

**IN THE HIGH COURT OF SINDH AT KARACHI**

**C. P. NO. D-608/ 2008**

**Present:**

**Mr. Justice Muhammad Junaid Ghaffar.**

**Mr. Justice Khadim Hussain Tunio.**

**Mutloob Ahmed Khan ----- Petitioner**

**Versus**

**The City District Government & others ----- Respondents**

**Date of hearing: 30.01.2018.**

**Date of order: 30.01.2018.**

**Petitioner: Through Mr. Moiz Ahmed Advocate**

**Respondent No. 2 Through Mr. Rao Sarfaraz Advocate**

**Respondent No. 5 to 8 Through Mr. Mayhar Kazi along with Mr. Omer Memon Advocates**

**Respondent No. 9 Mr. Miran Muhammad Shah AAG a/w Mr. Asadullah Lashari State Counsel.**

**J U D G M E N T**

**Muhammad Junaid Ghaffar, J.** Through this Petition (Amended)

the Petitioner seeks the following reliefs:-

- “1) To direct the respondents No. 1 and 2 to take action against the respondent No.3 and stop him from converting the car parking area of Zainab Arcade into the commercial shops.
- 2) To further restrain the respondent No.3 from converting the parking area on ground floor of Zainab Arcade into the commercial shops for creation of nuisance of the occupants of Zainab Arcade as well as Dada Terrace;

- 3) To declare that due to above mentioned act of converting of car-parking in to commercial shops, the petitioner and other occupants of Dada Terrace as well as Zainab Arcade shall be deprived of their legal right of light, air, privacy and peace;
- 4) Costs of the petition be also awarded;
- 5) Any other/further/additional relief or relieves, actions or directions as the Hon'ble Court deems fit and proper in the circumstances, of the case."

2. The precise facts as stated are that Petitioner resides in Flat No. 24, "Dada Terrace" constructed on Plot No.1, Block No.3, Behar Cooperative Housing Society, Karachi, since 1990. Adjacent to the Dada Terrace there is another residential complex on Plot No.14/5 Survey Sheet No.35/P-1 in the same Society known as "Zainab Arcade". It is the precise case of the Petitioner that Respondent No.3 raised illegal construction in Zainab Arcade, whereby, he converted the allocated parking area for commercial use by constructing shops in violation of the approved plan and the Sindh Building Control Regulations and such act of Respondent No.3 is going to create nuisance and peaceful residents of the locality will be deprived of their legal right of air, light and privacy. Initially, when this Petition was filed the owners of the shops were not arrayed as Respondents as it subsequently transpired that shops have been leased out and thereafter, Respondents No. 5 to 8 being owners of the shop were arrayed as Respondents.

3. Learned Counsel for the Petitioner has contended that the Petitioner being a resident just adjacent to the impugned illegal construction is an aggrieved person, whereas, the purported regularization under the amnesty scheme introduced in the Karachi Building & Town Planning Regulations 2002 ("KBTPR 2002") does not

apply to the case of Respondents as it was only applicable to the existing violative use, whereas, through Nazir report dated 18.3.2011 it has come on record that 5 out of 7 shops were closed and the remaining two shops were also not fully functional. Per learned Counsel the space where shops have been raised was reserved for an amenity purpose i.e. parking, and cannot be utilised for any commercial purposes. He has further contended that on the road on which the impugned project has been constructed no shops are permitted, whereas, even otherwise, they were never used as shops. According to the learned Counsel, mere construction does not fall within existing violative use, hence, the alleged regularization is on the face of it is illegal as the shops never qualified for such regularization, and therefore, the subsequent ownership and the alleged leases executed in favour of Respondents No. 5 to 8 are also liable to be cancelled. In support he has relied upon ***Habibur Rehman V. Ali Zafar Siddiqui (1992 SCMR 2351), Shafiqur Rehman and others V. Government of Sindh and others (PLD 2006 Karachi 10), Ardeshir Cowasjee V. Karachi Development Authority (2007 CLC 668) and Amer Bakht Azam and 4 others V. Cooperative Model Town Society (1962) Ltd. Lahore and 4 others (2007 CLC 374).***

