

**IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD**

C.P.NO.D-222 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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BEFORE:

Mr. Justice Aziz-ur-Rehman

Mr. Justice Muhammad Faisal Kamal Alam

- 1. For orders on office objection.*
- 2. For orders on MA-1206/2018*
- 3. For orders on MA-2342/2018*
- 4. For hearing of MA-13013/2018*
- 5. For hearing of main case.*

14.11.2018.

*M/s. Mir Naeem Talpur and Wali Muhammad Khoso,
Advocates for the Petitioner.*

Mr. Nadeem Abbasi, Advocate for Respondent No.4.

Mr. Adnan Kareem Khurram, Advocate for Respondent No.6.

*Mr. Allah Bachayo Soomro, Additional A.G alongwith Muhammad Khan
Khatti, A.C Taluka Hussain Bux Mari for D.C Mirpurkhas and Abdul
Qayoom, Mukhtiarkar, Taluka Hussain Bux Mari.*

ORDER

MUHAMMAD FAISAL KAMAL ALAM, J:-

The Petitioner has approached this Court, seeking directions, that official Respondents No.2 to 4 should remove the encroachment purportedly made by Respondent No.6 over the public road leading from Hyderabad Road to the Vision School, which is being run by the Petitioner. The Petitioner has prayed for the following relief(s):

- “a) *This Honourable Court may be pleased to direct the respondent No.2 to 4 to remove the encroachment made by the respondent No.6 over the public road leading from Hyderabad Road to the Vision School while constructing his mega project.*

- b) Direct the respondent No.4 to take action against the respondent No.6 for violating the rules while constructing the mega project.*
- c) Direct the respondents No.2 and 3 to decide the application of the petitioner and take action against the responsible including the respondent No.6.*
- d) Direct the respondents No.2 to 5 to reconstruct the road of leading from Hyderabad road to the Vision School and restore it in its original condition.*
- e) Cost of the petition be saddled upon the respondents.*
- f) Any other relief which this Honourable Court deems fit and proper under the circumstances of the case”.*

2. Mr. Wali Muhammad Khoso, the learned Counsel for the Petitioner has argued that private Respondent No.6, while undertaking the construction of Mall, by the name ‘Mega City Mall’, has encroached upon the main public road, because the Plot Nos.163 and 164 whereupon the said Mall is being constructed, abut on the said public road which further leads to the Plot No.164, on which the Petitioner’s School, that is, Vision School City Campus, is situated. It has been argued by the Petitioner’s side that the above named project has been constructed by private Respondents in violation of the building laws and regulations. It is further averred that due to the above project, the 40 feet wide public road has been encroached upon and its width is reduced, resulting in causing immense inconvenience to the public at large, particularly the students, their parents and teachers of the above named ‘Vision School’.

3. On the issuance of the notices, Comments have been filed by the official and private Respondents. The Respondent No.5-Executive Engineer, Highways Division, Mirpurkhas, has denied the claim of the Petitioner, while maintaining that the width of the above road has not been reduced because of the ‘Mega City Mall’ and the proper width of 28 feet is

maintained; *whereas*, another concerned Authority, viz. Respondent No.4-Director, Sindh Building Control Authority (**SBCA**), Mirpurkhas, has come up with a stance that the Respondent No.6, after obtaining the requisite approvals including the approval of building plan, has started raising construction of the Mall. The said Respondent-SBCA has substantiated the stance of other official Respondents to the extent that the width of the public road has not been reduced. With their parawise comments, the Respondent-SBCA has appended notices issued to the Petitioner for raising unauthorized 2nd Floor, in order to show that Petitioner has not come to the Court with clean hands. The Respondent No.3-Deputy Commissioner, Mirpurkhas, has also filed his parawise comments, *inter alia*, in which it has been stated that the total width of the public road is 30 feet and a portion whereof has been encroached by the Respondent No.6 and to remove the encroachment, already directions have been issued to the concerned Assistant Commissioner. The Managing Director of private Respondent No.6 (Ghulam Nabi) has filed the Objections to the main petition, wherein, the averments of the petition have been refuted. In Para-6 of the objections, it has been stated that after approval of the building plan, the construction of the Mall has been commenced, while disputing the fact that the width of the public road has been reduced due to the ongoing construction of the above named Mall. Conversely, it has been stated that it was the Petitioner, who damaged the public road because in the months of May / June, 2017, the Petitioner obtained Gas connection for his school, but the Petitioner did not bother to take steps for repairing the damage done to the public road. The Respondent No.6 has also leveled allegation of blackmailing against the Petitioner, being the real motive for preferring the instant petition.

