

IN THE HIGH COURT OF SINDH, KARACHI

Suit No.1546 of 2007

[Trustees of the Port of Karachi Versus Syed Fazal Mahmood Shah and others]

Date of hearing : 25.01.2018

Date of Decision : 25.01.2018

Plaintiff : Trustees of the Port of Karachi,
through Mr. Abdul Razzaq, Advocate.

Defendants No.1 to 7 : Syed Fazal Mahmood Shah and 6
others, through Mr. Rana Khalid
Hussain, Advocate.

Defendant No.8 : Karachi Building Control Authority,
through Mr. Khalid Hussain Shaikh,
Advocate.

JUDGMENT

Muhammad Faisal Kamal Alam, J: Plaintiff has filed this suit against the private Defendants No.1 to 7, who were allotted the Plot No.18, measuring 228 square meters, in Jackson Bazaar, Keamari Township, Keamari, Karachi (the “**Suit Property**”), whereupon the Defendants have raised construction, which, according to learned counsel for the Plaintiff, was partly illegal and liable to be demolished. Plaintiff contains the following prayers:

- “(a) *restraining the Defendants No.1 to 7 by grant of permanent injunction from raising any construction in violation of the approved and sanctioned plan and of the terms and conditions of the lisenca,*
- (b) *issuing mandatory injunction against such illegal construction shall be pulled down,*

- (c) *ordering Defendants not to create third party interest in the constructed area on the plot,*
- (d) *granting any other relief which this Hon'ble Court deems appropriate or expedient in the circumstances of the case; and*
- (e) *awarding costs of the suit."*

2. On service of the summons, the private Defendants as well as Defendant No.8-Sindh Building Control Authority ("SBCA") contested the suit by filing their respective Written Statements / pleadings.

3. On 24.05.2010, following Issues were framed:

- "A) Whether any permission for additional floors beyond two floors is required to be obtained from the plaintiff?*
- B) Whether the plaintiff granted permission to other owners of the flats in the locality for construction of building beyond two floors. If yes, the defendants are not entitled for such permission.*
- C) Whether the building in question has been constructed according to the approved plan. If not so, what is its effect?*
- D) Whether the additional floors of the subject building have been constructed illegally and unauthorizedly. If so, what is its effect?*
- E) Whether the building in question is liable to be pulled down / demolished in the facts and circumstances and in law?*
- F) What should the decree be?"*

4. Only Plaintiff led the evidence and was also cross-examined by the counsel for the private Defendants, but latter and the Official Defendant-SBCA did not opt to lead the evidence, by producing their witnesses to be cross-examined.

5. A site inspection was ordered and Nazir's Report dated 01.01.2008 was taken on record on 25.02.2008, to which no objection was filed. In the Nazir's Report, violations in the subject building have been clearly highlighted. Injunction was confirmed by consent on 06.04.2009, with the undertaking of the private Defendants that they will not raise further construction nor create third party interest.

6. The undisputed facts of present case are that the private Defendants after getting the possession of the Suit Property from the Plaintiff, applied to Defendant No.8-SBCA for approval of building plan, so that they may raise construction on the Suit Property. The approval was given vide Exhibit P/3 and P/8 and an approval letter dated 06.05.2006 (**Exhibit P/7**). Admittedly, the approval was given only for ground + 2 upper floors. It is also not disputed fact that the private Defendants have constructed an additional floor in violation of the approved building plan.

7. The Plaintiff's witness-P.W.-1, namely, Zia Ahmed (Assistant Estate Manager) placed on record the number of official documents, which have been exhibited. Some of these documents show that for this additional third floor, the Plaintiff as well as Defendant No.8-SBCA, both being the concerned authorities in exercise of their respective jurisdiction, have taken action against the private Defendants, by sealing the unauthorized floor. Appraisal of the evidence of the Plaintiff's witness shows that counsel for the private Defendants was unable to impeach his credit, particularly, with regard to any discriminatory attitude meted out to the private Defendants, as averred. The sole witness has categorically denied when queried that any verbal permission was given to the private Defendants for construction of two floors on the Subject Property.

