

*ORDER SHEET***IN THE HIGH COURT OF SINDH, KARACHI**

*Before: Nadeem Akhtar &  
Mohammad Abdur Rahman, JJ,*

**C.P. No.D-6115 of 2023**

Saad Aqil  
Vs.  
Province of Sindh & Others

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1. For hearing of CMA No.28581/2023 (U/S 151 CPC) :
  2. For hearing of main case.

Petitioner : Through Mr. Khilji Fahad Arif,  
Advocate

Respondent No.1 : Through Mr. Miran Muhammad Shah,  
Additional Advocate General

Respondents No.2 & 3 : Through Mr. Dhani Buksh Lashari  
Advocate

Date of hearing : 16.01.2024

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**ORDER**

**MOHAMMAD ABDUR RAHMAN, J.** The Petitioner has maintained this Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, seeking to demolish the construction on Plot No.OT-08/61, Old Town Quarters, Kharadar, Karachi, admeasuring 398 square yards (hereinafter referred to as the "Said Property") on account of the construction of the building being designated as "dangerous" and pursuant to Section 14 of the Sindh Building Control Ordinance, 1979 (hereinafter referred to as the SBCO, 1979").

2. The facts of this Petition are not in dispute, the Petitioner is the owner of the Said Property on which is constructed a building and which, from the photographs that have been filed, is clearly a construction that had been built prior to partition. From the photogprahs it is apparent that the building constructed is in a ruinous state but which cannot be demolished as it is purportedly

occupied by a solitary tenant. The Petitioner has also filed a letter dated 29 December 2023 confirming that, despite being an old construction, the Said Property does not find mention in the list of Protected Heritage maintained under the Sindh Cultural Heritage (Preservation) Act, 1994.

3. The Sindh Building Control Authority (hereinafter referred to as the "SBCA") have also filed their report confirming that the construction that exists on the Said Property is dilapidated and dangerous and is liable to be demolished. They however have also reconfirmed that the Said Property is partially occupied by one tenant and whose possession of the premises is preventing the construction from being demolished.

4. Mr. Khilji Fahad Arif, entered appearance on behalf of the Petitioner and has contended that the provisions of Section 14 of the SBCO, 1979 will prevail over the provisions of Sections 13 of the SRPO, 1979 (hereinafter referred to as the "SRPO, 1979"). He pleaded that the SBCO, 1979 is a special law and must prevail over the general provisions of the SRPO, 1979 which restrains the eviction of a tenant without first making an application under one of the clauses of Sub-Section (2) of Section 15 of the SRPO, 1979. He contended that as the construction on the Said Property had been declared as being "dangerous", there was no need for the Petitioner to maintain an application under clause (vi) of Sub-Section (2) of Section 15 of the SRPO, 1979 to seek the eviction of the Respondent No. 5.

5. Mr. Dhani Bux Lashari, counsel for the SBCA has supported the contentions as raised by Mr. Khilji Fahad Arif. Mr. Miran Muhammad Shah, the Additional Advocate General has confirmed that the Said Property is not designated as protected heritage under the provisions of the Sindh Cultural Heritage (Preservation) Act, 1994. Finally and despite notice having being issued and served on the Respondent No.5, no one has entered appearance on his behalf.

6. We have heard the counsel for the Petitioner, the Counsel for the SBCA and the Additional Advocate General and have perused the record. The Petition raises two questions and which are:

- (i) *as to whether the protection given to a tenant by Section 13 of the SRPO, 1979 would be overridden by the provisions of Section 14 of the SBCO, 1979 where a building is declared by the SBCA to have a likelihood of collapsing and hence would be classified as a “dangerous” building; and*
- (ii) *as to what rights, if any, would an occupier of such a building having after the demolition of the structure.*

As the construction is not located within the jurisdiction of a Cantonment Board, this judgement will not opine on an identical issue that could be raised in respect of constructions which are declared as “dangerous” under the provisions of the Cantonment Act, 1924 and which will have to be considered separately in appropriate proceedings.

**A. The Duty Cast on the SBCA to regulate “Dangerous” Buildings**

**(i) The Provisions of the Sindh Building Control Ordinance, 1979**

7. The construction of buildings in the Province of Sindh, excluding the areas coming within the domain of a Cantonment, are regulated under the provisions of the SBCO, 1979 the preamble of which reads as under:

“ ... Preamble.

*Whereas it is **expedient to regulate the planning, quality of construction and buildings control. Prices charged and publicity made for disposal of buildings and plots by builders and societies and demolition of dangerous and dilapidated buildings** in the province of Sind*

Section 14 of the SBCO, 1979 regulates the right of a person to remain in occupation of a building that is considered by the SBCA to be dangerous. The section reads as under:

“ ... **14. Dangerous Buildings**

(1) *If it comes to the notice of the Authority that a building is likely to collapse, the Authority may, after such enquiry as it deems fit order for carrying out the specific repairs or demolition of the whole or part of the building.*

(2) *Where the specific repairs are to be carried out, the Authority may, by notice, require the owner of building or in the event of his failure the occupier thereof to carry out such repairs within such period as may be specified in the notice and if the repairs are not carried out within the specified period, the Authority may, notwithstanding any other law for the time being in force proceed to have the building demolished and the cost of demolition shall be recovered from the owner as arrears of land revenue.*

(3) *Where the whole or a part of the building is to be demolished, the Authority may, by notice, require the occupier or occupiers thereof to vacate the building within the period specified in the notice and if the building has not been vacated within such period, the Authority may, notwithstanding any other law for the time being in force order that occupier or occupiers of the building be ejected, if necessary, by force.*

*Provided that no action shall be taken under this section unless the person who is likely to be affected thereby is given an opportunity of being heard.”*

**(ii) The Obligation on the SBCA**

8. As is apparent the purpose of the SBCO, 1979, as indicated in the Preamble, was *inter alia* to regulate the demolition of “dilapidated” and “dangerous” buildings within the Province of Sindh. The duty cast is clearly in furtherance of the duty of the SBCA to ensure that construction in the Province of Sindh is to safeguard the safety of the public.<sup>1</sup> We have no doubt that such an obligation includes the demolition of dilapidated” and “dangerous” structures which have in the past led to a loss of human life. It is in this regard, that the provisions of Sub-Section (1) of Section 14 of the SBCO, 1979 cast on the SBCA a mandatory obligation, to take notice

<sup>1</sup> See *Mian S.M. Yousuf Baghpattee vs. Karachi Building Control Authority and others* 1993 CLC 2491

of a structure which is “likely to collapse” and after conducting an enquiry to either compel the owner of the structure to either:

- (a) carry out specific repairs, or
- (b) to demolish the whole or a part of the building.

We would stress that the obligation that is cast on the SBCA to take notice, is not to wait for information to be placed before it regarding the likelihood of a building to collapse but rather it is a continuing obligation to take a proactive role by itself in reviewing the construction of buildings within its jurisdiction so as to identify buildings that are likely to collapse and after completing an enquiry, in accordance with the provisions of Section 14 of the SBCO, 1979, to forthwith take action to direct the owner to either carry out specific repairs to remove the likelihood of the building from collapse or by directing the owner or occupier to demolish the “whole” of the building or a “part” of a building to eliminate the “likelihood of the building from collapse”.

***(iii) The application of the provisions of Section 14 of the SBCO, 1979***

9. As per Sub-Section (1) of Section 14 of the SBCO, 1979 where the SBCA has “notice” of the “likelihood of a building to collapse”, it must conduct an enquiry and after determining its findings in that enquiry by a speaking order has the authority to order for either “specific repairs” to be carried out to ensure that the building does not collapse or in the alternative to order for the demolition of the building. Sub-Section (2) and Sub-Section (3) of Section 14 of the SBCO, 1979 elaborate on the powers conferred on the SBCA under Sub-Section (1) of Section 14 of the SBCO, 1979 by identifying the manner in which the specific repairs or demolition is to be carried out.

