

## IN THE HIGH COURT OF SINDH KARACHI

Suit No. 1762 of 2018

[Mrs. Zarina Iqbal versus Haji Jaffar and others]

Plaintiff : Mrs. Zarina Iqbal through Mr. S.M. Intikhab Alam, Advocate.

Defendant No. 1 : Haji Jaffer through Khawaja Shams-ul-Islam Advocate.

Defendant No. 2&3 : Nemo

Defendant No. 4&5 : Sindh Building Control Authority through M/s Muhammad Shahzad Qureshi and Nusrat Ali, Advocates.

Defendant No. 6&7 : The Province of Sindh and another through Ms. Naheed Akhtar, State Counsel.

Dates of hearing : 25.10.2018; 02.12.2018; 17.12.2018; 24.12.2018

### **ORDER**

**Adnan Iqbal Chaudhry J.** - This order will dispose of CMA No.13131/2018 moved by the Plaintiff for a temporary injunction to restrain the SBCA from approving the proposed building plan submitted by the Defendant No.1 in respect of the Suit Plot.

2. The Suit Plot is an open residential plot belonging to the Defendant No.1, being Plot No.335 measuring 1458 square yards in Cosmopolitan Cooperative Housing Society, Jamshed Quarters, Karachi. The Plaintiff claims to be the owner and resident of a single storey bungalow near the Suit Plot. However, such fact is disputed by the Defendant No.1 who contends that the Plaintiff's plot is also an open plot and is at a distance from the Suit Plot.

3. Admittedly, the lessor of Suit Plot, as that of the Plaintiff's plot, is the KMC who had leased the same to Cosmopolitan Cooperative

Housing Society, who in turn had transferred the same to the predecessor-in-title of the Defendant No.1. The copy of the lease on record executed by the KMC in favor of the Society relates to the Plaintiff's plot, but it is not disputed by the Defendant No.1 that an identical lease was executed for the Suit Plot. Clause 7 of such lease stipulates as follows:

*"7. The Lessee shall not (a) without the previous consent in writing of the Standing Committee of the Lessors divert the plot to uses other than those for which it is intended i.e. other than residential purposes, (b) shall not construct buildings on more than one third the area of the said plot or construct or reconstruct any building or add to any existing building a structure so as to make such building consist of more than two stories (i.e., the ground and the first floor), and (c) make any alterations or additions to any existing building without complying with the building bye laws and rules of the Lessor passed under the Karachi Municipal Act of 1933 or any other statutory law for the time being in force."*

4. The Defendant No.1 had submitted a proposed building plan to the SBCA seeking approval to construct a basement and ground + 2 upper floors consisting of 12 flats on the Suit Plot. Though the SBCA had yet to approve the proposed building plan, the Plaintiff challenged the same by way of this suit when she discovered that the SBCA had vide its letter dated 13-04-2018 approved the Architectural Concept Plan (not the proposed building plan) of the proposed building. The case of the Plaintiff is essentially that the construction of flats on the Suit Plot would be contrary to clause 7 of the lease of the Suit Plot; that such construction would infringe upon the privacy and easement rights of the Plaintiff and would constitute a nuisance for the Plaintiff; hence CMA No.13131/2018 for a temporary injunction.

5. Earlier, being aggrieved of the delay in the approval of his proposed building plan in respect of the Suit Plot, the Defendant No.1, along with other co-owners, filed C.P. No.D-2332/2018 against the SBCA before a Division Bench of this Court. In response, the SBCA informed the Division Bench that the proposed building plan could not be processed further until an NOC is given by utility service providers as required by orders passed by the Water

Commission for like buildings. Vide order dated 13-09-2018 passed in C.P. No.D-2332/2018 the learned Division Bench observed that the proposed building plan of the Suit Plot should be considered after submission of the required NOCs. The Plaintiff is not party to the said petition which apparently is still pending. However, Mr. Shamsul Islam, learned counsel for the Defendant No.1, submitted that the petition is a matter separate and independent and that no order has been passed in the said petition that would come in conflict with any order that may be passed in this suit on CMA No.13131/2018. He submitted that the KWSB had recently given its NOC to the proposed building. In view of the statement made at the bar that the pendency of C.P. No.D-2332/2018 does not pose a conflict, I proceed to decide CMA No.13131/2018.