4. Rival submissions have been heard and record of the case is taken into the account.

5. In order to ascertain the correct position on the ground, a site inspection was ordered by this Court on 07.03.2018, and the learned Additional Registrar of this Court was appointed as Commissioner, who submitted a Site Inspection Report dated 21.03.2018, together with documents and photographs. As per the Commissioner's report, the representatives of Respondent No.6 failed to produce any approval for construction of the said project. The measurement of the subject public road was also taken from different points and the conclusion of the above Report is that the width of the road in front of the subject Mall was found to be 30 feet, *whereas*, the same width was narrowed at the point where the school of the Petitioner is situated. It is further observed that the Plot Nos.163 and 164, upon which the construction of the Mall is done, though falls in a housing scheme, namely, Gulshan-e-Hussain Housing Scheme, but no plot was reserved for any amenity purpose. Due to this reason, the learned Commissioner has expressed his opinion that the subject housing scheme has not been duly approved. In this regard, layout plan of the said Gulshan-e-Hussain Housing Scheme, produced by the Petitioner's side at the time of site inspection, though has been appended with the site inspection report as Annexure "A", but the learned Commissioner has also expressed his reservation about its authenticity, as it does not bear any official stamp of the competent authority, including Respondent No.4-SBCA.

6. At a later stage of the proceedings, the learned Counsel for the Petitioner has filed an application-M.A No.13013 of 2018, seeking permission from this Court to allow certain amendments in the main petition

to the extent of raising the plea of amenity plot and that the present Respondent No.6 has illegally converted the use of Plots Nos. 163 and 164 of Gulshan-e-Hussain Housing Scheme, reserved for amenity purpose to commercial, *inter alia*, for raising construction of a commercial project. This application was opposed by Respondent No.6 by filing the objections / counter affidavit.

7. The Respondent No.6 through his Advocate filed a Statement dated 12.07.2018, under which the following documents were filed:

- i. *Photocopy of Approved Plan of Mega City Mall issued by Sindh Building Control Authority.*
- ii. *Photocopy of No Objection Certificate in respect of Mega City Mall issued by Sindh Building Control Authority Regional Directorate Mirpurkhas on dated 29.02.2016 vide letter N: RD/SBCA/MPK(Reg)/NOC/ADV/MPK No:31 of 2016.*
- iii. *Photocopy of Structure Plan in respect of Mega City Mall issued by Sindh Building Control Authority Regional Directorate Mirpurkhas on dated 28.02.2017 through letter No: RD/SBCA/MPK (Reg) 26/2017.*
- iv. *Photocopy of Amalgamation issued by Government of Sindh Town Planning Department Hyderabad vide letter No:DTP/MPS-313/287 dated 10.06.2015.*
- v. *Photocopies of Challans Nos: 466, 127, 537, 505, 387, 386 deposited by respondent No.6 in respect of Mega City Mall in the account of Sindh Building Control Authority Regional Directorate Mirpurkhas.*
- vi. *Photocopy of Deh Form-II vide Jeryan No:1986 dated 13.07.2017 issued by Mukhtiarkar Revenue Taluka Hussain Bux Mari.*
- vii. *Photocopies of Rubkari issued by Mukhtiarkar Revenue Taluka Hussain Bux Mari vide letter No: SHR/547/ of 2013 H.B Mari dated 05.08.2013 and letter MUKH/HBM/167/2018 dated 27.02.2018.*
- viii. *Photocopies of publication in the newspapers in daily Jurat Karachi dated 24.07.2013 and daily Sindh Hyderabad on 24.07.2013 and again published in the*

same newspaper dated on 25.05.2015 in respect of the plots purchased by the respondent No.6 in Gulshan-e-Hussain and Shalimar View situated in Deh 108, Taluka Hussain Bux Mari District Mirpurkhas.