4. On the other hand, learned Counsel for Respondent No. 5 to 8 has contended that the project in which the Petitioner resides as well as the project in which allegedly shops have been constructed are on roads which have already been declared as commercial and in this regard he has referred to Regulation 18-13 of KBTPR 2002. He has further contended that the Petitioner resides in a building which is

constructed on roads which all are commercial, whereas, even otherwise, there are various shops in the very project in which the Petitioner resides including shops just in front of the impugned project, and therefore, per learned Counsel the Petitioner cannot plead any grievance including nuisance. According to him, the Petitioner has come before this Court with unclean hands and has only subjected the Respondents shops which is a case of pick and choose. He has further contended that the open space, part of which is now occupied by the impugned shops, was never designated as a parking space in the original plan and therefore, there is no question of converting any amenity area into a commercial use and in this regard he has also relied upon the same Nazir report and submits that the parking area is already there and is distinct from shops. Insofar as the objection regarding non-applicability of the amnesty and the regularization scheme is concerned, learned Counsel has contended that these shops were regularized admittedly in 2007 and a restraining order was passed on 16.7.2010 whereas, the inspection was carried out by the Nazir on 18.3.2011 and therefore, without prejudice to the merits of the Nazir report, it cannot be presumed that when the regularization was made, the shops were not in use. Per learned Counsel this even otherwise, requires adducing evidence and such exercise cannot be carried out in the Constitutional jurisdiction. Learned Counsel has further contended that latches would also apply as the building was constructed on the basis of a plan approved in 1997 and Regularization was done in 2007 whereas, instant Petition has been filed in 2008. According to the learned Counsel, the entire exercise of regularization was carried out after strict scrutiny and payments of requisite fee and therefore, it is

now a past and closed transaction. In support he has relied upon ***(Multiline Associates v. Ardeshir Cowasjee and others (1995 SCMR 362), Ardeshir Cowasjee and others v. Karachi Building Control Authority and others (2007 YLR 947), Vazir Ali and others v. Hanif (1989 MLD 1966), Dr. Shahzad Alam and 2 others v. Beacon Light Academy and 5 others (2011 CLC 1866), Abdul Rashid through Legal Heirs and 6 others v. Mahmood Ali Khan (1994 SCMR 2163) and Ardeshir Cowasjee and others v. Government of Sindh and others (1998 MLD 1219).***

5. Similarly, learned counsel for SBCA has supported the case of Respondents and has contended that in the original plan there was no reserved area for parking, whereas, the violation if any, already stands regularized and condoned under the amnesty scheme after approval of the Master Plan Group of Offices (MPGO) therefore, no case is made out on behalf of the Petitioner.

6. We have heard all the Learned Counsel and perused the record. It appears that impugned construction in question was raised by Respondent No.3 after grant of approval of building plan on 8.8.1997. The said approval was initially for Ground+2 upper floors, whereas, the construction was raised in violation of the approved plan as Ground+4 upper floors having shops in front line and parking on rear side. Thereafter, owner of shops (Respondent Nos.5 to 8) submitted regularization plans individually under the amnesty scheme introduced through Karachi Building & Town Planning Regulations (Amendment), 2004, whereby, Regulations 3-2.20 and 3-2.21 were introduced, and clause 3-2.21(b) provides, that Regularization of violations relating to the cases of change of land use shall be

considered to the extent of existing violative use of building but subsequent conversion in other uses whatsoever shall not be allowed. The first objection which has been raised on behalf of the petitioner is to the effect that the amnesty scheme promulgated through amendment in the Karachi Building and Town Planning Regulations 2002, (Reg: 3-2.21.1(b)) the allottees of the shops in question were not entitled for its benefit inasmuch as the same was only meant for existing violative use of buildings, whereas, per Nazir report dated 18.3.2011 the shops in question were never in use. However, we are not impressed with this argument for the reason that firstly, the inspection was carried out somewhere in 2011, whereas, the shops were regularized on 14.4.2007, and a restraining order was passed on 16.7.2010. Therefore in all fairness there is a strong presumption and possibility that the shops in question were in *use* when the regularization was done. The regularization has been done after fulfillment of requisite formalities and payment of fee, whereas, the Master Plan Group of Offices (MPGO) has also accorded its approval which at the relevant time was the competent authority. The argument of the petitioner, cannot, in our constitutional jurisdiction be accorded any weightage as no evidence is before us that the shops were never in use, especially when the regularization process was being carried out. Merely for the fact that it came in to the knowledge of the petitioner subsequently, the entire exercise cannot be nullified on mere assertion of the petitioner. The shops admittedly have been constructed much before in time, and it must have been in the knowledge of the petitioner that such shops are being constructed, as the petitioner resides just opposite. Whether such construction of shops was with approval or not is not relevant for this and the

