

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

C.P Nos. D-6400 of 2016.

DATE	ORDER WITH SIGNATURE OF JUDGE
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Directions.

1. For hearing of Misc. No.34332/16.
2. For orders as to maintainability.

05.05.2017

Mr. Sikandar Khan, Advocate for Petitioner.

Mr. Anwar Ali Shah, Advocate for SBCA.

Mr. Abdul Wajid Wyne, Advocate for Respondent in C.P No.D-4176 of 2016.

Mr. Asadullah Lashari, State Counsel.

Mr. Syed Amir Shah, Advocate for Respondent No.3.

On 29.11.2016 an objection was raised regarding maintainability of this petition in the following terms:-

“The petitioner has alleged that respondent No.3 has raised illegal construction on the subject plot in violation of the building plan as well as the relevant rules, regulations and byelaws, and due to such illegal construction, the privacy of his family is at stake. It is an admitted position that the petitioner attempted to intervene in Constitutional Petition No.D-4176/2016, wherein the same construction had been challenged that has been impugned in the present petition. The said petition was disposed of vide order dated 29.09.2016 (page 29) as SBCA had reported that all violations have been removed and the builder had undertake before the Court that such violations will not be reconstructed by him in future. Counsel for the Petitioner is put on notice to satisfy the Court on the next date about maintainability of the instant petition as the legality of the impugned construction has already been decided in the above noted previous petition. Subject to maintainability, let notice be issued to the respondents.”

Again on 14.12.2016 the Petitioner was confronted as to maintainability of this petition in the following terms:-

“Counsel for the petitioner is once again directed to address the question of maintainability of this petition on the next date in view of the observation made by us on 29.11.2016 and also as to how easementary rights claimed by him can be decided in

the present proceedings. At his request, adjourned to 12.01.2017.”

Today, we have heard the learned Counsel for the Petitioner on this issue. Per learned Counsel instant petition is maintainable in view of the Judgment reported as **1990 CLC 83 (Mst. Sardar Begum Faruqui and 6 others v. Rashida Kahtoon and 2 others)** inasmuch as the Petitioner is aggrieved by raising of construction by respondent No.3 as balconies have been raised, opening towards the house of the Petitioner. He further submits that the privacy rights including the fundamental as guaranteed under the Constitution are being violated, hence petition is competent.

We have heard learned Counsel for the Petitioner and have perused the record. It appears that earlier Anjuman Falah-e-Behboob Muhammadan Community has filed C.P No.D-4176/2016 against the present Respondent No.3 on the ground that the construction being raised was in violation of the Karachi Building Town Planning Regulations, 2002 as well as Sindh Building Control Ordinance, 1979. In the said petition, the Petitioner has filed application under Order 1 Rule 10 CPC and through Order dated 29.09.2016 the said petition was disposed of in the following terms:-

“After going through the compliance report filed today by SBCA, learned Counsel for the petitioner concedes that violations have been removed by SBCA. He, however, states that the petitioner and other residents of the vicinity in question apprehend that respondent No.4 / builder may raise such construction or may modify the present construction, which may be in violation of the approved building plan. Respondent No.4 / builder Muhammad Shabbir (CNIC No.42101-1423081-3) is present in person. He undertakes not to violate the approved building plan in any manner whatsoever in future. In case any violation in the approved building plan is found in future, SBCA will be at liberty to take action in respect thereof in accordance with the law.

Counsel for the petitioner, respondent No.4 and SBCA state that they have no objection if this petition is disposed of in the above terms. However, counsel for the intervenor Amjad Hussain states that the impugned construction has invaded

his privacy in view of the balconies overlooking his house. Since this question is not the subject matter of the present petition and the violations of the approved plan have already been removed by the competent authority, the intervenor will be at liberty to seek his remedy, if any, before the competent forum in accordance with law.

The petition and the listed applications stand disposed of in the above terms.”

Perusal of the aforesaid order reflects that insofar as the alleged illegal construction is concerned, the same was taken care of in the above order and such controversy was put to an end. Whereas, the petitioner was permitted to seek remedy, if any, in accordance with law through the present petition. The petitioner has raised two contentions, one regarding the alleged illegal construction and non-performance of the statutory duty by the government official and other appears to be the rights of privacy as well as the easements. Insofar as the first contention is concerned the same is passed and closed transaction as it has been taken care of in the aforesaid order, therefore, to that extent this petition appears to be incompetent. As regards to the other contention in respect of easement and privacy rights we may observe that for such enforcement of rights a petition is not competent and only a Suit can be filed by leading evidence regarding easement and privacy rights. Insofar as reliance on the case of **Mst. Sardar Begum Faruqui (supra)** we have made observation that in that matter in addition to the easement rights the primary case was nonperformance of statutory duty by the government official, and therefore, it was held that the petition is competent on facts of this case is not similar as insofar as the nonperformance of statutory duty is concerned the same has been taken care of in C.P No. D-4176/2016.

In view of hereinabove facts and circumstances of the case, we are of the considered view that instant petition in its present form is

not competent as there are disputed facts, which are required to be proved through evidence, therefore, the same is dismissed. However, the petitioner is at liberty to file a civil suit for seeking appropriate remedy in accordance with law.

Judge

Judge

Ayaz P.S.