6. Mr. S. M. Intikhab Alam, learned counsel for the Plaintiff submitted firstly that no flats could be constructed on the Suit Plot inasmuch as it was a “residential plot”, a category separate and distinct from a “flat-site”, the latter having being defined by Regulation 2-54 of the Karachi Building & Town Planning Regulations [KBTPR], 2002 as a plot ‘designated’ as such for multi-family residential use. He therefore submitted that until the Suit Plot was converted from a “residential plot” to a “flat-site” by invoking the provisions of change of land use contained in Regulations 18-4.2 and 18-5 of the KBTPR 2002, it could not be used to construct flats. The second argument advanced by Mr. Intikhab Alam was that in any case the building plan proposed for the Suit Plot was in contravention of condition (b) of clause 7 of the lease of the Suit Plot (reproduced above) which provides that construction on the Suit Plot shall not cover more than one third of the area of the plot nor shall the building thereon exceed ground + 1 floor. Learned counsel pointed to KMC’s NOC to the SBCA stating that building plan may be approved “*as per conditions of grant*”, which words per learned counsel mean that the KMC (the lessor) has also given its NOC only for ground + 1 floor in line with condition (b) of Clause 7 of the lease. Learned counsel relied

on *Muhammad Anas Kapadia v. M. Farooq Haji Abdullah* (PLJ 2007 Kar 361) and *Kathiawar Cooperative Housing Society v. Province of Sindh* (2018 YLR 560) to submit that where construction was contrary to lease conditions, the injunction prayed for should be granted.

7. Per the reply and report filed by the SBCA, it has so far approved only the Architectural Concept Plan of the proposed building for a basement (for parking, air raid shelter and recreation area), ground floor for flats, and 2 upper floors for flats, which approval is subject to a number of conditions contained in the letter dated 11-04-2018 issued by the Deputy Director Town Planning, SBCA, and the letter dated 13-04-2018 issued by the Deputy Director Jamshed Town - I, SBCA. Per SBCA's report dated 02-10-2018, the process for the approval of the proposed building plan was withheld until utility service providers gave their respect NOCs. However, per the SBCA, since the proposed flats constitute residential use only, the case does not entail change of land use.

8. Mr. Shamsul Islam, learned counsel for the Defendant No.1 submitted that the suit was malafide; that the Suit Plot was away from the Plaintiff's plot; that the Plaintiff's plot was also an open plot and hence the question of nuisance, invasion of privacy and infringement of easement rights did not arise; that a number of residential buildings in the vicinity consisted of ground + 2 floors. He submitted that a "residential building" as defined by Regulation 2-107 of the KBTPR 2002 specifically includes flats; that the definition of "residential use" in Regulation 19-2.1 also envisages flats; and therefore the construction of flats on a residential plot does not constitute change of land use. Regards condition (b) of clause 7 of the lease, Mr. Shamsul Islam submitted that such lease condition was subject to the KBTPR 2002. He submitted that it was Regulation 25-9.1.2 that would apply to the Suit Plot (in Jamshed Quarters, Karachi), which permits a Floor Area Ratio of 1:1.75 which ratio translates into ground + 2 floors. He submitted that even the previous building on

the Suit Plot, before it had been demolished, consisted of ground + 2 floors. He relied on *Zaheer Ahmed Chaudhry v. City District Government Karachi* (2006 YLR 2537) and *Standard Chartered Bank v. Karachi Municipal Corporation* (2015 YLR 1303) to submit that construction of flats on a residential plot does not constitute change of land use.