petitioner ought to have approached the Court as well as SBCA immediately, so that the question of its *use* or not at the relevant time could have been ascertained. Even otherwise, the Court cannot rely upon the Nazirs report exclusively (which otherwise does not fully support the petitioner's case) to arrive at a final conclusion that since when the inspection was made, certain shops (five out of seven) were found out of use, therefore, the amnesty under the regularization be declared as illegal and unlawful. It is by now settled law, that the report of a Commissioner appointed by the Court is always persuasive in nature, and is only a tool for the Court to arrive at a just and fair decision but under no circumstances it is binding on the Court. It is not necessarily to be acted upon by the Court mandatorily. The Court has to and must examine the report as a Commissioner's report is not a substitute of evidence, and can only be an aid in evidence, whereas, this is not a case where the matter is being decided on the basis of any evidence which could corroborate with the pleadings and documents on record. We may, however, observe that inspection of location by a Court may be necessary and helpful in deciding a case, but surely it should not be substituted as an evidence, which otherwise is required to be produced by a party.<sup>1</sup> Thus, Order XXVI, Rule 12(2), C.P.C. makes it discretionary for the Court to accept or reject a Commissioners report if it is to the dissatisfaction of the Court.<sup>2</sup>

7. The second argument of the learned Counsel for the petitioner that it is a case of change of land use i.e. an amenity area (parking area) has been converted into a commercial use is not only

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<sup>1</sup> Abdul Rashid v Mahmood Ali Khan (1994 SCMR 2163)

<sup>2</sup> Gulzar Hussain Awan v Akbar (1999 YLR 2250)

misconceived but so also fallacious and delusive inasmuch as the building plan originally approved never earmarked the area in question specifically for parking purposes. This fact was conceded by the learned Counsel on a query of the Court. Subsequently, shops have been raised on this area which according to the original plan was an “open space”. This has been thereafter regularized through a process of amnesty which itself is not impugned before us. In fact we have been informed by the learned Counsel for SBCA, that such amnesty was impugned through CP No.856 of 2003, which stands dismissed, however, this is not relevant for the present purposes. Therefore, in our considered view, it is not a case of change of land use to the effect that certain amenity area has been converted for any other purpose. Notwithstanding this, we may also make it clear that even otherwise, the restriction of change / relocation of land use in case of an amenity plot, only applies when the same has been notified and categorized in the original master plan of the area as an amenity and not otherwise. However,, in a case where the relocation (as against elimination or curtailment) of an amenity plot in a scheme takes place prior to or during the stage of implementation of its infrastructural provisions or before representation to or use by the public, the changes made in the layout plan should not injure public interest.<sup>3</sup>

8. The third argument which was advanced is to the effect that since the road on which this project is located has not been declared as commercial, therefore, no shops could be permitted. This again has no basis in view of the amnesty scheme under which the shops stand

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<sup>3</sup> Mansoor Sharif Hamid v Shafique Rehman (2015 SCMR 1172)



regularized as already discussed above. Secondly, it has been brought on record that there are shops running in the project wherein the petitioner himself resides. In its affidavit in rejoinder it has been asserted that the said shop will be closed soon and this was stated in 2011. Till date no such evidence was placed, whereas, learned Counsel for respondents has assisted us with some photographs showing existence of various shops and other commercial activity being running, therefore, this ground is also misconceived and therefore untenable.

9. In view of hereinabove facts and circumstances of this case, we were of the view that the petitioner had failed to make out a case for any indulgence, and therefore by means of a short order on 30.01.2018 we had dismissed instant petition with pending applications. The above are the reasons thereof.

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