7A. In the intervening period, another order dated 27.08.2018 was passed, directing the Respondent No.3-Deputy Commissioner, to decide the application of the Petitioner, which was filed before the former (official Respondent No.3), with regard to the subject controversy. This was also one of the reliefs sought by the Petitioner in his prayer clause "C" of the petition.

8. The learned Additional Advocate General through a Statement dated 14.11.2018 filed the comments / Report of the Deputy Commissioner (Respondent No.3) along with the order passed on the application bearing No.396 / TVS dated 18.12.2017, earlier filed by the Petitioner's school. This Report of official Respondent No.3 has been filed in compliance of the above Court Order dated 14.11.2018. Subsequently, the learned Counsel for the Petitioner preferred objections to the above order passed by Respondent No.3 (Deputy Commissioner) on the application of Petitioner.

9. Mr. Adnan Kareem Khurram, Advocate, for Respondent No.6, has argued that while raising construction of the Mall, no illegality has been committed. On a specific query, the learned Counsel replied, that since at the time of site inspection due to bonafide error, the approved building plan and other sanctions/approvals could not be produced, therefore, the same have been subsequently under the above Statement dated 12.07.2018 (of Respondent No.6).

10. In order to appreciate the rival submissions, the afore-referred Order passed by the official Respondent No.3 (Deputy Commissioner) has

been perused. The crux of the order is that nowhere it appears from the official record and arguments of the parties hereto that the afore mentioned two Plots Nos.163 and 164, upon which the construction of Mega City Mall is being done, besides other Plots Nos.9, 10, 11, 12 and 13 falling in another housing scheme, viz. Shalimar View, were / are reserved as the amenity plots. It has been further mentioned in the Order that subsequently after the approvals obtained by Respondent No.6, the use of the above mentioned plots has been converted from residential to commercial. It has been further highlighted that the plots, upon which the Mega City Mall is presently being constructed and that of the Petitioner's school, were utilized by the earlier respective owners of these plots for non-agricultural purposes. With regard to the width of the subject public road, the finding is mentioned under Issues No.3 and 4; that, from the official record, it has been determined that width of the road is 30 feet and not 40 feet as claimed by the Petitioner. The order of the Deputy Commissioner also confirms the fact that portion of the public road has been occupied / encroached upon by Respondent No.6, regarding which the latter (Respondent No.6) has undertaken to remove the safety wall of the Mall building s soon as the construction is complete. Nevertheless, the Deputy Commissioner has issued instructions to the concerned Assistant Commissioner for taking appropriate measures with the help of District Police and Anti-Encroachment Force for removal of any encroachment on the public road.

11. The learned Counsel for the Petitioner has referred to his objections filed against the above order of Respondent No.3 (Deputy Commissioner). The main emphasis of Petitioner is that the Plot Nos.163 and 164 were reserved for amenity purpose and to substantiate this plea the

Petitioner has appended a proposed layout plan of Gulshan-e-Hussain Housing Scheme. This is the same proposed layout plan, which was produced by the learned Commissioner with his above referred site inspection report as Annexure "A". *Ex-facie*, this proposed layout plan has no legal sanctity; *firstly*, because the layout plan is merely a proposed one, without any approval letter of a competent authority; *secondly*, this 'proposed' layout plan document bears a stamp of one Ghulam Mustafa, a property dealer, which, simply proves that it is not an official document, but a private one.

Conversely, the Respondent No.6 has appended the registered sale deed in respect of Plot Nos.163 and 164, total admeasuring 21600 Sq. Feet, with their objections to the main petition. The relevant Form-II (Extract of Ownership) issued by the Board of Revenue, is also placed on record by the Respondent No.6 alongwith his objections; in the above said revenue record, these two plots are shown as residential. Sale deeds of other properties have also been appended with the Objections of the Respondent No.6, to substantiate the arguments that the width of the public road is 30 feet and not 40 feet, as alleged by Petitioner.