9. During rebuttal, Mr. Intikhab Alam, learned counsel for the Plaintiff conceded that the KBTPR 2002 would prevail over the lease conditions of the Suit Plot and such acceptance is recorded in the order dated 03-12-2018 which reads as follows:

“Learned counsel for the Plaintiff while arguing his case concedes that if the Karachi Building & Town Planning Regulations, 2002 (KBTPR) is at variance with the lease condition No.7, the KBTPR 2002 will prevail. However, he submits that it is his case that before the provisions of KBTPR 2002 are applied, the Defendant No.1 would need to follow procedure for change of land use as per the KBTPR 2002. In order to argue this aspect of the matter, for want of time, the case is adjourned to 17.12.2018 at 11:00 a.m.”

Mr. Intikhab Alam also acknowledged that the previous building on the Suit Plot (before its demolition) also consisted of ground + 2 floors, but he contended that the previous building was used as a residence by only one family and not by a number of families which would be the case if flats are permitted on the Suit Plot. He submitted that the Plaintiff would not have objected to the construction of ground + 2 floors on the Suit Plot had the same been intended for use as a residence by one family. He therefore submitted that the construction of a number of units/flats on a plot originally intended for one family would be an added burden on infrastructure and utilities that are already deteriorating.

10. Heard the counsel and perused the record.

As discussed above, learned counsel for the Plaintiff had conceded that in the event of an inconsistency between the two, the KBTPR 2002 will prevail over the lease conditions of the Suit Plot. After going through Chapter 25 of the KBTPR 2002, I agree with Mr. Shamsul

Islam, learned counsel for the Defendant No.1, that as regards the Suit Plot, which is situated in the old area of Jamshed Quarters, Karachi, the Floor Area Ratio [FAR] of 1:1.75 given in Regulation 25-9.1.2 would apply. Mr. Shamsul Islam had contended that such FAR implies that construction beyond ground + 1 floor but not exceeding ground + 2 floors is permitted on the Suit Plot. That effect of the said FAR was not disputed by learned counsel for the Plaintiff. In fact, he had acknowledged that the previous building on the Suit Plot (before its demolition) had also comprised of ground + 2 floors. As per the approval of the Architectural Concept Plan, the Suit Plot is inside the  $\frac{3}{4}$  mile radius of the Mazaar-e-Quaid and therefore under Regulation 25-1.10.2 of the KBTPR, the height of the building proposed on the Suit Plot cannot exceed 38 feet. In view of what has been discussed, the interpretation made by learned counsel of KMC's NOC also does not hold force as the words "*as per conditions of grant*" appearing therein can only mean that the residential status of the Suit Plot shall not be changed. That puts to rest for the time being the contention of learned counsel with regards to the number of floors permitted on the Suit Plot, and the only question that needs to be considered is whether the KBTPR 2002 restricts construction of flats on a residential plot.

11. The case of *Muhammad Anas Kapadia* (PLJ 2007 Kar 361) relied upon by Mr. Intikhab Alam is not relevant inasmuch as that was a case involving change of land use from residential to commercial. Regards the case of *Kathiawar Cooperative Housing Society* (2018 YLR 560) cited by Mr. Intikhab Alam, there the subject property was an amenity plot allotted by the Society to a charitable institution specifically for the purposes of a girls schools for the benefit of the community of the area and the question that arose was whether the running of a co-education school thereon by the proposed transferee on commercial basis would be unlawful when the conditions of allotment viz. that of running a girls schools was not incorporated in the lease of the said plot. On the interpretation of instruments

subsequent to the allotment, the learned Single Judge granted injunction to restrain the subsequent transferee from operating a co-education school on commercial basis on the ground that the allotment conditions had to be read into the lease. Therefore, the case of *Kathiawar Cooperative Housing Society* is also not relevant as it did not involve the provisions of the KBTPR 2002.

