

THE HIGH COURT OF SINDH, KARACHI

Present:

Mr. Justice Adnan Iqbal Chaudhry &

Mr. Justice Zulfiqar Ali Sangi.

Const. Petition No. D - 2489 of 2023

[Tanveer Ahmed & others versus Province of Sindh & Others]

Petitioners : Tanveer Ahmed & 02 Others through Mr. Usman Farooq, Advocate.

Respondent 1 : Nemo.

Respondent 2 : The Director General SBCA through M/s. Dhani Bux Lashari, Nusrat Ali and Anwar Ali Shah, Advocates along with Syed Asif Ali Rizvi, Director SBCA District East.

Respondent 3 : Nemo.

Respondent 4 : Muhammad Mohsin Waheed (Builder/Owner) through M/s. Malik Khushhal Khan and Fahad Akbar, Advocates.

Respondent 5 : Nemo.

Intervenors : Shaikh Muhammad Tahir Saleem Chandna & 03 Others through Syed Salim Ahmed, Advocate.

Const. Petition No. D - 2202 of 2023

[Roshan Saeed versus S.B.C.A. and another]

Petitioner : Roshan Saeed through M/s. Malik Khushhal Khan and Fahad Akbar, Advocates.

Respondents : The Director General SBCA through M/s. Dhani Bux Lashari, Nusrat Ali and Anwar Ali Shah, Advocates along with Syed Asif Ali Rizvi, Director SBCA District East.

Date of hearing : 01-08-2023

JUDGMENT

Adnan Iqbal Chaudhry J. - These petitions are in respect of unauthorized construction on residential plot No. B-172, Block-5,

measuring 400 square yards, at Karachi Administration Employees Cooperative Housing Society [**said plot**].

2. The Petitioner in C.P. No. D-2202/2023 is the **owner** of said plot, acting through the **builder**, who is her Attorney both for said plot and the petition. They pray for a writ to restrain the Sindh Building Control Authority [**SBCA**] from demolishing the building constructed on said plot. The owner and builder admit that though the building plan approved by the SBCA was for basement + ground + 1 floor, the building actually constructed is ground + 3 floors. Their case is that they have submitted a 'completion plan' to the SBCA and until the SBCA decides to regularize or not to regularize unauthorized construction, the additional floors cannot be demolished. By an interim order dated 09-05-2023 it was observed that no final adverse action should be taken against the petitioner.

3. The Petitioners in C.P. No. D-2489/2023 are the immediate **neighbours** of said plot who pray for a writ to the SBCA to demolish the unauthorized building on said plot. The builder is Respondent No.4 in this petition. The case of the neighbours is that the builder has constructed a multi-story building on a residential plot without an approved plan; that he was also constructing a 4th floor; that the building has blocked air and sun-light to the neighbours; that they had time and again made complaints to the SBCA and the Society but to no avail. By an interim order dated 23-05-2023, the SBCA was directed to ensure that no unauthorized construction takes place at said plot.

4. As per the report filed by the SBCA, the builder had constructed 2nd, 3rd and 4th floors without an approved building plan; that such additional floors could not be regularized under the Karachi Building & Town Planning Regulations, 2002 [KBTPR]; that the SBCA had taken demolition action first in April 2023 and then in May 2023 when the 4th floor and part of the 3rd floor were demolished, but then

due to the interim order dated 09-05-2023 passed in C.P. No. D-2202/2023 further demolition was halted.

5. Malik Khushaal Khan, learned counsel for the owner/builder submitted that their case is now confined to ground + 3 floors; that even though the construction of two additional floors was without an approved building plan, but in processing the completion plan of the building the SBCA is required to consider regularization of the unauthorized construction under the KBTPR.

Syed Salim Ahmed Advocate representing 4 intervenors with an application under Order I Rule 10 CPC, submitted that they were occupants of the building who had purchased premises in the building from the builder and thus they were entitled to be heard as well. He seconded the arguments of Mr. Malik Khushaal Khan.

Mr. Usman Farooq, learned counsel for the neighbours submitted that the SBCA had demolished the entire 4th floor and part of the 3rd floor, and while these petitions were pending, the builder proceeded to reconstruct the 3rd floor and inducted occupants into the building even though the SBCA had not issued any occupancy certificate.

Mr. Dhani Bux Lashari, learned counsel for the SBCA submitted that the KBTPR did not permit regularization of additional floors. He relied on the case of *Muhammad Saleem v. Administrator KMC* (2000 SCMR 1748) to submit that the intervenors who came into possession of the building without an occupancy certificate had no right to be heard.