12. The documents appended with the Statement of Respondent No.6 have also been examined:-

- (i) The first document is the approved building plan of the Mall, bearing the stamp of Respondent-SBCA.
- (ii) Sale NOC dated 29.02.2016 is also available, issued by Respondent-SBCA to Respondent No.6, *inter alia*, for sale and advertisement of the units in the subject project-'Mega City Mall and Residency Tower.' One of

the conditions (Condition No.6) is that if any misrepresentation is found to be made, then the Authority (SBCA) will take necessary action, including withdrawal of the NOC.

- (iii) Structural approval dated 28.02.2017 is also available.
- (iv) A letter for amalgamation of plots and conversion of the same from residential to commercial also forms part of the record and is one of the Annexures with the above Statement of Respondent No.6. This approval letter is of 10.06.2015 and has been issued by the Government of Sindh, Town Planning Department, Hyderabad.

13. The order passed by the Respondent No.3-Deputy Commissioner and the documents mentioned in the preceding paragraphs are the official acts and official documents and hence the presumption of validity and genuineness is attached to them in terms of the Article 92, 93 and 129 of the Qanun-e-Shahadat Order, 1984. On the other hand, the Petitioner's side is unable to show that the official approvals, as discussed hereinabove, were granted in favour of Respondent No.6, by not fulfilling the codal formalities.

14. It is also necessary to clarify that a plot of land, even if it is situated in some housing scheme, cannot be presumed to be reserved for amenity purpose, unless it is shown as an amenity plot in the **duly approved layout plan**. No plausible material or document has been brought on record by the Petitioner's side which can lead to the conclusion that the Plot Nos.163 and 164 were actually the amenity plots and their use was illegally changed/converted from amenity to that of commercial.

15. Adverting to the observation mentioned in the Site Inspection Report dated 21.03.2018 about Gulshan-e-Hussain Housing Scheme, it is necessary to clarify that; *firstly*, no material / record has been placed before the Court to show that the above named housing scheme exists; *secondly*, even for the argument's sake, if the Gulshan-e-Hussain Housing Scheme does exist, then for non-availability of any amenity plot in the said Housing Scheme, the concerned authority, including Respondent-SBCA, can initiate an action against the Management of the said Housing Scheme, but for such an irregularity, if any, on the part of the Management of above named Housing Scheme, the present Respondent No.6 cannot be and should not be penalized, because it is an established legal principle that a person is not required to perform an act which is beyond his control or upon which one has no authority; "*lex non cogit a dispossibilia*". This maxim has been discussed in a reported decision of the Hon'ble Supreme Court-2003 SCMR 1773. More so, the Petitioner has also very frankly pleaded in Paragraph-16 of the Memo of Petition that private Respondent No.6 should keep the construction on his project within the property limits; thus, the Petitioner, as such, is not aggrieved with the ongoing construction of the subject Mall.

16. The upshot of the above discussion is that the Petitioner has failed to point out any illegality in the construction of 'Mega City Mall and Residency Tower', which is a project of Respondent No.6. However, since the subject project falls within the definition of a 'public building' as contained in Section 3, sub-section (o) of The Sindh Buildings Control Ordinance, 1979 (SBCO), therefore, the official Respondents and particularly Respondent No.4-SBCA is under an obligation to ensure that the project is completed in conformity with the afore mentioned statute,

Building and Town Planning Regulations and the Approved Building Plan; particularly, Section 6, Sub-Section 2 with regard to occupancy certificate and Section 7(e) regarding the completion of building, should be strictly adhered to by the Respondent-SBCA and private Respondent No.6.

17. Similarly, Respondents No.3 and 5, Deputy Commissioner and Executive Engineer [Highways Division], are directed to re-inspect the subject public road and if it is found encroached upon by any person including the Petitioner and / or Respondent No.6, then the encroachment should be removed and in this regard the latest report should be submitted to this Court through its learned Additional Registrar within 04(four) weeks from today.

18. In view of the above, the present constitutional petition stands disposed of with no order as to costs. All the pending Applications are also dismissed having become infructuous.

JUDGE

JUDGE

Hyderabad
Dated:

Shahid