12. In the case of *Standard Chartered Bank* (2015 YLR 1303) relied upon by Mr. Shamsul Islam, a learned Division Bench of this Court while following a judgment of an earlier Division Bench held that the use of a residential plot in the area of Civil Lines Quarters, Karachi, for constructing residential flats did not attract the provisions of change of land use contained in Regulation 18-4 of the KBTPR 2002. However, in my view, the said finding of the Division Bench was only to answer the question whether Regulation 18-4 of the KBTPR in specific was attracted, and it was obviously not intended to lay down the proposition that any number of floors with any number of flats can be constructed on any residential plot. In the other case cited by Mr. Shamsul Islam, i.e., the case of *Zaheer Ahmed Chaudhry* (2006 YLR 2537), though a Division Bench of this Court had agreed with the submission of counsel that the Supreme Court had settled that flats can be constructed on a residential plot, but the citation of such judgment of the Supreme Court does not find mention therein. Nonetheless, the said case too does not lay down the proposition that any number of floors with any number of flats can be constructed on a residential plot.

On the other hand is the judgment of the Honourable Supreme Court of Pakistan in *Abdul Razzak v. KBCA* (PLD 1994 SC 512). There the plot involved was a residential plot and Abdul Razzak, after demolishing the residential house thereon, started to construct a high-rise building containing flats in violation of the approved building plan and the erstwhile building Regulations. The argument advanced on behalf of Abdul Razzak that the KBCA (now SBCA) had regularized the breach of building Regulations was rejected by the

Supreme Court by distinguishing between criminal liability under section 19 of the SBCO, 1979 and civil liability under the building Regulations to rectify irregularities, and by holding that though the Authority may compound criminal liability, it cannot regularize a breach of the building Regulations which in its nature has changed the complexion of the structure originally intended. After holding so, it was further observed by the Hon'ble Supreme Court that :

“21. It may be mentioned that framing of a housing scheme does not mean simpliciter leveling of land and carving out of plots, but it also involves working out approximate requirements of water, electricity, gas, sewerage lines, streets and roads etc. If a housing scheme is framed on the assumption that it will have residential units 1 + 1, but factually the allottees of the plots are allowed to raise multi-storeyed buildings having flats, the above public utility services will fall short of requirements, with the result that everyone living in the aforesaid scheme will suffer. This is what has happened in Karachi. Without any planning and without expanding the provisions of the above items of public utility services, the people were allowed to erect multi-storeyed buildings having shops and flats. In consequence thereof everyone living in Karachi is suffering. There is scarcity of water, some people even do not get drinking water. The above other items of the public utility services are short of demand. Roads and streets are normally flooded with filthy and stinking water on account of choking and overflowing of sewerage lines. To reduce the miseries of most of the Karachi-ites, it is imperative on the public functionaries like the Authority to ensure the adherence to the Regulations. However, it may be clarified that it may not be understood that once a scheme is framed, no alterations can be made. Alterations in a scheme can be made for the good of the people at large, but not for the benefit of an individual for favouring him at the cost of other people.”

The conflict between *Abdul Razzak (supra)* and *Multi Lines Associates v. Ardeshir Cowasjee* (PLD 1995 SC 423) with regards to objections against high-rise buildings was resolved by a larger Bench of the Supreme Court by approving *Abdul Razzak* (to the extent of the conflict). This was done in the case of *Ardeshir Cowasjee v. KBCA* (1999 SCMR 2883), popularly known as the '*Costa Livina*' case. Though in that case the plot involved was an amenity plot which was converted to a commercial-cum-residential plot for a high-rise building without

inviting public objections, it was again observed by the Supreme Court that :

“21. .... Simpliciter the factum that on account of tremendous increase in the population in Karachi the situation demands raising of high-rise buildings, will not justify the conversion of residential plots originally intended to be used for building ground-plus-one and allowing the raising of high-rise buildings thereon without providing for required water, electricity, gas, sewerage lines, streets and roads etc.”