6. Heard learned counsel and perused the record

7. We advert first to the case of the 4 intervenors. They claim to be in possession of different portions in the building pursuant to sale agreements with the builder executed in the month of March, 2023. But the fact of the matter remains that they took possession without the SBCA having issued any occupancy certificate in respect of the

building, which possession is prohibited under section 6(2) of the Sindh Building Control Ordinance, 1979 [SBCO] as follows:

“6(2) No building mentioned in sub-section (1) shall be occupied by any person or shall be allowed by the builder to be occupied, before the Authority has, on application of the occupant or owner, issued occupancy certificate, in such manner as may be prescribed”.

8. The submission of Mr. Usman Farooq that it was for the builder to obtain the occupancy certificate has no force when the prohibition in section 6(2) applies to all persons and envisages that where the building is complete and the builder fails to obtain an occupancy certificate then the purchaser of the building may apply for the same. In *Jamil Ahmed v. Karachi Building Control Authority* (2001 MLD 1635) a learned Division Bench of this Court held that purchasers of unauthorized shops who had entered possession without obtaining an occupancy certificate could not be treated as *bonafide* purchasers as they had entered possession in flagrant violation of the requirements of section 6 of the SBCO. In *Din Muhammad v. Government of Sindh* (2003 CLC 245) a learned Division Bench of this Court permitted the ejectment of occupants, by force if necessary, who were in possession of an unauthorized building without an occupancy certificate. Finally, in *Muhammad Saleem v. Administrator KMC* (2000 SCMR 1748), while adverting to section 6(2) of the SBCO, the Supreme Court of Pakistan held that:

“8. Suffice it to say, petitioners having not verified the right, interest and title of the vendors and having occupied the premises without obtaining occupancy certificate from KBCA cannot claim to have acquired a perfect and marketable title to the premises. It was incumbent upon them to be vigilant and over cautious in view of mushroom growth of illegal buildings, to find out whether the Project had been constructed with due approval and sanction of KBCA and whether requisite occupancy certificate had been obtained from the KBCA as mandated by law. By not taking care and caution to ascertain the title of the vendors, the petitioners can at best be said to have acquired a defective and unenforceable right to property at their own cost and risk. There is a well-known maxim of law relating to acquisition of property rights namely "Buyer be beware" which was obviously not adverted to by the petitioners. Since they were not put into possession of their respective premises as per amended law, they had stepped into the shoes of the builders and could hardly be said to be entitled to the issuance of a show-cause notice within the spirit of law. Learned High Court being fully

mindful of these circumstances was right in making an observation that for all practical purposes notice issued to the builders was in effect a notice to the petitioners. The plea of bona fide purchase can hardly attract equities in favour of the petitioners who would be deemed to be fully aware of the short-comings and lapses on the part of the builders from whom they purportedly acquired their right and interest to property. A reasonable possibility of their connivance with the builders in occupation of an illegal building cannot be altogether excluded in the circumstances. Even officials of KBCA seem to be indirectly involved in this nefarious deal by ignoring to take timely notice of illegal constructions in the City of Karachi.” (emphasis supplied)

9. Therefore, it stands settled that the intervenors who entered possession of an unauthorized building without an occupancy certificate in violation of section 6(2) of the SBCO cannot claim to be *bonafide* purchasers; they have no equity on their side; rather they have simply stepped into the shoes of the builder and will sink or sail with him.

10. The undisputed facts of the case are as follows:

(i) The said plot is a residential plot of 400 square yards in a residential area.

(ii) By letter dated 31-10-2022, the SBCA had approved a building plan of basement + ground + 1 floor, whereas the builder constructed ground + 3 floors and gave notice of completion to the SBCA on 09-03-2023 while submitting a completion plan for ground + 3 floors for SBCA's approval.

(iii) As per the approved building plan, the permitted covered area for each floor was 2292.50 sq. ft., and the total 6877.50 sq. ft. On the other hand, as per the completion plan, the area actually constructed for each floor had been increased to 2678.50 sq. ft., and the total to 10,714.00 sq. ft.

(iv) As per the approved building plan and Regulation 25-2.1 of the KBTPR, the permitted footprint of the building was 65% of the size of the plot i.e. 2340 sq. ft. out of 3600 sq. ft.; the minimum compulsory open space [COS] required was 7 ft. in the front, 5 ft. on the sides and

7 ft. at the rear. As per the completion plan, all of that has been violated. In fact, photographs filed by the builder himself show that the building rises from the plot-line/boundary wall and covers the entire plot leaving no COS whatsoever on the front and sides.

(v) While taking action against the aforesaid unauthorized construction, the SBCA had demolished the 4th floor and part of the 3rd floor in April and then in May 2023 as demonstrated by photographs filed by the SBCA, and yet the builder proceeded to reconstruct the 3rd floor again.

(vi) On 31-07-2023, the SBCA again took demolition action, and as the building presently stands, the front side of the 2nd and 3rd floors are partially demolished as evident from photographs filed by the SBCA.