10 In respect of specific repairs to be conducted to a building or a portion of a building under Sub-Section (2) of Section 14 of the SBCO, 1979 or for demolition of the building under Sub-Section (3) of Section 14 of the SBCO, 1979, it is first incumbent on the SBCA

to carry out an enquiry as envisaged by Sub-Section (1) of Section 14 of the SBCO, 1979. The enquiry must commence by issuing a notice, which should be headed as being issued under Section 14 of the SBCO, 1979, and should be issued at the minimum to the owner **and** any occupier of the building and affording each of them an opportunity of a hearing as mandated by the proviso to Section 14 of the SBCO, 1979. The enquiry envisaged to our mind must have within its members a qualified structural engineer who is able to identify the defects in the building. The enquiry, after having heard all concerned, may by a speaking order direct action to be taken to remedy the defects in the structure of the building or order for the demolition of a building. Clearly, the order passed pursuant to the enquiry must be proportional and the SBCA should not be advocating the demolition of the building as a first resort but as a last resort. As such any order passed for demolition must necessarily clarify as to why repairs to the building would not eliminate the likelihood of the building from collapse. Thereafter, on the basis of the findings of the enquiry, the SBCA must, in the event that building is required to be repaired, first issue a notice to the owner of the building to **commence** making the repairs required by the enquiry within a prescribed time. If the owner fails to commence such repairs within the time prescribed another notice would be issued, this time, to the occupier to commence such repairs. In the event that the repairs are commenced by the occupier, unless it can be shown by contract as between the occupier and the owner that such an obligation to cause the repairs lay on the occupier, the cost incurred can be recovered by the occupier from the owner. In the event that both the owner and the occupier each fail to carry out the repairs within the prescribed time, then the SBCA is empowered to issue a notice under Sub-Section (3) of Section 14 of the SBCO, 1979 directing whoever is in occupation of the building to vacate the building and the SBCA is obligated at its own cost and expense to cause the building to be demolished. If the occupiers of the building do not vacate the building in the time frame prescribed, the SBCA is obligated to cause for any person in occupation of the building to be “ejected” and if resistance is made to use “force” to secure such “ejectment”. If the enquiry conducted under Sub-Section (1) of

Section 14 of the SBCO, 1979, in the manner as clarified above, comes to the conclusion that the building is liable to be demolished, then the SBCA can directly resort to the provisions of the Sub-Section (3) of Section 14 of the SBCO, 1979 and exercise its power, as contained in Sub-Section (1) of Section 14 of the SBCO, 1979, to order for the demolition of the building. Any cost incurred by the SBCA to conduct such demolition will be at the sole cost of the owner and can be recovered, as clarified in Sub-Section (2) of Section 14 of the SBCO, 1979 “as arrears of land revenue.”

11. The provisions of such an enquiry are subject to the proviso to Section 14 of the SBCO, 1979 which mandates that a hearing must be given to all “persons” who are likely to be affected by an order passed by the SBCA. We are clear that the expression “person” as used in the proviso would mandatorily include the owner of the property and a person in occupation of the property and may, dependent on the facts and circumstances, also include any other class of persons impacted by the repairs and demolition such as residents in properties neighbouring the property.

***(iv) The Case Law that has developed on the Interpretation of Section 14 of the SBCO, 1979***

12. The provisions of this Section have come to be interpreted before this Court and before the Honourable Supreme Court of Pakistan. In the decisions reported as ***Furqan Ahmad vs. Deputy Controller of Buildings and another***,<sup>2</sup> ***Abdul Aziz vs. The Director- General Karachi Development Authority and 2 others***,<sup>3</sup> ***Vincent vs. Kaachi Development Authority***,<sup>4</sup> ***Nasir Khan vs. Aziz Ahmed***,<sup>5</sup> and ***Messrs Haji Khuda Bux Amir Umar vs. Karachi Building Control Authority and another***<sup>6</sup> it was held that the failure to issue notices prior to issuing an order for the demolition of the building would be in excess of the jurisdiction conferred on the SBCA and would be illegal. Regarding the enquiry to be carried out it has been held in the decision reported as ***Messrs Pakistan***

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<sup>2</sup> 1984 CLC 2476

<sup>3</sup> 1990 CLC 119

<sup>4</sup> 1992 CLC 518

<sup>5</sup> 1998 MLD 681

<sup>6</sup> 2000 MLD 247

**Pharmaceutical Products Ltd. and 4 others vs. Karachi Building Control Authority**<sup>7</sup> that “wide powers vested in the SBCA to form an opinion above the state of the structure” as there was no mandatory requirement in the statute that the findings of the enquiry are to be based on any particular material. We also have noted that there is a difference of opinion as between two Learned Single Judges of this Court as to whether the provisions of Section 14 of the SBCO, 1979 confer on the SBCA the authority to demolish a building. In the decision reported as **Muhammad Aftab vs. K.B.C.A.**<sup>8</sup> while hearing an injunction application it was considered that:

“ ... Quite surprisingly, no power to carry out demolition of building is vested upon the authority itself in the event of its forming the opinion that the building in question requires to be demolished wholly or in part. The provision may appear to be strange, nevertheless, the non-conferment of the exercise of power contained in section 14 of the 1979 Ordinance have to be followed in letter and spirit. Unless the procedure prescribed under section 14 is followed, the authority cannot take action as is contemplated in the present case. The procedure prescribed under section 14 of 1979 Ordinance provides safeguards against arbitrary action of the authority to carry out demolition and such logic has to be preserved.”

Conversely in the decision reported as **M. Zekar and 18 others vs. Lal Taj Khan**,<sup>9</sup> again while considering an injunction application, the learned single Judge while disagreeing with the interpretation cast in **Muhammad Aftab vs. K.B.C.A.**<sup>10</sup> has held that:

“ ... With respect, I am unable to agree with the foregoing conclusion in Muhammad Aftab's case for the following reason.

*Relying on subsection (3) of section 14 of the 1979 Ordinance the Court in Muhammad Aftab came to the conclusion that: "In case the building is not vacated, the authority is empowered merely to eject the occupiers through use of force".*

*The operative portion of subsection (3) of Section 14 reads as follows:*

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<sup>7</sup> 1986 CLC 581

<sup>8</sup> 1999 YLR 529

<sup>9</sup> 2009 YLR 1540

<sup>10</sup> 1999 YLR 529



*“...the Authority may, notwithstanding any other law for the time being in force order that the occupier or occupiers of the building be ejected, if necessary, by force”.*

*In Muhammad Aftab the Court was quite correct in interpreting the words "the authority may...order that the occupier or occupiers of the building be ejected, if necessary, by force" to mean that the K.B.C.A is "empowered to eject the occupiers through use of force". The Court was also correct is using the word "merely but only when construing the import of subsection (3) of Section 14.*

*What I am unable to agree with is the Court's conclusion in Muhammad Aftab that the K.B.C.A has no power at all to carry out demolition itself if it forms the opinion that the whole or part of a building is to be demolished.*

*Employing the process of reasoning used in Muhammad Aftab's case, this power, in my opinion, is 'conferred by subsection (1) of section 14 itself which, in pertinent part, provides that if it comes to the notice of the K.B.C.A that a building is likely to collapse, the K.B.C.A may, after conducting such enquiry as it deem fit, order for carrying out the demolition of the whole or part of the building.*

*If, in subsection (3) the K.B.C.A can order that the occupier or occupiers of the building be ejected, if necessary, by force and then itself proceed to eject the occupiers through use of force, there is reason why, in the case of subsection (1) of section 14, the K.B.C.A, after ordering for demolition of the whole of part of a building, cannot proceed to demolish the building itself.*

*In my opinion subsection (1) of section 14 of the 1979 Ordinance fully empowers the K.B.C.A to demolish a building that has been determined to be dangerous and beyond repair (a Category-I Dangerous Building) or, if capable of repair, which has not been repaired as required (a Category-II Dangerous Building). In both cases the demolition can be carried out by the K.B.C.A itself or through a person acting on its behalf.*

*If a building is to be demolished by the K.B.C.A in exercise of the power conferred by Section 14 of the 1979 Ordinance, it must first be cleared by the K.B.C.A of all occupiers. That is the subject of subsection (3) of section 14 of the 1979 Ordinance.”*

As is evident, we find ourselves in agreement with the interpretation that has been cast on Section 14 of the SBCO, 1979 in the decision reported

as *M. Zekar and 18 others vs. Lal Taj Khan*<sup>11</sup> and respectfully disagree with the interpretation cast in the decision reported as *Muhammad Aftab vs. K.B.C.A.*<sup>12</sup> that the SBCA lacks the jurisdiction to demolish a building. The language used in Sub-Section (1) of Section 14 of the SBCO, 1979 empowers the SBCA to “*order for carrying out the ... demolition of the whole or part of the building*” and clearly there is nothing in any provisions of the SBCO, 1979 including, but not limited to, the provisions of Section 14 of the SBCO, 1979 to restrict the SBCA, when passing such an order, to prevent it from directing its officers to affect the demolition. The decision in *Muhammad Aftab vs. K.B.C.A.*<sup>13</sup> to that extent is clearly not a correct interpretation of the provisions of Section 14 of the SBCO, 1979 and to extent should not be followed.

## **B. The Rights of Persons under Section 14 of the SBCO, 1979**

### **(i) The issue**

13. In practical terms, the issue that nearly always arises whenever a notice is impugned under Section 14 of the SBCO, 1979 before this court is not as to whether the building that is required to be demolished is or is not “dangerous” but rather as to what the rights are of the occupiers in the property after it is demolished. This is primarily on account of the provisions of Section 14 of the SBCO, 1979 being silent as to the rights of an occupier post the repair or demolition and also on account of this section being used by an owner of a property in collusion with officials of the SBCO, 1979 to bypass the provisions of the Sindh Rented Premises Ordinance, 1979 (SRPO, 1979) and indirectly “evict” the tenant from his possession of a tenement. While the right to demolish and reconstruct on a property, if exercised by an owner under clause (vi) of Sub-Section (2) of Section 15 of the SRPO, 1979 would secure the rights of a tenant to be reintroduced into a tenement when a building is reconstructed on a property which housed his tenement, Section 14 of the SBCO, 1979 fails to determine the rights of persons who are in occupation of such buildings after such a building is demolished.

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<sup>11</sup> 2009 YLR 1540

<sup>12</sup> 1999 YLR 529

<sup>13</sup> 1999 YLR 529

14. To our mind, the rights of a person who is in occupation of premises under, post the demolition, would depend on his status in the property and which to our mind can be classified in five separate categories:

- (i) A person can be classified as the owner of a property whereby he possesses all the right, title and interest in and to an immovable property;
- (ii) In the event that a person is not the owner of a property, his status as an occupier may be that of a “lessee” and whose obligations with a “lessor” would ordinarily be regulated under the provisions of the Transfer of Property Act, 1882 (hereinafter referred to as the “TPA, 1882”) and whereby he would under Section 105 of the TPA, 1882 be granted by the owner of the Said Property a “right” in the property to enjoy such property” for a defined period of time;
- (iii) With the promulgation of what have come to be known as “Rent Laws’, the “right to enjoy such property” were restated and which are generally in the Province of Sindh at present defined by the SRPO, 1979, while in respect of properties located in the jurisdiction of a Cantonment with the Province of Sindh, such rights and obligations are in the Cantonment Rent Restriction Act, 1963. In the event the relationship comes to be regulated by the provisions of the SRPO, 1979 the tenant's status is, however, protected by Section 13 of the SRPO, 1979 which states that:

“ ... 13. *No tenant shall be evicted from the premises in his possession except in accordance with the provisions of this Ordinance.*”

There being no right conferred on a “landlord”, under the provisions of the SRPO, 1979, to evict a tenant on the determination of the term of a lease or tenancy, the occupation of a tenant in a tenement is secured under

Section 13 of the SRPO, 1979 and his character in respect of the tenement is colloquially referred to as a “statutory tenant” and who retains the right to remain in the tenement and can only be ejected thereafter in accordance with the provisions of Section 14, Clauses (i) to (vii) of Sub-Section (2) of Section 15 and Sub-Section (2) of Section 16 of the SRPO, 1979;

- (iv) Where the relationship of a “landlord” and a “tenant” does not exist either the TPA 1882 or under the SRPO, 1979, the legal character of a person in possession of an immovable property, who has been introduced into a property at the behest of the owner, must be classified as a “licensee” and whose rights are determined under the provisions of the Easements Act, 1882; and
- (v) Where a person enters onto a property without the consent of the owner, his status is neither that of a “tenant” nor that of a “licensee” and can only be classified as that of a trespasser.

***(ii) The Right of an owner when a notice is issued by the SBCA under Section 14 of the SBCO, 1979***

15. Being the owner of the entire estate in the land, clearly after the demolition of a structure, on the basis of an order passed by the SBCA under Section 14 of the SBCO, 1979, an owner of the property would have all the rights, title and interest that were invested in him in respect of the property prior to its demolition. This would however be subject to the right of the SBCA to institute proceedings for recovery of amounts expended by the SBCA for the demolition of the structure and which would be recoverable by the SBCA as arrears of land revenue thereby giving the SBCA, unless such amounts are paid to the SBCA by the Owner, the right to attach and sell the property to recover such amounts.

***(iii) The Right of a Lessee under the TPA, 1882 when a notice is issued by the SBCA under Section 14 of the SBCO, 1979***

16. As the provisions of Section 14 of the SBCO, 1979 do not in any manner state that the rights of the “occupier” would determine on the

issuance of a notice under Section 14 of the SBCO, 1979, we would consider that the rights of the lessee have to be considered in terms of their rights and obligations as agreed in the Deed of Lease. These rights would ordinarily be regulated by the provisions of the TPA, 1882. A lease under Section 105 of the TPA, 1882, being a right not to the possession of a property but a right in the property itself<sup>14</sup> would to our mind not automatically determine on a property being “vacated” by a tenant pursuant to an order under Section 14 of the SBCO, 1979. The only argument that we can consider that could be raised was that the lease had determined on account of the subject matter of the property have been demolished i.e. the lease stood frustrated. Clearly, as per clause (e) under heading B of Section 108 of the TPA, 1882, **unless specifically contracted otherwise**, just because the construction on a property is declared as “dangerous” under Section 14 of the SBCO, 1979 and on account of which the structure housing the lessee is demolished, the right of the lessee in the property would not *ipso facto* terminate the right of the lessee in the property on the ground of frustration. The relevant portion of the section reads as under:

“ ... 108. *Rights and liabilities of lessor and lessee.—*

*In the absence of a contract or local usage to the contrary, the lessor and the lessee of immovable property, as against one another, respectively, possess the rights and are subject to the liabilities mentioned in the rules next following, or such of them as are applicable to the property leased:-*

*The benefit of such contract shall be annexed to and go with the lessee’s interest as such, and may be enforced by every person in whom that interest is for the whole or any part thereof from time to time vested.*

**(B) Rights and Liabilities of the Lessee**

*(e) if by fire, tempest or flood, or violence of an army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void:*

<sup>14</sup> See Manish Anand vs. Ramniwas Gupta AIR 2012 MP 90

*Provided that, if the injury be occasioned by the wrongful act or default of the lessee, he shall not be entitled to avail himself of the benefit of this provision:*

This section has been interpreted by the Honourable Supreme Court of Pakistan in the decision reported as **Abdul Mutaleb vs. Mst. Rezia Begum**<sup>15</sup> wherein it was held that:

“ ... Section 111 of the Transfer of Property Act provides the various modes in which a lease in respect of immovable property may be determined. Under that section, the destruction of the whole or part of the subject-matter of a lease is not one of the grounds for which a lease in respect of immovable property comes to an end. Except section 111 of the Transfer of Property Act, there is no other provision either in that Act or in the premises Rent Control Act or its successor Ordinance with regard to the mode of determination of a lease in respect of immovable property. Section 108(e) of the Transfer of Property Act, of course, provides that if any material part of the demised property is wholly destroyed by fire, tempest or flood etc., the lease shall, at the option of the lessee, be void. Although the two huts of the suit premises were destroyed by fire, the lessee in this case far from exercising the option to avoid the lease, persisted that the lease continued in operation. It cannot, therefore, be said that with the destruction of the two huts included in the suit premises the lease automatically came to an end under any of the provisions of the laws by which the lease was governed. There is yet another aspect of the matter. When the lease included not only the huts but also the land, the Courts below were not correct in holding that the entire subject-matters of the lease were destroyed by fire, because the land itself remained unaffected by fire. If the respondent is not willing to construct any new but on the land, it is just possible for the appellant to utilise the vacant land for the purposes of his business till the lease is determined according to law.

*The learned Judges of the High Court proceeded on the erroneous view that the lease in question was in respect of the two huts alone which were destroyed by fire. Accordingly, they came to the*

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<sup>15</sup> PLD 1970 SC 185

*conclusion that with the burning of the huts, the entire subject-matters of the lease were destroyed and consequently section 108(e) of the Transfer of Property Act was not attracted to this case and the lease automatically came to an end. In support of this view, they relied on an earlier decision of the High Court of East Pakistan in the case of Golamar Rahman Sowdagar v. Emaratannissa Begum (PLD 1957 Dacca 372). In that case, the subject matter of the lease was only a but and not the land. As the but was completely burnt down, it was held in that case that the option under section 108(e) of the Transfer of Property Act was not available to the lessee and that the lease came to an end on the general principles of law. The learned Judges deciding the cited case did not, however, explain the general principles of law said to be applicable in that case. However, the facts of the aid present case are different in that the land which is also the subject-matter of the lease was not destroyed and, as such, there was no complete destruction of the demised premises. The appellant as lessee had, therefore, an option under section 108(e) of the Transfer of Property Act to take the stand that the lease is not void.*

*Even if it is assumed that the entire subject-matters of the lease in question were destroyed, the appellant had still the option to avoid or not to avoid the lease under section 108(e) of the Transfer of Property Act. The said section runs thus*

*"if by fire, tempest or flood, or violence of any army or of a mob or other irresistible force, any material part of the property be wholly destroyed or rendered substantially and permanently unfit for the purposes for which it was let, the lease shall, at the option of the lessee, be void."*

*The learned Judges of the High Court as also the learned Judges who had decided the case of Golamar Rahman Sowdagar v. Emaratennissa Begum appeared to be of the view that section 108(e) is attracted only in a case where the subject-matter, of a lease is partially destroyed and that the said section has no application in the case of destruction of the entire subject-matter. The relevant expression occurring in the said section which appeared to have weighed with the learned Judges in taking that view is "any material part of the property be wholly destroyed". The word "any" occurring in the said expression does*

*not necessarily mean only a part; it is a word of wider connotation and implies the whole as well. The word "any", as stated by Fry, L. J. in the case of Duck v. Dales (13 Q B D 843) is a word which excludes limitation or qualification. The word "any" occurring in a lease came to be construed by the House of Lords in the case of Liddy v. Kennedy (L R 5 H L 134). In that case, the lease gave a power to the lessor to resume "possession of any portion of the premises demised". In that case, there arose a controversy with regard to the construction of the word "any" occurring in the above-quoted expression. It was contended that the word "any" implied that the demised property was resumable piecemeal and not all at a time. The House of Lords rejected that contention and construed the word "any" as implying not only a part but also the whole. Accordingly, it was held in that case that the landlord had the power of resuming either the whole or any portion of the demised property. This construction put on the word "and" is equally apt in this case. If the lessee has the option under section 108(e) of the Transfer of Property Act to avoid a lease on the ground of partial destruction of the demised property and thereby relieve himself of the liability to pay rent, it does not stand to reason why he shall not have the option to avoid the lease if the whole of the demised property is destroyed. If the option under the said section be not available to the lessee in the event of destruction of the whole of the demised property, he shall, in spite of non-existence of the, subject-matter of the lease continue to remain liable for rent during the entire period of the lease and for all time to come if the lease is a perpetual one, whereas in the case of partial destruction of the demised property he can get rid of his liability to pay rent by avoiding the lease by exercising his option under section 108(e). The unjust consequences as indicated above may ensue if section 108(e) be not held to be applicable-also in the case of destruction of the whole of the subject-matter of a lease. It is the duty of the Court to put such construction on statutory provisions as it appears to it to be most in accord with reason, justice and fairness and to avoid such construction as may cause hardship and injustice. We, therefore, think that section 108(e) of the Transfer of Property Act does not admit of any narrow construction and that a fair and reasonable construction of that section warrants its application also in the case of destruction of the entire subject-matter of a lease.*



*Mr. Ahmad Sobhan, learned counsel for the respondent submits that the lease in respect of the suit premises was frustrated according to the provisions of section 56 of the Contract Act. The doctrine of frustration, as embodied in the said section is applicable only to executory contracts whereunder performance or further performance of a promise is outstanding, but does not apply to a transaction which is complete and has already created a right in immovable property in favour of a party. In the present case, the lease in respect of the suit premises was a completed transaction. Under the lease, the appellant got possession of the premises paid rent therefor to the respondent. Thus, the lease created an estate in immovable property in favour of the appellant. This is manifest from the definition of 'lease' in section 105 of the Transfer of Property Act, which runs thus :-*

*"A lease of immovable property is a transfer of a right to enjoy such property, made for a certain time, express or implied, or in perpetuity, in consideration of a price paid or promised, or of money, a share of crops, service or any other thing of value, to be rendered periodically or on specified occasions to the transferor by the transferee, who accepts the transfer on such terms."*

*In view of this definition the lease clearly created a right in rem in favour of the appellant, however transient that right may be. After the accrual of this right under the lease, nothing more remained to be performed by either Mr. Ahmad Sobhan then invoked the doctrine of frustration under the English Common Law in support of his contention that the lease in favour of the appellant came to an end under that doctrine. He cited the case of *Denny, Mott & Dickson Ltd. v. James B. Fraser & Co. Ltd.* (1944 A C 265) for this purpose. In that case, an executory contract was held to have been frustrated by operation of law. That case is therefore, of no assistance here.*

*Even in England, the doctrine of frustration has not been definitely held to be applicable to a lease creating an estate in immovable property. The question whether under the English Common Law this doctrine applies to lease or not was exhaustively dealt with by the House of Lords in *Cricklewood Property and Investment Trust Ltd. v. Leightons Investment Trust Ltd.* (1945 A C 221). Lord Russel and Lord Goddard were*

*definitely of the opinion that the doctrine of frustration cannot apply to a lease in respect of immovable property as it creates an estate in such property. Lord Simon and Lord Wright agreed that generally speaking the doctrine of frustration is inapplicable to a lease, but expressed the view that it is only in rare and exceptional circumstances that the doctrine might apply. Lord Porter who was also a party to the decision in the cited case did not, however, express any opinion on this point. This question came up for consideration in a later case, namely, *Denman v. Brise* ((1949) 1 K B 22). In view of the divergent opinions expressed by the House of Lords in the case of *Cricklewood Property and Investment Trust Ltd. v. Leightons Investment Trust Ltd.* the Court of Appeal preferred to take its own decision in the case of *Denmen v. Brise* on the question of application of the doctrine of frustration to a lease. In that case, a house in occupation of a tenant was destroyed by a bomb. The tenant accordingly ceased to occupy the premises, but there was no evidence to show that he abandoned or surrendered the lease. The landlord constructed a new house on the old site. There after, the tenant wanted to get possession of the new house, but the landlord refused. On an action by the tenant for possession, the Court found the tenant to be entitled to occupy it. In another identical case, namely, *Simper v. Combs* ((1948) 1 All E R 306), Denning, J. sitting on the King's Bench Division held:*

*"The position at common law is plain. She had a contractual tenancy, and that tenancy has never been determined by due notice to quit. It, therefore, continues in existence. The destruction of the house by a bomb did not determine the tenancy. It is well settled that the destruction of a house does not by itself determine the tenancy of the land on which it stands.*

*The result is that there has been nothing at common law to determine the tenancy.*

*The fact that a new house has been erected on the site does not make any alteration to the legal position."*

*Thus, the doctrine of frustration was not applied even in such extreme cases. It is not necessary to refer to other English decisions inasmuch as the question whether the doctrine of frustration applies to a lease does not appear to have been*

*finally resolved so far in England by any authoritative decision of the House of Lords. Section 56 of our Contract Act lays down as rule of positive law relating to frustration of contract by reason of supervening impossibility or illegality of the act agreed to be done by the contracting parties. Next, section 111 of the Transfer of Property Act provides the various modes for the, determination of a lease in respect of immovable property of the kind involved in this case. **In view of these statutory provisions, there is really no scope for importing the doctrine of frustration under the English Common Law, although the English decisions possess persuasive value and may be helpful in showing how Courts in England decide cases under circumstances similar to those which have come before our Courts (see A I R 1930 P C 59).***

*The subject-matters of the lease in this case, as already stated, were not completely destroyed, for the demised land remained unaffected by fire. The appellant did not walk out and abandon the land after the destruction of the huts. Nor did he exercise the option under section 108(e) of the Transfer of Property Act with a view to avoiding the lease. A lease may be, avoided on the happening of a contingency as contemplated by its terms, express or implied. No provision is there in the lease deed in this regard. It cannot, therefore, be said that the lease in question came to an end with the destruction of the two huts comprised in the demised premises. Although the lease did not come to an end, the appellant was not authorised to raise a structure of his own on the old site except with the consent of the respondent.”*

As opined by the Honourable Supreme Court of Pakistan, unless the land itself is “completely destroyed” or unless there is either an “express term or implied term” in the lease itself to regulate the obligations as between the lessor and the lessee, in the event of a property being declared as “dangerous” under Section 14 of the SBCO, 1979, the lease itself will not determine and the lessee would continue to retain a right to renter the land on which the construction stood. Needless to say, the lessee would have an option to terminate the lease but until such moment that he exercises such an option, his right in the property would endure.

