

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. D-1320 of 2023

Date	Order with Signature of Judge
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- 1). Mr. Justice Salahuddin Panhwar
- 2). Mr. Justice Mohammad Abdur Rahman

Petitioner : Represented by Mr. Shahan Karimi

Respondent No.1 : Represented by Mr. Jawad Dero, Additional Advocate General along with Syed Dr. Muhammad Ali, Additional Secretary Local Government

Respondent Nos.2 & 3 : Represented by Mr. Ghulam Akbar Lashari along with Ms. Roop Mala Singh,

Date of hearing : 19 March 2024

Date of Announcement : 15 March 2024

ORDER

MOHAMMAD ABDUR RAHMAN, J: Through this Petition, maintained under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the Petitioner has impugned a letter dated 17 September 2021 (hereinafter referred to as the "Impugned Order") issued by the Sindh Building Control Authority (hereinafter referred to as the "SBCA") rejecting a request for the sanction of an application for an addition/alteration to a construction that had been approved by the SBCA on Plot No. ST-33, Block-2, Karachi Development Authority Scheme No.5, Karachi admeasuring 5,212.71 square yards¹ (hereinafter referred to as the "Said Property").

2. The Petitioner is a body constituted by the Indus Valley School of Art and Architecture at Karachi Act, 1994 and by virtue of which it is, inter alia,

¹ The allotment letter issued by the Karachi Development Authority indicates the size of the Said Property to be 5,500 square yards, however as the documents issued by the KBCA indicate that the size of the Said Property is 5,212.71 square yards this order has been made on the basis of the square yardage of the Said Property as indicated in the

empowered to award “degrees, diplomas, certificates and other academic distinctions” to persons. The Petitioner has acquired title to the Said Property by virtue of an allotment made to it by the Karachi Development Authority (hereinafter referred to as the “KDA”) on 2 April 1991 and possession of which was handed over to it on 23 October 1991. Permission for construction was thereafter admittedly approved by the erstwhile Karachi Building Control Authority on 16 March 1993 under the provisions of Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979 and Karachi Building and Town Planning Regulations, 1979 (hereinafter referred to as the “KB&TPR, 1979”) for the construction of a Basement + Ground + 3 Upper floors structure on the basis of a Floor Area Ratio (hereinafter referred to as “FAR”) of 1:1.5 and against which a total covered area of 70,371.585 square feet, as against the maximum total covered area of 74,250 square feet, was approved by the erstwhile KBCA. It seems that thereafter a Completion Certificate dated 27 January 2015 was issued by the SBCA whereby the FAR was increased to 84,443.62 square feet, inter alia on the condition that:

“ ... *No further construction shall be allowed without prior permission from the authority.*”

3. It is common ground that the provisions of the KB&TPR, 1979 were repealed and replaced by the Karachi Building & Town Planning Regulations, 2002 (hereinafter referred to as the “KB&TPR, 2002”) and which, under the dispensation available in 2015 and also under the current dispensation **as clarified in the first note to Regulation 25-5.1 of the KB&TPR, 2002**, permitted an FAR of 1:6 thereby increasing the permissible covered area that may be constructed by the Petitioner on the Said Property to 281,486.34 square feet. After the completion plan had been issued, the Petitioner, attempted to seek further benefit of such an enhanced FAR, as granted under the provisions of the KB&TPR, 2002, and applied for permission seeking to alter/revise the sanction granted on 27 January 2015

by increasing the covered area of the construction **within the additional 197,042.72 square feet** permissible under Regulation 25-5.1 of the KB&TPR, 2002. After initial correspondence with the SBCA the approval sought was rejected by the SBCA by the Impugned Order in the following terms:

“ ... With reference to the submitted proposed addition/alteration building plan in respect of the subject plot submitted by you through licensed Architect has been carefully examined and found that previously proposed building plan was granted under Rules-1979 vide dated 16.03.1993 **and Regularization/Completion plan under amnesty scheme was also granted vide dated 27.01.2015** in which you have already availed more than allowable area, as per Clause 3-2.20.2 (d) of KB&TPR- 2002 (amended up to date), so the propose addition/alteration building plan cannot be considered.

Therefore in view of the above your propose addition/alteration building plan is hereby rejected by this authority.”

4. The Petitioner, through correspondence, protested the Impugned Order and clarified that the SBCA had incorrectly treated the application that had been maintained by the Petitioner for alteration/revision of the building plan dated 16 March 1993 as one for regularisation of a deviation of the regulations and pressed that the Impugned Order should be reconsidered. The Petitioners' requests fell on deaf ears and which has now prompted the Petitioner to maintain this Petition challenging the Impugned Order as being illegal and seeking directions to be issued to the SBCA to process the alteration/revision of the building plan dated 16 March 1993 presented to it by the Petitioner.

5. Mr. Shahan Karimi entered appearance on behalf of the Petitioner and has contended that the SBCA has misinterpreted their own regulations and have incorrectly applied the provisions of Regulation 3-2.20 of the KB&TPR, 2002 to both the applications maintained by the Petitioner in 2015 and to the application of the Petitioner seeking the alteration of the construction on a building and which does not exceed the provisions of the KB&TPR, 2002. He further contended that the reasons given by the SBCA in the Impugned Order, that the Completion Certificate dated 27 January

2015 was in effect a regularisation, thereby prohibiting any further construction was illogical as the enhancement in the covered area from 70,371.585 square feet to 84,443.62 square feet was well within the permissible 281,486.34 square feet as permissible under the first note to Regulation 25-5.1 of the KB&TPR, 2002 and hence must be treated as an alteration/revision and not as a regularisation as the enhancement in the covered area was within the limits permitted under the provisions of the first note to Regulation 25-5.1 of the KB&TPR, 2002. ON this basis he contended that the Impugned Order was not sustainable and sought directions to be issued to the SBCA to consider the plan submitted as an addition/alteration to the existing construction under Regulation 3-2.14 of the KB& TPR, 2002. Mr. Karimi did not rely on any caselaw in support of his contentions.

6. Mr. Ghulam Akbar Lashari has entered appearance on behalf of the SBCA and has contended that once the building is constructed in deviation of the approval originally sanctioned by the SBCA then the only jurisdiction that the SBCA can exercise is to regularise the construction under the provisions of 3-2.20 of the KB&TPR, 2002 and hence the Impugned Order cannot be assailed.

7. We have heard Mr. Shahan Karimi and Mr. Ghulam Akbar Lashari and have perused the record. The obligation on the Petitioner to apply to the SBCA to seek a sanction for construction has been imposed on it by virtue of Section 6 of the SBCO, 1979 and which reads as hereinunder:

“ ... 6. Approval of plan.-

(1) No building shall be constructed before the Authority has, in the prescribed manner, approved the plan of such building and granted No Objection Certificate for the construction thereof on payment of such fee as may be prescribed”

The expression prescribed is defined in Sub-Section (l) of Section 3 of the SBCO, 1979 and which reads as hereinunder:

“ ... *“prescribed” means prescribed by rules or regulations made under this Ordinance;*

Reading the definition of the expression “prescribed” within the context of Sub-Section (1) of Section 6 of the SBCO, 1979, the only interpretation that can be given is that, within the areas of the Province of Sindh which come within the jurisdiction of the SBCA, no building can be constructed until the SBCA has approved a plan for such construction in accordance with “rules” or “regulations made under the provisions of the SBCO, 1979. The regulations that attempted to regulate the construction of buildings and town planning within the city of the Karachi in the year 1979 were the KB&TPR, 1979 and which when originally drafted were to be notified under Article 142 (c) of the Constitution of the Islamic Republic of Pakistan, 1973 read with part I, item (37) of the Federal Legislative List but were in fact never notified in such terms and hence never took legal effect. The KB&TPR, 1979 was eventually given legal sanction by the insertion of Sub-Section (3) of Section 21 A into the SBCO, 1979² and by which they were to “be deemed to be the regulations” until the time that regulations were framed under Section 21 A of the SBCO, 1979. Such regulations were eventually framed under Section 21 A of the SBCO, 1979 on 4 April 2002 and which were known as the KB&TPR, 2002.

8. By virtue of Regulation 1-5 of the KB&TPR, 2002 those regulations were to “*supercede*” the KB&TPR, 1979 and all actions taken thereunder were to be”

“ ... *deemed to have been passed issued, established, initiated or made in these regulation (Karachi Building & Town Planning Regulation -2002), as if these regulations were in force at the time of which such orders were passed, instructions issued and made and shall continue to have effect accordingly.”*

Hence for all intents and purposes the original approval, that had been sanctioned by the erstwhile KBCA to the Petitioner on 16 March 1993 under the provisions of the KB& TPR, 1979, would be deemed to have been given under the provisions of the KB &TPR, 2002. It is also apparent that the Petitioner thereafter made some modifications to the plan sanctioned by the SBCA on 16 March 1993 and which were indicated on the completion plan which was submitted by the Petitioner to the SBCA and approved on 27 January 2015.

9. The dispute in this Petition revolves around the reliance by the SBCA on clause (d) of Regulation 3-2.20 of the KB&TPR, 2002 to reject the

² inserted by Sindh Building (Amendment) Ordinance No. III of 1982 dated 6th March 1982

application for alteration of the existing construction on the Said Property by the Impugned Order contending therein that the proposed construction exceeded the “allowable area” permissible under the KB & TPR, 2002. The provisions of that regulation read as hereinunder:

“ ... *The building which has already been considered/approved for Regularization / Revision / Addition / Alteration under the KB & TPR, 1979 shall not be further considered for regularization / addition / alteration/revision/extra floors on the existing building as per KB &TP Regulations 2002 except residential bungalow upto 399 Sq. Yds. subject to the stability certificate duly signed by Licensed Structural Engineer and for amenity plots subject to stability certificate by a Licensed Structural Engineer. However other than above categories the plan approved under regulations 1979 shall only be considered under the Same regulations viz. 1979.*”

The regulation clarifies that any construction that has been approved for “*Regularization / Revision / Addition / Alteration*” under the provisions of the KB &TPR, 1979 would not be considered for “*regularization / addition / alteration/revision/extra floors*” under the provisions of the KB & TPR, 2002. The provision further excludes two types of construction that were approved under the KB & TPR, 1979 and which can be subject to *regularization /addition/alteration/revision/extra floors*” under the provisions of the KB&TPR, 2002 i.e. construction on residential plots of size no greater than 399 square yards and construction on amenity plots.