11. Section 6(1) of the SBCO prohibits construction of a building without a plan approved by the Authority/SBCA. 'Building' is defined in section 3(d) to include "a part thereof". Admittedly, the 2nd and 3rd floor of the building in question, a part of the building, were constructed without any building plan approved by the SBCA. Section 7-A then stipulates that where a building is constructed in violation of section 6(1), the SBCA is empowered to eject the occupant and demolish the building.

12. To escape the consequence of section 7-A of the SBCO, i.e. demolition of 2nd and 3rd floors, the builder contends that the KBTPR empowers the SBCA to regularize unauthorized additional floors, and thus their refusal to exercise such discretion is unlawful. That submission is completely misconceived. Regularization of construction raised in violation of building regulations is dealt by Regulation 3-2.20 of the KBTPR. While clause (c) of Regulation 3-2.20.2 provides that the SBCA may regularize violations in the existing structure depending on the nature and merits of the case, the

proviso thereto gives a list of building violations that cannot be regularized at all and which includes the following:

“(v) if the building works or thereof exceed the maximum permissible height and number of stories;”

13. The permissible number of stories or floors of a building is indicated by the Floor Area Ratio¹ [FAR] prescribed for the plot and is regulated by ‘Zoning Regulations/Area Standards’ under Chapter 25 of the KBTPR. The provision applicable to said plot is Regulation 25-2.1 where under the FAR for a plot of 400 sq. yd. (or 3600 sq. ft.) is 1:1.3 i.e. 4680 sq. ft. (3600 x 1.3), which cannot be beyond ground + 1 floor. Therefore, when the KBTPR categorically prohibits the SBCA from regularizing the 2nd and 3rd floor of the impugned building, there is no question of exercising discretion to regularize. Demolition of said floors is unescapable.

14. Even at the time when the building regulations were not as specific as to what was regularizable or what was not, it had been held by the Supreme Court in *Haji Abdul Razzak v. Karachi Building Control Authority* (PLD 1994 SC 512), and then again by a larger Bench in *Ardeshir Cowasjee v. Karachi Building Control Authority* (1999 SCMR 2883) that the power to regularize contained in the SBCO and the building Regulations is intended and designed to be exercised when irregularity is of the nature which does not change the complexion or character of the structure originally proposed, nor is it to adversely affect the rights/interests of third parties.

15. As regards the violation of COS on the ground floor, that could have been examined and considered for regularization under proviso (vi) to clause (c) of Regulation 3-2.20.2 “if the violations/deviations in building works do not exceed beyond 20% of the permissible limit in respect of compulsory open space/covered area”. But apparently, as noticed above, the builder has constructed the entire COS at the front

¹ “Floor Area Ratio” means the total floor area of a building divided by the area of the plot. Regulation 2-56 of the KBTPR.

and the sides of the building. Therefore, to retrieve the minimum COS prescribed by the KBTPR, the ground floor too will have to be demolished to that extent.

16. Something must now be made of the certificate issued by the licensed Architect and Engineer who had endorsed the completion plan as follows:

“PROFESSIONAL’S CERTIFICATE

I hereby Certify that the Building Works in the building on the Plot No. _____ Completed / partly completed under my supervision and / entire satisfaction is in accordance with the building plan approved vide No. _____ Dated: _____

I also certified that the building has been constructed according to the approved specification.

Licensed Architect/Licensed Engineer
Building Supervisor

Sd/-
Jahanzeb Rasheed
Architect
PCATP Regd No.A-05572
SBCA AL-01-904-B

Sd/-
Eng. Rauf Ahmed Malik
Structural Engineer
SBCA License No.SB-06-337”

The certification that the building was constructed in accordance with the approved building plan is apparently false and thus attracts grounds for cancellation/suspension of licenses of the said Architect and Engineer under Regulation 4-10 of the KBTPR.

17. In view of the foregoing, C.P. No. D-2202/2023 is dismissed, and C.P. No. D-2489/2023 is allowed as follows:

- (i) The SBCA shall eject the occupants of the building on plot No. B-172, Block-5, Karachi Administration Employees Cooperative Housing Society, Karachi, with police aid if necessary;
- (ii) The SBCA shall demolish the entire 2nd and 3rd floor of the building. Thereafter, the remaining structure shall be demolished to the extent necessary to restore COS as per the KBTPR. The demolition shall be at the cost of the builder;
- (iii) The D.G. SBCA shall initiate action under Regulation 4-8 of the KBTPR against the aforesaid licensed Architect and Engineer of

the building for issuing a false certificate with the completion plan.

Petitions disposed off as above along with pending applications.

JUDGE

JUDGE

Signed on: