not indicate that the view taken is not a possible view. The appellate court, therefore, should not have substituted its views in the matter merely on the ground that in its opinion the facts of the case call for a different conclusion. Such an exercise is not the correct parameter for exercise of jurisdiction while hearing an appeal against a discretionary order. While we must not

be understood to have said that the appellate court was wrong in its conclusions what is sought to be emphasised is that as long as the view of the trial court was a possible view the appellate court should not have interfered with the same following the virtually settled principles of law in this regard as laid down by this Court in Wander Ltd. v. Antox India (P) Ltd. [Wander Ltd. v. Antox India (P) Ltd., 1990 Supp SCC 727]”

20. The arguments raised by learned counsel for the plaintiff-respondent No.1 would be a matter of evidence. At this stage what needs to be seen is to balance the convenience and to ascertain the substantial mischief or injury that may be caused to a party. On the face of it, no such injury would be caused to the plaintiff-respondent No.1 which cannot be compensated in monetary terms in case the interim injunction is not granted. The defendant-petitioners are not constructing a basement in the SCO immediately adjoining the house of the plaintiff-respondent No.1 so his existing construction is safeguarded. Rather, injuncting a true owner from carrying out construction on his own property, which construction is duly sanctioned and authorized, would cause irreparable harm and injury to the true owner. At this point, at the stage of *ad-interim* relief, to go into the legality of the sanction granted by the defendant-respondent No.2 would amount to pre-judging the issue especially when no evidence has been led.

21. Another aspect which needs to be noticed is the conduct of the plaintiff-respondent No.1. It is borne out from the record produced before this Court that the plaintiff-respondent No.1 himself has constructed shops in

the front portion of his house. The properties adjoining and in the vicinity of the property of the plaintiff-respondent No.1 are commercial properties. Further, a hospital is running next to the property of the plaintiff-respondent No.1 qua which no complaint was ever made by him either at the time of its construction or *qua* its operation. In **Seema Arshad Zaheer vs. Municipal Corpn. of Greater Mumbai [(2006)5 SCC 282]** it was *inter-alia* held that “*The discretion of the court is exercised to grant a temporary injunction only when the following requirements are made out by the plaintiff : (i) existence of a prima facie case as pleaded, necessitating protection of the plaintiff's rights by issue of a temporary injunction; (ii) when the need for protection of the plaintiff's rights is compared with or weighed against the need for protection of the defendant's rights or likely infringement of the defendant's rights, the balance of convenience tilting in favour of the plaintiff; and (iii) clear possibility of irreparable injury being caused to the plaintiff if the temporary injunction is not granted. In addition, temporary injunction being an equitable relief, the discretion to grant such relief will be exercised only when the plaintiff's conduct is free from blame and he approaches the court with clean hands*”. The facts of the present case and the conduct of the plaintiff-respondent No.1 do not warrant the exercise of grant of discretionary relief in his favour.

22. The judgments relied upon by the learned counsel for the plaintiff-respondent No.1 would also be of no avail to him. In the cases of **Shanti Sports Club (*supra*)**, **K. Ramdas Shenoy (*supra*)** and **Pratibha Co-op. Housing Society Ltd. (*supra*)**, the Supreme Court was dealing with cases arising out of writ proceedings and not interim proceedings under

Order XXXIX Rules 1 and 2 CPC. There had already been a final determination about the legality of the construction. Even in the case of **Dipak Kumar Mukherjee** (*supra*) the Hon'ble Supreme Court found that in view of the pleadings filed before the High Court and the affidavits filed before the Court, there was no escape from the conclusion that respondent No.7 therein had raised construction in violation of the plan sanctioned under Section 396 of the Calcutta Municipal Corporation Act, 1980 and had continued with that activity despite the order of the Mayor-in-Council. However, in the present case the suit is still at the preliminary stage with no evidence having been led. It is yet to be finally concluded whether the sanction in favour of the defendant-petitioners is valid or not. The case of **Nazir Hussain** (*supra*) before the Delhi High Court arose out of an application for amendment of the plaint and has no bearing to the present case. In the case of **Arya Vidya Mandir** (*supra*) reliance had been placed by the Courts below on the advice and note of the Legal Adviser attached to the Municipal Committee as per which the proposed construction was on an area more than 33⅓% of the total area and that the Municipal Committee had earlier rejected the plan but subsequently sanctioned the plan. There is no parity of the said case with the present case when the defendant-respondent No.2 (Municipal Council, Kharar) has itself sanctioned the building plan of the defendant-petitioners and that too not once but on two occasions. The case of **Atma Singh** (*supra*) is also distinguishable as the same arose from the final judgements and decrees passed by the Courts below and was not related to *ad-interim* proceedings.

23. In view of the above, the present civil revision is allowed. The impugned order dated 20.01.2022 passed by the lower Appellate Court is set aside and the order dated 18.10.2021 passed by the Trial Court is restored. It is, however, made clear that any construction carried out by the defendant-petitioners would be at their own risk and responsibility and would be subject to the final out come of the suit. No observation made in this order shall have any bearing on the merits of the suit.

The civil revision is accordingly allowed. Pending applications also stand disposed off.

(ALKA SARIN)
JUDGE

21.07.2022
jk

NOTE : Whether speaking/non-speaking : Speaking
Whether reportable : YES/NO