17. The law in the United Kingdom since the decision of the Honourable Supreme Court of Pakistan in **Abdul Mutaleb vs. Mst. Rezia Begum.**<sup>16</sup> has remained consistent and as clarified in Chitty on Contracts<sup>17</sup>:

“ ... *there is no reported case in England in which a lease has been held to be frustrated.*”

The decision referred to by the Honourable Supreme Court of Pakistan and reported as **Cricklewood Property and Investment Trust Ltd. v. Leightons Investment Trust Ltd.**<sup>18</sup> was reconsidered by the erstwhile House of Lords, in a decision reported as **National Carriers Ltd. vs. Panalpina (Northern) Limited**<sup>19</sup> where while considering the impact of a temporary order passed by a local council closing a road, which provided the only access to a premises for a portion of the term of the lease, the House of Lords had held that such an act would not amount to frustrating the lease so to absolve the lessee from paying rent. After spending much time analysing the theoretical foundations of the doctrine of frustration it was held that while the doctrine of frustration could apply to leases, the application of the doctrine would be very rare and would as held in **Cricklewood Property and Investment Trust Ltd. v. Leightons Investment Trust Ltd.**<sup>20</sup> and which was reaffirmed in **National Carriers Ltd. vs. Panalpina (Northern) Limited**<sup>21</sup> to apply in an Atlantean situation where:

“ ... *some vast "convulsion of nature swallowed up the property altogether, or buried it" in the depth of the sea.*”

18. As stated earlier, the language of Section 14 of the SBCO, 1979 where a building has been declared as dangerous simply calls

<sup>16</sup> PLD 1970 SC 185

<sup>17</sup> Beale, H.G. et al. (2021) **Chitty on Contracts Volume 1, General Principles.** London, Sweet & Maxwell 34<sup>th</sup> Edition, at paragraph 26-053

<sup>18</sup> [1945] A.C. 241; also reported in [1945] 1 All E.R. 252

<sup>19</sup> [1981] A.C. 675; also reported in [1981] 1 All E.R. 161

<sup>20</sup> *Op cit* at pg. 229

<sup>21</sup> [1981] A.C. 675; also reported in [1981] 1 All E.R. 161

for the occupier to “vacate” or be “ejected” from the premises and not for the determination of the rights of the occupier to the property. As such we are clear that an order passed by the SBCA under the provisions of Section 14 of the SBCO, 1979, calling for the “vacating” of a premises or for the “ejectment” of occupants thereon, in respect of a construction which is deemed to be “dangerous” would not in any manner take away a right that a lessee would have in a property under a lease in terms of Section 105 read with clause (e) of Heading B of Section 108 of the TPA, 1882 and such a lessee would, unless there are either:

- (i) express terms of the lease to the contrary which regulate the obligations as between the lessor and the lessee; or
- (ii) unless a term can be implied into the lease to determine the lease; or
- (iii) unless a custom can be demonstrated that the lease would determine;

continue to have all the rights guaranteed to him in the property, under the provisions of the TPA, 1882. Resultantly, where the term of the lease has not expired, on the implementation of an order under Section 14 of the TPA, 1882 to demolish a structure as being dangerous, the lease itself will not determine and the lessee would continue to have a right to the property which he could enforce in a court of competent jurisdiction i.e. the tenant could *inter alia* therefore maintain a *lis* to be put back into possession of the land on which the property leased was constructed by seeking enforcement of the right of the lessee in the property, as the demolition of the construction would not impact on the lessee right in the property on which the construction stood.

- (iv) ***The Status of Tenant under the Provisions of the Sindh Rented Premises Ordinance, 1979 when a notice is issued by the SBCA under Section 14 of the SBCO, 1979***

19. The rights that are conferred on a lessee under the provisions of the TPA, 1882 are clearly separate from the statutory rights that are conferred to a tenant in possession of a property under the provisions of the SRPO, 1979. To consider the nature of the rights of tenant under the provisions of the SRPO, 1979 would necessitate us, on a point of interpretation, to consider as to whether or not such statutory protections as conferred by the SRPO, 1979 would be overridden by the provisions of Section 14 of the SBCO, 1979 or vice versa, or as to whether they have to be read in conjunction with one another.

20. The SRPO, 1979 was promulgated on 21 November 1979 and the preamble of which reads as under:

" ... **WHEREAS** *it is expedient to make effective provisions for regulation of relations between landlords and tenants and protect their interests in respect of rented premises within urban areas*

The purpose and intent of the SRPO, 1979, as contained in the preamble is to regulate the obligations as between a "landlord" and a "tenant" as defined in the statute and who are occupying premises in urban areas within the Province of Sindh. As part of the regulation of obligations as between landlord and tenants, the statute by Section 13 of the SRPO, 1979 prevents the eviction of a tenant other than in a manner which accords with the provisions of that statute. A literal reading of this Section clearly shows that where a person is introduced into a property as a tenant by a landlord, his possession of that property cannot be resumed from him other in accordance with the provisions of the SRPO, 1979 i.e. under the provisions of Section 14, Clauses (i) to (vii) of Sub-Section (2) of Section 15 and Sub-Section (2) of Section 16 of the SRPO, 1979 and which read as under:

" ... 14 (1) *Notwithstanding anything contained in this Ordinance or any other law for the time being in force, the landlord of a building who is a widow, or a minor whose both parents are dead or a salaried employee due to retire within the next six months or has retired or a person who is due to attain the age of sixty years within the next six months or has attained the age of sixty years, may, by notice in writing, inform the tenant that he or she needs the building for personal use and require him to deliver vacant possession of the building within such time as may be specified in the notice, not being earlier than two months from the receipt thereof:*

*Provided that nothing in this sub-section shall apply where the landlord has rented out the building after he has retired or attained the age of sixty years or, as the case may be, has become widow or orphan."*

*(2) The landlord shall not be entitled to avail the benefit of Sub-Section (1) if he is in occupation of a building owned by him in any locality.*

*(3) Where the tenant has failed to deliver the possession of the building under sub-section (1), the Controller shall, on application by the landlord in this behalf, order eviction of the tenant from the building in a summary manner, by using such force as may be necessary.*

*15. (1) Where a landlord seeks to evict the tenant otherwise than in accordance with section 14, he shall make such application to the Controller.*

*(2) The Controller shall, make as an order directing the tenant to put the landlord in possession of the premises within such period as may be specified in the order, if he is satisfied that:*

*(i) omitted*

*(ii) the tenant has failed to pay rent in respect of the premises in his possession within fifteen days after the expiry of the period fixed by mutual agreement between the tenant and landlord for payment of the rent, or in the absence of such agreement, within the sixty days after the rent has become due for payment*

*provided that where the application made by the landlord is on the sole ground mentioned in this clause and the tenant on the first day of hearing admits his liability to pay the rent claimed from him, the Controller shall, if he is satisfied that the tenant has not made such default on any previous occasion and the default is not exceeding six months, direct the tenant to pay all the rent claimed from him on or before the date to be fixed for the purpose and upon such payment, he shall reject the application*

*(iii) the tenant has, without the written consent of the landlord—*

*(a) handed-over the possession of the premises to some other person;*

*(b) used the premises for the purpose other than that for which it was let out;*

*(c) infringed the conditions on which the premises was let out;*

*(iv) the tenant has committed such acts as are likely to impair the material value or utility of the premises;*

*(v) the tenant has indulged in such activities as are causing nuisance to the neighbours;*

**(vi) the premises is required by the landlord for reconstruction or erection of a new building at the site and the landlord has obtained necessary sanction for such reconstruction or erection from the authority competent under any law for the time being in force to give such sanction;**

(vii) the landlord requires the premises in good faith for his own occupation or use or for the occupation or use of his spouse or any of his children.

**(3) Where the landlord who has obtained the possession of the premises for the purpose of reconstruction of the building or erection of a new building, shall demolish the existing building within six months of the taking over of the possession of the premises or, as the case may be, commence the erection of the new building within two years of the taking over of the possession of the premises, and in case the landlord fails to demolish the building as aforesaid, the tenant shall be entitled to be put into possession of the premises and for that purpose he may apply to the Controller for an order in that behalf and for the purpose he may apply to the Controller for an order in that behalf"**

**("4") Where the land-lord constructs the building as aforesaid the tenant who was evicted from the old building may, before the completion of new building and its occupation and the Controller shall make an order accordingly in respect of the area applied for or such smaller area, as considering the location and type of the new building and the needs of the tenant, the deems just and on payment of rent to be determined by him on the basis of rent of similar accommodation in the locality.**

#### 16. Arrears of Rent

(1) Where a case for eviction of the tenant has been filed, the Controller shall, on application by the landlord and after such summary inquiry as he deems fit to make, determine the arrears of the rent due and order the tenant to deposit the same within such period as the Controller may fix in his behalf and further direct the tenant to deposit monthly rent regularly on or before the tenth of every month, until final disposal of the case Provided that the Controller may direct that the arrears of rent approximate rent may be paid to the landlord through pay order, or by any other mode agreed to be the parties, or as directed by the Controller

(2) Where the tenant has failed to deposit the arrears of rent or to pay monthly rent under sub-



*section (1), his defence shall be struck off and the landlord shall be put into possession of the premises within such period as may be specified by the Controller in the order made in this behalf..”*

As such if a landlord is to evict a tenant he must make an application to a Rent Controller, appointed under Sub-Section (1) of Section 4 of the SRPO, 1979. to resume possession of his property from a tenant and which application must be premised on the provisions of either Section 14 or one of the clauses of Sub-Section (2) of Section 15 of the SRPO, 1979 or by an order under Sub-Section (2) of Section 16 of the SRPO, 1979.