8. Mr. Abdul Razzak, the learned counsel for the Plaintiff in support of his arguments, has placed reliance upon the following case law:

- i. P L D 2016 Sindh page-114
[*Dr. Pervaiz Mehmood Hashmi v. Province of Sindh and others*]
- ii. 1992 M L D page-1727
[*Dost Mohammad v. Mrs. Amina Bano and others*]

9. In rebuttal, Mr. Rana Khalid Hussain, the learned counsel for the private Defendants has mainly relied upon the provisions of the Sindh Regulation and Control (Use of Plots and Construction of Buildings) Ordinance, 2002 (the “**said Ordinance 2002**”) and the Rules framed thereunder having title as the Sindh Regulation and Control (Use of Plots and Construction of Buildings) “Rules 2002”. As per learned counsel for the private Defendants, if the Rule 4 of the afore-referred Rules 2002, read with Schedule-II and its paragraph-2, is examined, it is quite apparent that this additional floor is regularizeable under the above statutory Rules and if the same treatment has been given to other allottees by the Plaintiff and Defendant No.8-SBCA, then the private Defendants are also entitled to the same. Learned counsel for the private Defendants has further referred to a C. P. No.D-2308 of 2007, a copy whereof is appended with their Written Statement, in support of his arguments, in which earlier stay was granted, but subsequently, the said petition was disposed of as present *lis* was pending.

10. Mr. Khalid Hussain Shaikh, the learned counsel for Defendant No.8-SBCA has mainly relied upon his Written Statement and disputed the claim of the private Defendants that the Subject Property / building has been regularized, while stating the actions which have been taken by said Defendant No.8 against private Defendants.

11. The Issue-wise finding is mentioned herein under:

Issue No.A _____ Affirmative.

Issue No.B	_____	As under.
Issue No.C	_____	As under.
Issue No.D	_____	Affirmative.
Issue No.E	_____	As under.
Issue No.F	_____	Suit decreed with no order as to costs.

Discussion / Reasons of the Issues:

ISSUES NO. 'A' AND 'B':

12. In the present case, after hearing the Defendants and considering the pleadings and evidence of the parties, it is quite apparent that the present case can be decided purely on the basis of legal Issues and even if the aforementioned Issues are examined, the same also lead to the conclusion that primarily they all arise out of point of law. Therefore, my findings on **Issues No. A and B** are that the Issue No. A is answered in the **Affirmative** that for raising the additional floor, the approval by the Plaintiff and particularly Defendant No.8-SBCA was / is required. Latter being the regulator of buildings for the Province of Sindh under the Special Statute- The Sindh Building Control Ordinance, 1979. With regard to Issue No.B, no evidence has been led by the Defendants that permission was accorded by the Plaintiff to other persons in the same locality. Thus, this Issue is decided against the private Defendants.

ISSUES NO. 'C' AND 'D':

13. With regard to **Issues No.C and D**, it can be concluded in the light of the above discussion that the third floor / additional floor was constructed illegally and that is why the Defendant No.8-SBCA took action against the private Defendants, hence Issue No. C is answered accordingly that portions of the subject building in question is not according to the approved building plan, particularly, the third floor is in clear violation of the approved building plan. Issue No.D is answered in **Affirmative** that the

additional floor is unauthorizedly constructed and, therefore, this Issue is answered against the Defendants and in favour of the Plaintiff. The cumulative effect of the Issues No.C and D is discussed herein under, while deciding the Issues No.E and F.

ISSUES NO. 'E' AND 'F':

14. Adverting to the **Issues No.E and F**. The validity of the above Ordinance 2002 was challenged and the Honourable Apex Court in its reported Judgment in **S B L R 2013 SC page-25** [*Aslam and others v. Syed Shamsuddin and others*] has ruled that the said Ordinance 2002 is a valid piece of legislation. In effect, this statute provide a limited amnesty to the buildings, as envisaged in its Section 5. Secondly, in the present case, dictum laid down in the decision handed down by the learned Division Bench in **Dr. Pervaiz's** case (*supra*), is to be followed, that if the deviations are regularizeable under some statutory provisions and the Karachi Building and Town Planning Regulations, 2002, then the same may be regularized; but, if the violations are of such a nature which cannot be regularized, then unauthorized construction raised by private Defendants has / have to be demolished by the Sindh Building Control Authority (SBCA).

15. The upshot of the above is that, the Plaintiff and Defendant No.8-SBCA will consider the application of the private Defendants strictly in accordance with law, Karachi Building and Town Planning Regulations, 2002, as well as the aforementioned Ordinance 2002 and the Rules framed thereunder, and will pass a speaking order in respect of the same within two (02) months from today. If third floor of the subject building and other deviations / violations are regularizeable, then the private Defendants will complete other formalities in accordance with the relevant Rules as directed by Defendant-SBCA. Further, if Defendant No.8-SBCA gives the adverse

finding that the building in question is not regularizeable under the law, the same decision will be conveyed to the private Defendants. It is clarified that once Defendant No.8-SBCA comes to the conclusion that the subject building is not regularizeable then forthwith an appropriate action will be taken by Defendant No.8-SBCA against the private Defendants, strictly in accordance with law.

16. In the above terms, I decree the present suit with no order as to costs.

JUDGE

Riaz/P.S*