13. Since the KBTPR 2002 came about after the aforesaid judicial pronouncements of the Supreme Court in *Abdul Razzak and Ardeshir Cowasjee*, it is safe to assume for the present purposes that construction permitted by the said Regulations takes in account the concomitant burden of such construction on the existing infrastructure and utilities. In any case, it is not the case of the Plaintiff that any provision of the KBTPR 2002 is unlawful.

14. Regulations 2-9 and 2-10 of the KBTPR 2002 define “Apartment” and “Apartment Building” respectively. Regulation 2-53 defines “Flat” as an ‘Apartment’. Regulation 2-54 defines a “Flat-site” to mean a plot designated as such for multi-family residential use. Though the Regulations do not expressly define a ‘residential plot’, zoning regulations and area standards for a ‘residential plot’ and a ‘flat-site’ are dealt with separately by Regulations 25-2 and 25-4 respectively. Therefore, a ‘residential plot’ intended originally for the construction of a residential bungalow, and a ‘flat-site’ intended for the construction of flats, are recognized as different types of plots under the KBTPR 2002. But having noticed that, I have also noticed that the KBTPR does not categorize construction on both types of plots separately, but instead it categorizes both as a “Residential building” under Regulation 2-107 to mean a “building constructed for residential purposes, e.g. bungalow, town house, flats and such other buildings.” The ‘land use’ of both a ‘residential plot’ and a ‘flat-site’ is described by Regulation 19-2.1 as “residential use” to include all land used for dwelling facilities (except lodging facilities on commercial

basis). *Ergo*, Regulation 18-4 of the KBTPR does not require change of land use where flats are intended to be constructed on a residential plot and the proposed building is not a high-rise building. But where a high-rise building comprising of flats is proposed on a residential plot situated in the High Density Zone of Blocks 1 to 4 Clifton, Karachi, Regulation 25-12.2 of the KBTPR 2002 does require a change of land use from a 'residential plot' to a 'flat-site'. Under the Sindh High Density Development Board Act, 2010 a 'High Density Zone' means an area designated by a High Density Development Board under the said Act for construction of high-rise buildings in the urban centers of the Province.

In other words, the KBTPR 2002 as it presently stands, does not require change of land use for constructing flats on a residential plot as long as the proposed building is not a high-rise building. However, by that the KBTPR does not intend that any number of floors consisting of any number of flats can be constructed on a residential plot, in that, the number of floors and the number of flats therein are regulated *inter alia* by the Floor Area Ratio permitted for residential buildings vide Regulation 25-2 read with Regulation 25-9, by height restrictions contained in Regulations 25-1.8 and 25-1.10, by space requirements in and about the building contained in Chapter 9, and by Density Standards contained in Regulation 20-3 of the KBTPR 2002.

15. It is not the case of the Plaintiff that the letter dated 11-04-2018 issued by the Deputy Director Town Planning, SBCA, and the letter dated 13-04-2018 issued by the Deputy Director Jamshed Town - I, SBCA, approving the Architectural Concept Plan of the proposed building is contrary to the KBTPR 2002. The apprehension of invasion of privacy, of infringement of easement rights and of nuisance are all unsubstantiated at this stage and will require evidence. Therefore, the Plaintiff has failed to make out a *prima facie* case for the grant of the temporary injunction prayed for. The other two ingredients for the grant of a temporary injunction are also lacking. Therefore, CMA No.

13131/2018 is dismissed but with the observation that since the proposed building plan submitted for the Suit Plot has yet to be approved by the SBCA, it is expected that in doing so the SBCA will adhere to the KBTPR 2002 to regulate the height and number of flats in the proposed building, failing which the Plaintiff will be free to challenge the same.

Nothing herein shall be construed to waive the condition of NOCs required from utility providers. A copy of this order shall be placed by the office in the file of C.P. No.D-2332/2018 for information.

J U D G E

Karachi  
Dated: 06-07-2019