21. There is no dispute that one of the grounds that is available to a landlord to seek the eviction of a tenant is one that is found under clause (vi) of Sub-Section (2) of Section 15 of the SRPO, 1979 which is maintained by a landlord on the basis that the landlord intends to demolish the premises and reconstruct them and which the rent controller can permit on the basis that once the premises are reconstructed, the landlord would reintroduce the tenant into an identical sized premises in the newly constructed building. It would therefore be imperative for us to consider as to whether the provisions of clause (vi) of Sub-Section (2) of Section 15 read with Section 13 of the SRPO, 1979 are in conflict with the provisions of Section 14 of the SBCO, 1979 which also seem to dispossess the tenant without apparently conferring on the tenant a right to be reintroduced into the property. In addition, in the event that there is such a conflict, on a point of interpretation we would thereafter also have to consider as to which of those sections would prevail over the other.

22. On this point of interpretation, we would begin by examining Section 3 of the SRPO, 1979 which contains a non-obstante clause and which reads as under:

“ ... 3. *Applicability*

*(1) Notwithstanding anything contained in any law for the time being force, **all premises** other than those owned or requisitioned under any law, by or on behalf of the Federal Government or Provincial Government, **situated within an urban area, shall be subject to the provisions of this Ordinance***

*(2) Government may, by notification, exclude any class of premises, or all premises in any area from operation of all or any of the provisions of this Ordinance.”*

As is apparent, the provisions of Sub-Section (1) of Section 3 of the SRPO, 1979 made the provisions of that statute applicable to all “premises” located within an urban area in the Province of Sindh unless the premises come within the class of premises mentioned in Sub-Section (1) of Section 3 of the SRPO, 1979 or are premises that are excluded by a notification issued the Government under Sub-Section (2) of Section 3 of the SRPO, 1979. A reading of Sub-Section (1) of Section 3 of the SRPO, 1979 ordinarily would mean that the provisions of the SRPO, 1979 would override the applicability of any other statute which relates to either a building or land which is let out on rent, other than a hotel, if that statute attempts to regulate the relationship as between landlord and a tenant in respect of such premises.

23. Contrastingly, the SBCO, 1979 which was promulgated earlier than the SRPO, 1979 on 3 March 1979, indicates the intention of that statute in its preamble and which reads as under:

“ ... *Whereas it is expedient **to regulate** the planning, quality of construction and buildings control, prices charged and publicity made for disposal of buildings and plots by builders and societies and **demolition of dangerous and dilapidated buildings** in the Province of Sindh.*”

We have already clarified that one of the purposes of enacting the SBCO, 1979, as indicated in the Preamble, was *inter alia* to regulate the demolition of “dilapidated” and “dangerous” buildings within the Province of Sindh. Section 2 of the SBCO, 1979, also contains a clause which, to our mind, is not a non obstante clause and which reads as under:

“ ... **2. Non-application of a law**  
*Nothing contained in any other law for the time being in force shall apply to any matter regulated by this Ordinance.*”

On a literal reading of this provision, we are clear that the intention of this section is not to override but rather to exclude the application of any law to any matter that is regulated by the SBCO, 1979.

24. From a point of interpreting these two provisions, it is interesting to note that the heading of Section 3 of the SRPO, 1979 is entitled as “applicability” while the heading of Section 2 of the SBCO, 1979 is

identified by the negative statement of “non-applicability.” To our mind, by excluding the application of **“any other law for the time being in force”** to any matter “regulated” by the SBCO, 1979 by declaring that **“Nothing contained”** therein would apply to **“any matter”** regulated by the SBCO, 1979 we would consider that that such a clause would, whether or not there is any inconsistency between those two statutes, override that statute to the extent of the matters regulated by the SBCO 1979 and which would include, but not be limited to, negating the impact of a Non-Obstante Clause contained in any other statute such as the one that exists in Sub-Section (1) of Section 3 of the SRPO, 1979.

25. The interpretation as to the applicability of these clauses would come into question if we come to the conclusion that there is an inconsistency as between these two statutes.<sup>22</sup> While there **seems** to be a conflict, that may be considered as an inconsistency, as between the provisions of clause (vi) of Sub-Section (2) of Section 15 read with Section 13 of the SRPO, 1979 with the provisions of Sub-Section (3) of Section 14 of the SBCO, 1979 on account of clause (vi) of Sub-Section (2) (3) and (4) of Section 15 SRPO, 1979 allowing a tenant to be reintroduced into the premises, while no such right exists under Section 14 of the SBCO 1979, we are of the opinion that there is actually no such conflict. While, the provisions of Section 13 of the SRPO, 1979 prohibit the **eviction** of a tenant in possession of a premises, including those which could be classified as “dangerous,” without the institution of a proceedings under Section 15 of the SRPO, 1979, the provisions of Sub-Section (3) of Section 14 of the SBCO, 1979 oblige the SBCA to require an occupier of a building, that is in the opinion of the SBCA considered to be dangerous, to **vacate** the building and which if not vacated by the Occupier can be compelled by the SBCA by force. The expression “eviction” has been defined by Blacks Law Dictionary to mean:<sup>23</sup>

“ ... *Dispossession by process of law ; the act or process of legally disposing a person of land or rental property.*”

<sup>22</sup> See **Muslim Commercial Bank Ltd. vs. Federation of Pakistan through Director, (Legal-II), Presidents Secretariat** 2020 CLD 829; **Messrs Pak Brunei Investment Company Limited vs. New Allied Electronics Industries (Pvt.) Ltd.** 2019 CLD 301

<sup>23</sup> Garner, B.A (2019) **Blacks Law Dictionary**, 11<sup>th</sup> Edition

Contrastingly, the expression “vacate” has been defined by Blacks Law Dictionary to mean:<sup>24</sup>

“ ... *To surrender occupancy or possession; to move out to leave.*”

From the definition of the above two expressions we would conclude that while the provisions of the SRPO, 1979 regulates the eviction of a tenant from a premises, the provisions of Section 14 of the SBCO, 1979 do not “evict” a person from a premises and simply direct an “occupier” including, but not limited to, a person who may be a tenant to “vacate” a premise on account of it being “dangerous”. We are therefore clear that an order passed by the SBCA under Section 14 calling for an occupier of premises to “vacate” would not amount to an “eviction”, leading us to the conclusion that there is no conflict as between the provisions of Section 13 of the SRPO, 1979 and Section 14 of the SBCO, 1979. Each of the provisions of law would therefore coexist.

26. There being no inconsistency, we are left to consider as to whether a tenant who vacates a premises pursuant to an order under Section 14 of the SBCO, 1979 would have a right to be reintroduced into the property after the property is either repaired or reconstructed and if so how?

27. Such rights as between a landlord and tenant came to be examined by this Court in a decision on a rent appeal under Section 21 of the SRPO, 1979 and which is reported as **Pak Army Furnishing Stores vs. Syed Ali Akbar Rizvi and 3 others**<sup>25</sup> and which decision was approved by the Honourable Supreme Court of Pakistan in the decision reported as **Karachi Building Control Authority vs. Hashwani Sales and Services Limited**<sup>26</sup> wherein while examining the vires of the Karachi Building and Town Planning Regulations, 1979 with reference to rights of tenants being impacted by Section 14 of the SBCO, 1979 it was observed by the Honourable Supreme Court of Pakistan that:

“ ... 18. *It is not necessary to deal with all the above cases in detail. However, it may be pertinent to refer to the case of Messrs Pak Army furnishing Stores v. Syed Ali Akbar Rizvi and 3 others (supra), in which one of us Saleem Akhtar J (as his Lordship then was), while dealing with an appeal under section 21 of the*

<sup>24</sup> Garner, B.A (2019) **Blacks Law Dictionary**, 11<sup>th</sup> Edition

<sup>25</sup> PLD 1985 Karachi 201

<sup>26</sup> PLD 1993 SC 210

S.R.P.O. and while consider the Regulations under the Ordinance, pointed out that neither the Controller nor the appellate Court was competent to go into the question of vires of the Regulations. However, at the same time, the following observations were made:-

*“ The Authority has been empowered to grant approval of building plan and no-objection certificate for construction. Grant of such certificate and approval are to be regulated by the Rules and Regulations which are framed for effective enforcement of the S.B.C. Ordinance. **The Authority can, therefore impose conditions while granting permission for demolition of the building and erection of a new building. It cannot overlook the rights of the tenants, who occupy the premises and have a valuable interest in it. The tenancy right is a valuable right and unless otherwise provided by law it cannot be lost inertly because the landlord want to demolish the building erect a new buildings. Therefore, if for re-erection of a new building the Authority imposes reasonable conditions which are not in conflict with the Sindh Buildings Control Ordinance the same would valid and proper.** Conscious of the jurisdiction under which I am dealing with the matter, I would refrain from commenting whether the Regulations is ultra vires or invalid. Suffice to say that for the purpose of limited investigation which can be made in this appeal, the Regulation is not patently void or illegal.”*

**The above observations to the effect that the tenancy right, being a valuable right, cannot be lost because the landlord wants to demolish the building and erect a new building,** have bearing on a case where the landlord without the aid of the Court gets a tenant evicted and gets the building demolished under the provisions of Section 14 of the Ordinance, if the Authority is instrumental in depriving a tenant, his possession and tenancy right in respect of a building or a tenement without the intervention of the Court in exercise of the power vested in it under Section 14 of the Ordinance, the efforts on the part of the Authority to provide for reintroduction of the tenant into the newly constructed building may have rational nexus with the power exercised under Section 14 of the Ordinance, as observed by hereinabove. Since the case in hand does not involve section 14 of the Ordinance, it is not necessary for us to deal with the above point any further as observed hereinabove.”

