

IN THE HIGH COURT OF SINDH AT KARACHI

High Court Appeal No.260 of 2019
[Mrs. Zarina Iqbal vs. Haji Jaffar and six others]

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Muhammad Faisal Kamal Alam

Dates of hearing : 09.09.2020, 29.09.2020 and
07.10.2020.

Appellant
[Mrs. Zarina Iqbal] : Through Mr. Intikhab Alam,
Advocate.

Respondent No.1
[Haji Jaffar] : Through M/s Khawaja Shams-
ul-Islam, Muhammad Mustafa
and Imran Taj, Advocates.

Respondents No.6&7
[Sub-Registrar and the Province
of Sindh, Respectively) : Through Mr. Muhammad
Meeran Shah, Additional
Advocate General Sindh.

Respondents No.2 to 5 : Nemo

JUDGMENT

Muhammad Faisal Kamal Alam, J: Appellant has filed the present Appeal against the order dated 09.07.2019 of the learned Single Bench, who has dismissed the Injunction Application of present Appellant being CMA No.13131 of 2018 (*Plaintiff in Suit No.1762 of 2018*).

2. Succinctly, Plaintiff has filed the above Suit against the Respondents, particularly Respondent No.1 that he and his other partners

are raising construction of a multi storey building at Plot No.335, situated in Cosmopolitan Co-operative Housing Society Limited, Jamshed Town, Karachi (in Respondent No.3)-‘the subject property’ in violation of law and relevant Rules, viz. Karachi Building and Town Planning Regulations, 2002 (***Building Regulations***). Plaintiff has sought number of reliefs, including enforcement of his easementary rights and forestalling private nuisance.

3. Mr. Intikhab Alam, Advocate representing the Appellant has argued that the impugned order has not considered a very basic fact, that construction of a multi storey building at the subject property is violation of Clause-7 of the lease condition of the subject property, so also that of Regulation 3-2.2. He has also referred to Regulation 19.1 in support of his case, which relates to land use classification along with other Regulations. Further contended that since Cosmopolitan Co-operative Housing Society/Respondent No.3 is not mentioned in the above Regulations, therefore, only ground plus one, that is, double storey construction can be raised on the subject property and not a multi storey building, as wrongly / illegally approved by the Respondent-Sindh Building Control Authority (***SBCA***). He has stated that even the approved building plan (*at page-341 of the Appeal file*) is in violation of the above Regulations and is to be held illegal by this Court. He has referred to the following Judgments to augment his arguments_

1. 2018 YLR page-560 [Sindh]

[Kathiawar Cooperative Housing Society Ltd. Through Member Managing Committee and another vs. Province of Sindh through Secretary and 3 others]

2. PLJ 2007 Karachi page-361

[Muhammad Anas Kapadia and 19 others vs. M. Farooq Haji Abdullah and 5 others]

4. The above arguments were controverted by Mr. Khawaja Shams-ul-Islam, Advocate, representing the Respondent No.1. He contends that the impugned Judgment has taken into the account, relevant Regulations as well as different Judgments on the subject, which were handed down over a period of time concerning the controversy involved in the present Appeal and in the above *lis*. He argued by referring Regulations 2-54, 2-107 read with Regulations 25-9.1, that there is no conversion of plot from its residential status to commercial, because no shops or showrooms are proposed to be built in the subject multi storey project, which comprises of flats only, for different persons and families. He has referred to No Objection Certificate (*NOC*) given by different authorities to demonstrate that codal formalities were completed before granting approval of the building plan of Respondent No.1. These documents are at pages-315, 335 and 347 of the Court file.

5. Learned Additional Advocate General Sindh representing the official Respondents No.6 and 7 supported the arguments of learned Advocate for Respondent No.1.

6. Learned counsel for Respondent No.1 has cited the following case law in support of his arguments.

1. **2006 YLR page-2537 [Karachi]**
[Zaheer Ahmed Chaudhry and 9 others vs. City District Government, Karachi through Nazim-e-Ala and 13 others]
2. **2015 YLR page-1303 [Sindh]**
[Standard Chartered Bank Limited through Constituted Attorney vs Karachi Municipal Corporation through Administrator and 9 others]
3. **2014 YLR page-1689 [Sindh]**
[Standard Chartered Bank Limited through Administrator, Karachi and 7 others vs. Karachi Municipal Corporation through Administrator, Karachi and 7 others]
4. **PLD 2007 SC page-472**
[Jawad Mir Muhammadi vs. Haroon Mirza]