10. We must admit we are unable to understand how the SBCA can even think of invoking the provisions of clause (d) of Regulation 3-2.20 of the KB &TPR, 2002 to reject the application of the Petitioner. Firstly, while the approval that was sanctioned by the SBCA was sanctioned under the provisions of the KB&TPR,1979 the completion certificate that was granted had not been sanctioned under the provisions of the KB & TPR, 1979 and had in fact been sanctioned under the provisions of the KB & TPR, 2002, thereby excluding the application of that provision. Secondly, even if the completion certificate is somehow to be considered to have been approved under the provisions of the KB&TPR,1979 an exception has specifically been made in that regulation for amenity plots such as the Said Property. Finally, as per Regulation 1-5 of the KB&TPR, 2002 all approvals that had been sanctioned under the KB&TPR,1979 are to be deemed to have been made under the provisions of the KB&TPR, 2002 in effect apparently rendering the entire regulation as superfluous.

11. Without dilating on the impact of the Regulation 1-5 on clause (d) of Regulation 3-2.20 of the KB &TPR, 2002, suffice to say as the completion certificate for the construction granted to the Petitioner had been granted

under the provisions of the KB &TPR, 2002 and as the Said Property is admittedly an amenity plot we are clear that the SBCA could not have relied on the provisions of clause (d) of Regulation 3-2.20 of the KB &TPR, 2002 to reject the application of the Petitioner.

12. What is left to be ascertained is as to what is the allowable area that can be sanctioned under the provisions of the KB & TPR,2002 ? The permissible area that can be constructed on the Said Property is regulated by the Regulation 25-5 of the KB & TPR, 2002 and which prescribes that:

“ ... *Amenity Plots*
25-5.1 *Subject to the general conditions as defined in Clause 25-1*

S No.	Plot Size	Foot Print	F.A.R.	Minimum COS Front (Ft.)	Minimum COS Sides (Ft.)	Minimum COS Rear (Ft.)
1.	Less than 1.0 Acre	50%	1:3.5	10 (3m)	10 (3m)	10 (3m)
2.	1.0 Acre and above	40%	1:4.5	20 (6m)	20 (6m)	20 (6m)

Note. - (1) For high education institute/ university duly chartered by Govt. of Sindh and recognized by Higher Education Commission (HEC). Govt. of Pakistan the FAR shall be 1:6 and same FAR shall be applicable for Educational Institutes/ Universities and Hospitals only on plot size 2000 Sq. Yds. (1680.67 m) mean for education/health/commercial purpose only...”

It is admitted that size of the Said Property is 5,212.71 square yards which being more than 1 Acre would permit an FAR of 1:4.5 and would result in allowable area of 211,114.755 square feet. However keeping in mind that the Petitioner is a “*university duly chartered by Govt. of Sindh and recognized by Higher Education Commission*” it would fall into the exception that has been crated in the first note to Regulation 25-1 and would be permitted to avail and FAR of 1:6 and would be allowed to construct on an area 281,486.34 square feet. From the documents appended it seems that the approval initially sanctioned by the SBCA on 16 March 1993 permitted a total covered area of 70,371.585 square feet and which was subjected to an upward revision of 84,443.62 square feet at the time when the completion certificate was issued and which is now being further enhanced by around 36,849.27 square feet to 123,519.27 square feet and

which is well within the permissible covered area of 281,486.34 square feet. We are therefore clear that this was not a regularisation and was in fact an alteration and no basis existed for the SBCA to reject the alteration that was sought by the Petitioner under the provisions of Regulation 3-2.4 of the KB&TPR, 2002 and which can clearly not be sustained.

13. While we could have simply granted this Petition, however keeping in mind the blatant illegality of the Impugned Order, we are of the considered opinion that the only reason why the application of the Petitioner was not accepted was so as to frustrate the application of the Petitioner so as to allow officers of the SBCA to obtain illegal gratification for sanctioning such an approval, we therefore while allowing the Petition and setting aside the Impugned Order direct as hereinunder:

- (i) the Petitioner shall within a period of one month submit all the documents required by the SBCA for seeking the sanction to the alteration of the construction that is proposed to be carried out on the Said Property;
- (ii) the Director General of the SBCA shall, on such an application being submitted by the Petitioner, **personally** consider the application of the Petitioner under the provisions of Regulation 3-2.4 of the KB&TPR, 2002, within a maximum period of 2 weeks from the date of its submission and pass an order thereon treating the Application of the Petitioner as an alteration and not a regularisation.

The Petition stands allowed in the above terms with no order as to costs.

J U D G E

J U D G E

ANNOUNCED BY

JUDGE

JUDGE

A.Wahab/PA