The decision of the Honourable Supreme Court of Pakistan is clearly obiter dicta, but is nevertheless binding on us.<sup>27</sup> We do however note that while emphasising the valuable rights that have been conferred on the tenant, the Honourable Supreme Court does not discuss as to whether such rights are contained in the provisions of the SRPO, 1979 or under the TPA, 1882 or are common law rights protected under the principles of justice, equity and good conscience.<sup>28</sup> What is however clear, is that where a tenant is “vacated” from a “premises” by the SBCA on account of an order having been passed under the provisions of Section 14 of the SBCO, 1979, the SBCA is obliged to “to provide for reintroduction of the tenant into the newly constructed building” and which obligation has a “rational nexus with the power exercised under Section 14 of the Ordinance.” Although not said categorically, it would seem that the obligation on the SBCA would be that, when it sanctions an approval under Sub-Section (1) of Section 6 of the SBCO, 1979 for a new construction on the plot that housed the tenant, to mandatorily impose a condition on the owner of the property to reintroduce the tenant into the building once constructed i.e. granting rights parallel to those contained in clause (vi) of Sub-Section (2) of the SRPO, 1979.

28. While the decision of the Honourable Supreme Court of Pakistan reported as **Karachi Building Control Authority vs. Hashwani Sales and Services Limited**,<sup>29</sup> having answered the query, as to whether a tenant having been directed to “vacate” a property pursuant to an order passed by the SBCA under Section 14 of the SBCO, 1979 would continue to have a right to be reintroduced into a property on its reconstruction, would not require us to further consider what the nature of the valuable right are i.e. as to whether it is right under the provisions of the SRPO, 1979 or under the TPA, 1882 or are common law rights protected under the provisions of the principles of justice, equity and good conscience, we have nevertheless considered to define the nature of those rights conferred on the tenant.

29. To start with we are clear that there are no provisions of the SRPO, 1979 which would entitle a tenant to maintain an application to be reintroduced into a premises when he is directed to “**vacate**” a property as any direction under that Statute would amount to an “**eviction**”. The

<sup>27</sup> See **Justice Khurshid Anwar Bhinder vs. Federation of Pakistan** PLD 2010 SC 483, **Dr Iqrar Ahmad Khan vs. Dr Muhammad Ashraf** 2021 SCMR 1509

<sup>28</sup> See **Hitachi Limited v Rupali Polyester** 1998 SCMR 1618

<sup>29</sup> PLD 1993 SC 210

rights of a tenant to be reintroduced into a property which is demolished are contained in Sub-Section (3) and Sub-Section (4) of Section 15 of the SRPO, 1979 and which are that when a landlord has successfully made an application to **evict** a tenant on the grounds of reconstruction of the building housing the premises either fails to construct the building within the time prescribed or when he constructs the building he is obliged to reintroduce the tenant into a tenement in the newly constructed building. There being no right of a tenant, on being directed to **vacate** a premises, to maintain an application before a Rent Controller to seek their reintroduction into premises that are reconstructed, we are therefore clear that there is no statutory right conferred on a tenant under the provisions of the SRPO, 1979 which could be secured by him to compel the SBCA under the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 to reintroduce him into the property at the time of sanctioning an approval for construction.

30. There being no statutory right contained within the SRPO, 1979 we would next have to consider as to whether a tenant, not having such rights under the provisions of the SRPO, 1979, could nevertheless claim such rights under the provisions of the TPA, 1882.

31. To begin with we note that the non-obstante clause contained in Sub-Section (1) of Section 3 of the SRPO, 1979 does not exclude the application of the provisions of the TPA, 1882 to rights conferred on tenants by that statute. That being the case it could well be considered that the rights that exist under the provisions of the TPA, 1882 can subsist and be claimed by a tenant. This position is reinforced by the Honourable Supreme Court of Pakistan in the decision reported as **Mrs. Zehra Bequm v Messrs Pakistan Burmah Shell Limited**<sup>30</sup> wherein the interface of the obligations as between a "landlord" and a "tenant" under the TPA, 1882 and the SRPO, 1979 were considered it being held that:

“ ... *The historical background of Rent Laws in Sind and Karachi is that provisions of Contract Act and Transfer of Property Act apply with full force. The earlier rent laws like the Sind Rent Restriction Act, 1947 (Act X of 1947) or of 1952 (Act XIX of 1952) and Karachi Rent Restriction Act, 1953 (Act VIII of 1953) regulated the "supply of accommodation whether residential or non-residential,, furnished or unfurnished" and were designed "in particular to provide for controlling the rents chargeable for such*

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<sup>30</sup> PLD 1984 SC 38

supply of accommodation and for preventing in certain cases eviction from the accommodation supplied." In 1959 with the West Pakistan Urban Rent Restriction Ordinance the object slightly underwent a change, inasmuch as supply of accommodation no longer remained the object of law. Its purpose was of restricting in public interest "the increase of rent of certain premises within the limits of the urban areas and the eviction of tenants therefrom." Unlike its predecessors, the Ordinance has as its object "making of effective provisions for regulation of relations between landlords and tenants" and "to protect their interests in respect of rented premises within urban areas", Section 5 enjoins the tenancy agreements to be in writing, and to be authenticated either by registration of the deed or by its attestation by the signature and seal of the designated authorities. The validity of tenancy agreements has been recognized by section 6 and its expiry or its ceasing to be valid, made a ground independently of every other ground, sufficient to obtain eviction of the tenant. Section 7 authorizes the landlord to charge the mutually agreed rent till such time a fair rent is not got fixed from the Controller on an application by either party. **The provisions of the Ordinance permit freedom of contract based on equality of bargaining power in both parties. It formalizes the contract.**

It does not profess to protect any one class against the other. In this view of the matter if at the time of entering into lease agreement in 1965 the landlord knew that he was bartering away his personal need under the law then in force for a period of thirty years, he cannot under the statutory provision made in the Ordinance turn back to repudiate the term of the agreement. **In the first place the Ordinance keeps alive the contract, lends it continued validity and force and professes to protect as much the right of the tenant as that of the landlord, referable always to a valid subsisting contract.** In the second place even if there was such a right available under the law, (for arguments sake but not as a fact) it stood waived because it is not a part of public policy, but of a personal privilege which the landlord could forego for a valuable consideration."

The decision of the Supreme Court of Pakistan clarifies that the provisions of the SRPO, 1979 in fact "formalises" and do not "override" the obligations as exist between the "landlord" and the "tenant" under the TPA, 1882.<sup>31</sup> That being the

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<sup>31</sup> The Indian Supreme Court has considered the same proposition of "double protection" but had reached the opposite solution albeit after many passing many conflicting decisions— See **V. Dhanpal Chettiar v. Yesodai Ammal**(1979) 4 SCC 214; **Pradesh Kumar Bajpai v. Binod Behari Sarkar (Dead) by LRs**(1980) 3 SCC 348; ; **K.K. Krishnan v. M.K. Vijaya Ragavan**(1980) 4 SCC 88;; **Vannattankandy Ibrayi v. Kunhabdulla Hajee**(2001) 1 SCC 564; **Lakshmi pathi and Ors. v. R. Nithyananda Reddy and Ors**(2003) 5 SCC 150; **Shaha Ratansi Khimji and Sons v. Kumbhar Sons**



case and the right of lessee in the property having not been overridden by any provision of the SRPO, 1979 the “valuable right” of the tenant in the property as contained in Section 105 of the TPA, 1882 would endure in the land and the protection granted to a lessee under the provisions of clause (e) of Heading B of Section 108 of the TPA, 1882 could be availed by a tenant even after they are compelled to “vacate” their premises on account of an order passed by the SBCA under Section 14 of the SBCO, 1979.