7. Arguments heard and record perused.
8. Gist of the case law relied upon by Appellant is, that conversion of a plot from residential to commercial should not be done in violation of lease grant condition and requisite No Objection Certificate from the lessor of the Plot, because if a residential plot in a purely residential area is put to some other use, then residents / neighborhood of that area has a right to object to such conversion and raising of a high-rise building, *inter alia*, as it would affect the infrastructure of the entire vicinity; an amenity plot given for a particular purpose of establishing a Girls School, subsequently, cannot be sold by the transferee / grantee of the said amenity plot in violation of the allotment condition.
9. Similarly, précis of the case law relied upon by the Advocate for Respondent No.1 is that construction of flats on a residential plot does not change the land use and hence, requirement for change of land use is not attracted in such cases.
10. Appellant's counsel, under his Statement dated 08.10.2020, has also filed a certified copy of the Written Statement of Respondent No3- Cosmopolitan Cooperative Housing Authority Limited, which is Defendant No.3 in the above *lis*. Perusal of the Written Statement shows that the said Respondent Society has refuted the claim of Appellant.
11. Cited Regulations are considered. Regulations 3-2.2, referred to by the Appellant's Advocate, relates to submission of plans for approval in a prescribed form; *whereas*, Regulation 19.1 is about the land use classification, elaborating the definition of different categories and classification of lands; *similarly*, Regulations 25-1.10.2 and 25-9.6.10 (relied upon by Appellant's counsel), *inter alia*, deal with height restriction of a building, which is being constructed within the prescribed

vicinity of Quaid-e-Azam's Mausoleum. It is argued by learned Advocate for Appellant, that while constructing the building in dispute, these Regulations have been violated.

12. The record shows that the building plan in question was forwarded by lessor of the subject plot, that is, Respondent No.2- KMC to Respondent No.4-SBCA vide a correspondence dated 22.03.2018, inter alia, mentioning the status of Plot as residential. At page-347 a NOC dated 19.12.2018 is for the Project in question at the subject property is available, issued by KW&SB (Karachi Water and Sewerage Board). At page-325 (of the Appeal file), a compliance Report on behalf of Respondent-SBCA is submitted in a Constitutional Petition No.D-2332 of 2018, preferred by the Respondent No.1, about the approval of the building plan for raising construction at the subject property. A similar compliance Report was submitted in the above *Lis* preferred by the present Appellant, which however, was objected to by the latter. At page 341 is the approval of proposed building plan at the subject property, consisting of basement + ground + two upper floors; this document is one of the Annexures {**Annexure I**} filed with the Objections/Parawise Comments of the contesting Respondent No.1. In the above document/Approval Letter of Respondent SBCA, subject plot/property is mentioned as residential. Clause/Condition-29 of this Approval has dealt with the issue of height restriction, which *prima facie* addresses one of the objections of present Appellant.

13. Adverting to the main contention of learned Advocate for Appellant that while carrying out the construction in question at the subject property, its lease condition No.7 has been violated because the nature and character of residential use has been changed. This aspect has been aptly dealt with in the impugned order by placing reliance on the

reported decisions of the learned Division Bench of this Court, particularly, the case of Standard Chartered Bank (*ibid*). Construction of residential units/flats on a residential category plot has been considered in the light of relevant Regulations pertaining to the controversy, viz. Regulations 2-9, 2-10, 2-53 and 54 (about apartment building and flat) read with Regulation 18-4 [change of land use], land classification as per Regulation 19-2.1, zoning regulations-25-2 and 25-4; so also regarding high rise building. At present, we have no good reason to disagree with the finding of **the impugned order, particularly its paragraph-15, that construction of residential flats for dwelling purposes in a multi storey building**, as is done in the present case at the subject property, does not violate the Regulations, *inter alia*, because in the present case construction of flats have not changed the land use of the subject property, provided that no high rise building is raised at the subject property. *Secondly*, the averments of present Appellant about creating nuisance and violation of easementary rights, cannot be decided at the interlocutory stage as these are triable issues and can be decided after leading of evidence.

14. Both the cited reported decisions of Appellant are distinguishable [basic features of the cited case law are already discussed in the foregoing paragraphs]; for the reasons, that *firstly*, Respondent No.1 is not constructing a high-rise building at a residential subject property, because a high-rise building is to be governed by another statute, namely, the Sindh High Density Development Board Act, 2010 and is dealt with Regulation 25-14 of the afore-mentioned Regulations. The approved Building Plan of the subject property does not fall within the category of a high-rise building. *Secondly*, the present plot is admittedly not an amenity plot given for education purpose, hence, principle laid down for such plots cannot be invoked in the present case.

15. Summation of the above is that the present Record in this Appeal, at this stage does not reflect that any of the cited Regulations either have been violated by Respondent No.1, or Respondent-SBCA while granting approval of the building plan.

16. Consequently, no case is made out for interference in the impugned order and the same is maintained. Consequently, this Appeal is dismissed with an observation that discussion herein and in the impugned order is of tentative nature and will not affect the trial of above *Lis*. Respondent-SBCA and other official Respondents are fully authorized to take appropriate action against Respondent No.1, if the Regulations and the Approved Building Plan are violated at any stage.

17. Parties are left to bear their own costs.

JUDGE

Dated: _____

JUDGE

M.Javid.PA