

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI
Constitutional Petition No.D-3232 of 2011

PRESENT:

Mr. Justice Nadeem Akhtar
Mr. Justice Arshad Hussain Khan

For hearing of:

1. Misc. No.1718/2013 (Stay)
2. Misc. No.1719/2013 (Review)
3. Misc.No.1720/2013 (Inspection)

Date of hearing: 17.11.2016

Malik Altaf Javed, advocate for Petitioner.

Mr. Muhammad Aslam Butt, DAG.

ARSHAD HUSSAIN KHAN, J. Through the instant order we intend to dispose of the application under Order XLVII Rule 1 CPC read with Section 114 CPC, filed by the petitioner, seeking review of order dated 16.01.2013, passed by this Court in the above constitutional petition.

1. Brief facts necessary for disposal of the application is that the petitioner through the present petition sought following reliefs:

- a) *To direct the respondent.*
- b) *Not conduct the removal of operation in respect of property of petitioner to not remove the remaining floors.*
- c) *To direct the respondent No.2 to complete the process regarding issuing of site plan as per by laws of the cantonment act.*
- d) *To direct the respondent No.3 not to harass the petitioner and his family members without due course of law.*
- e) *Any other relief as this Hon'ble court may deem fit and proper may be awarded to the petitioner."*

2. Upon notice, respondents No.1 and 2 filed their joint para-wise comments wherein while denying the allegations it was, inter alia, stated that in the relevant record of cantonment, the petitioner was not the owner of the subject property. It was also stated that office of cantonment board is under statutory obligation to

correspond with the person whose name has been recorded in the relevant record. It was further stated that the original owner in the year 1990 served notice under Section 179 of the Cantonment Act, 1924. The Board granted municipal sanction, validity whereof was one (1) year. In May 2011, it was noticed that some material alteration at the ground floor was started, therefore, notice was served upon the owner of subject property, however, when the said notice was not replied to by the owner and instead started raising construction of 2nd and 3rd floor, final notice was served. It was also stated that the area being Cantonment, no person is allowed to raise construction without sanction of the Board in terms Section 181 of the Act. The petitioner raised construction without sanction, which is an offence under Section 184 of the Cantonment Act, 1924, and as such the same is liable to be demolished and further there is no provision to consider composition fees for regularization of construction raised beyond the scope of building byelaws.

3. When the present matter came up for hearing on 16.01.2013, the following order was passed:

“ Learned counsel for the petitioner submits that since the respondent No.2 Board shall now be regularizing the Petitioner’s construction, he would not press the petition. However, the statement is strongly refuted by Mr. Ashraf Ali Butt, learned counsel for the Respondent No.2 Board, who submits that the violations are such which cannot be regularized. We would, therefore, dispose of this petition by directing the Respondent No.2 Cantonment Board to initiate appropriate action with regard to impugned construction strictly in accordance with law and to submit compliance report within 15 days from today. The report shall explain the violations with graphic details and as to what actions have been taken by them , and as to under what provisions such action have been taken. The report shall also be accompanied by photographs of the impugned construction, so that the entire true picture may be depicted before this court. A copy of this order be provided to Mr. Ashraf Ali Butt, learned counsel for Respondent No.2 Cantonment Board, so that the order may be complied in letter and spirit.

The petition along with the pending application stands disposed of in the foregoing terms.”

Underlining to add emphasis

4. The petitioner, after the afore said order filed application for review of the aforesaid order on the ground that before passing of the order dated 16.01.2013, the attention of this Court was not invited towards section 184 and 185 of the Cantonment Act, 1924,

under which respondent No.2 has been vested with vast power to condone any illegality in the construction subject to payment of composition fee and the statement made on behalf of the respondent No.2 that violation in the instant case cannot be regularized runs contrary to the statutory provisions of law, hence the order suffers from mistake and error apparent on the face.

5. The respondent No.2 in reply to this application filed counter affidavit of its authorized officer. The record also reveals that no rejoinder to this counter affidavit has been filed by the petitioner, hence the objection raised by the respondent has gone unchallenged. Even otherwise, in the said counter affidavit, it was, inter alia, stated that the application is not maintainable as the petition was disposed of upon the statement of the counsel for the petitioner therefore, question of review of order dated 16.01.2013, does not arise. Further stated that though the Board under Section 185 of the Cantonment Act, has wider power to condone any illegality but the subject matter is not the case of illegal construction as the petitioner has not only encroached upon the society's land but raised construction at the subject property Ground plus three (03) upper floors plus stair tower whereas the approval was only for Ground plus first floor plus stair tower and the said violations are not compoundable under the relevant law.

6. Heard the learned counsel for the parties and with their assistance also perused the record and the relevant law.

7. The bare perusal of the order dated 16.01.2013, passed by this Court in the titled petition, reflects that firstly; the said order was passed on the statement of the petitioner's counsel that he intended to withdraw the petition, secondly; the direction contained in the said order was very clear that respondent No.2 was directed to initiate appropriate action strictly in accordance with law with regard to impugned construction. The said fact was also clarified by the Bench of this Court which has authored the order, sought to be reviewed, vide its order dated 01.02.2013, which reads as under:-

"1. Granted .

2 to 4. Notice for 13.2.2013, to be taken up at 12.00 noon. At this point, the learned counsel requests for suspension of order dated 16.01.2013. Suffice to say that through such order the Cantonment Board has only been directed to conduct/initiate appropriate action with regard to

the impugned construction strictly in accordance with Law and to submit compliance report within 15 days and therefore, there is no justification for suspension of the said order as the cantonment Board is required to initiate appropriate action in accordance with law and not otherwise.”

Underling is to add emphasis

8. The record reveals that upon the application of the petitioner, the Nazir of this Court was also appointed as commissioner to inspect the site. In pursuance thereof the Nazir submitted his report, which reflects that there was a construction of Ground plus three upper floors at subject property whereas according to the official of respondent No.2 who was present at the time of inspection, the approval for construction was Ground plus first floor. The record also reveals that no objections from any quarter have been filed in respect of said Nazir's report.

9. It appears that the order, which is sought to be reviewed, has been passed after hearing learned counsel for the parties and on the statement of the Petitioner's counsel regarding withdrawal of the petition. Furthermore, as regards the statement of the counsel for respondent No.2 is concerned, the said fact is also mentioned in the para-wise comments filed by respondent No.2. It also appears from the Nazir's report that the petitioner has raised construction of Ground plus three upper floors without approved building plan.

10. It is well-settled that where a Court had applied its mind to a particular fact or law and then passed the order, it could never be contended that error was one apparent on the face of the record and could be corrected by it. This court on the statement of the petitioner's counsel that he intended to withdraw the petition, while disposing of the petition, directed the respondent to initiate appropriate action with regard to the impugned construction, strictly in accordance with law. The said direction was absolutely within the four corners of law and by any stretch of imagination cannot be termed as error on the face of the record. It is settled that the case cannot be reopened on merits on the review application as scope of review is very limited; by its very nature it is not an appeal or rehearing merely on the ground that one party or the other conceived himself to be dissatisfied with the decision of the Court. Reference can be made to the cases of **Majid Mehmood v**

Muhammad Shafi (2008 SCMR 554) and Ali Ahmad v. Muhammad Iqbal (2009 SCMR 394).

11. Learned Counsel for the applicant in support of his stance in the case has relied upon **2008 MLD 793** and **PLD 2012 Sindh 1**, which are not related to the power of review of the Court under Order XLVII, C.P.C., hence the same are inapplicable in the present case.

12. As a result of our discussion, we have reached to a firm conclusion that neither any mistake or error is apparent on the face of the record nor any other sufficient reason or justification is made out by the petitioner to review the order passed by this court on 16.01.2013. Consequently, the review application is liable to be dismissed.

Foregoing are the reasons for our short order dated 17.11.2016, whereby Review Application (CMA 1719/2013) was dismissed along with listed applications with no order as to cost.

JUDGE

JUDGE

*jamil**