32. We would thus conclude that a tenant who has rights under the provisions of the SRPO, 1979 would not lose such rights at the time the premises are ordered to be demolished on an order passed by the SBCA under the provisions of Section 14 of the SBCO, 1979 and would clarify the “valuable rights” as described by the Honourable Supreme Court of Pakistan in the decision reported as **Karachi Building Control Authority vs. Hashwani Sales and Services Limited**<sup>32</sup> were in fact rights that are secured in the land and which would *inter alia* entitle the tenant to maintain a claim to their right in the land. This would of course include a right to claim to the premises once reconstructed and which right, as opined by the Honourable Supreme Court of Pakistan, would place a mandatory obligation on the SBCA after the demolition of the premises, to ensure that a condition is imposed in an approval granted under Sub-Section (1) of Section 6 of the SBCO, 1979 for the construction of a building on the property to ensure that the tenant is reintroduced into a tenement of an identical size and location as he held the demolished premises.

(v) **The Rights of a Licensee when a notice is issued by the SBCA under Section 14 of the SBCO, 1979**

33. A license is defined under Section 52 of the Easements Act, 1882 as under:

“ ... **52. “License” defined.**

*Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immoveable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an*

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**Hotel Private Limited and Ors**(2014) 14 SCC 1;; **R.S. Grewal and Ors. v. Chander Prakash Soni and Anr.** (2019) 6 SCC 216; **Abdul Khuddus Vs. H.M. Chandiramani (Dead) thr. L.Rs. and Ors.** (2021)15 SCC 474

<sup>32</sup> PLD 1993 SC 210

*easement or an interest in the property, the right is called a license.”*

34. The rights of a licensee to a property have been defined by the Supreme Court of Pakistan in the decision reported as **Abdullah Bhai and others vs. Ahmad Din**<sup>33</sup> wherein it was held that:

“ ... *On the other hand a "licence" as will appear from its definition in section 52 of the Easements Act is merely a competence to do something which except for this permission would be unlawful. **It does not confer any rights in physical property.** There is in the case of a licence only a personal agreement between the licensor and the licensee whereby the licensor agrees not to interfere with the doing of particular acts on property which is in his possession. **No right in rem passes to the licensee.** ...”*

As such where a person is a licensee he does not hold any right in the property per se and therefore would not have right to re-enter into a property after he is compelled to “vacate” a property on the basis of an order passed by the SBCA under Section 14 of the SBCO, 1979. To our mind, on the demolition of the property, the subject matter of the license i.e. the premises having been demolished, the agreement as between the Licensor and the Licensee would be frustrated.<sup>34</sup> That being the case the licensee would not have any right to maintain a claim for possession of the property and his right to damages, if any would be determined in accordance with his contractual obligations.

35. Where however a license is found to be coupled with a transfer of property as envisaged in clause (a) of Section 60 of the Easements Act, 1882, the licensee would to our mind have the same rights as conferred under clause (e) of heading B of Section 108 of the TPA, 1882 as clarified hereinabove to maintain a claim to be reintroduced into a property to the extent of his right in the property.<sup>35</sup>

**(vi) The Rights of a Trespasser when a notice is issued by the SBCA under Section 14 of the SBCO, 1979**

36. A Trespasser has no rights in a property. As such where a person is a trespasser he does not hold any right in the property and therefore would not have right to re-enter into a property after he is compelled to “vacate” a

<sup>33</sup> PLD 1964 SC 106

<sup>34</sup> See **Taylor vs. Caldwell** (1863) 3 B & S 826 and **Krell vs. Henry** [1903] 2 K.B. 740,

<sup>35</sup> See paragraph 13 to 15 above.

property on the basis of an order passed by the SBCA under Section 14 of the SBCO, 1979.

**C. The Order of this Court**

37. On the facts as pleaded in the Petition, the Respondent No. 5 is admittedly a tenant of the Petitioner and who purportedly has statutory rights under the provisions of the SRPO, 1979. Admittedly, no notice has been issued to the Respondent No. 5 under the provisions of section 14 of the SBCO, 1979 nor has he apparently been afforded a hearing at the enquiry conducted by the SBCA into the status of the construction on the Said Property. As such, the notice that has therefore been issued by the SBCA under Section 14 of the SBCO, 1979 is therefore as per the decisions of this court reported as **Furqan Ahmad vs. Deputy Controller of Buildings and another**,<sup>36</sup> **Abdul Aziz vs. The Director-General Karachi Development Authority and 2 others**,<sup>37</sup> **Vincent vs. Kaachi Development Authority**,<sup>38</sup> **Nasir Khan vs. Aziz Ahmed**,<sup>39</sup> and **Messrs Haji Khuda Bux Amir Umar vs. Karachi Building Control Authority and another**<sup>40</sup> patently illegal as no hearing has been afforded to the Respondent No. 5 at the time of the enquiry.

38. Regarding the order passed by the SBCA, the Honourable Supreme Court of Pakistan has held as to what would constitute a speaking order in the decision reported as **Mollah Ejahar Ali vs. Government of East Pakistan and others**<sup>41</sup> wherein it was held that:

“ ... To deal with the second contention first, there is no doubt that the High Court's order which is unfortunately perfunctory gives the impression of a hasty off-hand decision which, although found to be correct in its result, is most deficient in its content... **A judicial order must be a speaking order manifesting by itself that the Court has applied its mind to the resolution of the issues involved for their proper adjudication.** The ultimate result may be reached by a laborious effort, but if the final order does not bear an imprint of that effort and on the contrary discloses arbitrariness of thought and action, the feeling with the painful results, that just has neither been done nor seems to have been done is inescapable.”

<sup>36</sup> 1984 CLC 2476

<sup>37</sup> 1990 CLC 119

<sup>38</sup> 1992 CLC 518

<sup>39</sup> 1998 MLD 681

<sup>40</sup> 2000 MLD 247

<sup>41</sup> PLD 1970 Sc 173

It is apparent that instead of passing a speaking order after the enquiry, a standard form has been prepared by the SBCA where comments are made as to the status of the building and predetermined questions are answered on the form with a “yes” or “no” answer. We are afraid that the report of the SBCA passing one word comments on a standard form that has been prepared by the SBCA coupled with predetermined questions cannot in any manner satisfy the requirements of what is needed to be stated in a speaking order. In addition, the SBCA has also failed to indicate in its report as to why the structure on the building cannot be repaired and must be demolished. Finally, the report does not consider the objection raised and provide findings on each of those questions. As is apparent none of this has been done and the order is clearly not a speaking order must showing that an application of mind to the resolution of the issues is made as against an objective threshold. Finally, keeping in mind the decision of the Honourable Supreme Court of Pakistan reported as **Karachi Building Control Authority vs. Hashwani Sales and Services Limited**,<sup>42</sup> in the event that the SBCA come to a conclusion that the building is “dangerous” and which would compel the Respondent No. 5 to “vacate” the premises, an obligation would endure on the SBCA at the time of sanctioning an approval for the construction of a building on the Said Property under Sub-Section (1) of Section 6 of the SBCO, 1979 to impose a condition on the owner compelling him to ensure that the Respondent No. 5 is reintroduced into a tenement of an identical size and location as he held the demolished premises. The enquiry conducted and the order passed by the SBCA and the notices issued to the Respondent No. 5 therefore cannot be sustained and are set aside.

39. In the circumstances we hereby declare and direct that:

- (i) the ejectment notices dated 6 June 2023 and 8 January 2024 issued by the SBCA under Section 14 of the SBCO, 1979 are illegal as no hearing has been afforded to the Respondent No. 5 prior to the issuances of those notices and the report that has been filed after the enquiry cannot be treated as being a speaking order;
- (ii) the SBCA are directed to reconvene the enquiry mandated under Section 14 of the SBCO, 1979, inter alia, giving notice to the Respondent No. 5 to appear before the enquiry and giving his comments as to whether the building requires repair or is liable to be demolished;

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<sup>42</sup> PLD 1993 SC 210

- (iii) after hearing all the persons affected, the SBCA shall pass a speaking order clarifying as to whether the subject structure can be repaired or as to why the construction should instead be demolished giving reasons for both of the eventualities; and
- (iv) in the event that the SBCA comes to the conclusion that the building is to be demolished, ***in its order it must*** secure the valuable rights of the Respondent No. 5, if he is interested in being returned into possession of his tenement, as clarified by the Honourable Supreme Court in the decision reported as ***Karachi Building Control Authority vs. Hashwani Sales and Services Limited***,<sup>43</sup> and impose a condition on the owner compelling him to ensure that the Respondent No. 5 is reintroduced into a tenement of an identical size and location as he held the demolished premises after the construction on the plot is reconstructed.

The Petition stands disposed of in terms of these declarations and directions, along with all listed applications, with no order as to costs.

JUDGE

JUDGE

**ANNOUNCED BY**

JUDGE

JUDGE

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<sup>43</sup> PLD 1993 SC 210