

**ORDER SHEET**

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

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

**C.P. No.D – 478 of 2024**

Rana Muhammad Khalid & Another

Vs.

Province of Sindh & others

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1. For orders of Misc. No. 2337/2024 (Stay) :
  2. For hearing of Main Case :

Petitioners : Through Mr. Nehal Khan Lashari, Advocate.

Date of hearing : 31.01.2024

**ORDER**

**MOHAMMAD ABDUR RAHMAN, J.**- This Petition is maintained under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 seeking the following relief.

- “ ...
- a) *To hold and decide the following prayers under the doctoring of the necessity and past and closed transactions.*
  - b) *to declare that the fundamental rights of the public at Large is involved with the old constructed building for which they spent heavy amount to get the shelters according to their available resourced and by means of demolition process their fundamental rights under Article 23 and 24 may be snatched due to the act and omission of the respondents, as all the respondents tolerated the practice of illegal construction and the let the audience in wider prospective to purchase the houses in those illegal constructed buildings*
  - c) *to direct the Respondent No. 1 and 2 to announce any policy notification for regularization of the buildings constructed in back years, for the time being enforce the larger prospective which may favour the interest of public at large. In order to stop the blackmailing of blackmailers, who file the false and fabricated petitions before this Honorable Court and also blocked the way of corrupt officials.*

- d) *to direct the Respondent No. 3 to 10 to provide the proper data at the buildings constructed in back years or which are ready to move and further direct the respondents no. 3 to 10 to sealed the buildings which are under constructions, till December 2023.*
- e) *to direct the Respondent No. 11 to collect the date of the old constructed building and issue them leases in the light of decision od direction issued by Respondent No. & 2.*
- f) *to direct the Respondent No. 12 to stop the demolition process of the old constructed buildings till the disposal of instant petition.*
- g) *to direct all the Respondents not to regularise and construction which is constructed on indemnity plots*
- h) *costs of the Petition.*
- i) *any other relief(s) which this Honourable Court deems fir and proper in the circumstances of this case, be also awarded to the plaintiff.”*

2. Mr. Nehal Khan Lashari has entered appearance on behalf of the Petitioner and has contended that the Petitioner No. 1 is the owner of a unit in a building that is constructed on Plot No. 1253 , Street No. 20, Muhallah Azam Basti, Karachi while the Petitioner No. 2 is the owner of an entire building constructed on Plot No. 2120 & 2121, Street No. 11, Azam Town Mehmoodabad each of which have been constructed without an approval being sanctioned by the Sindh Building Control Authority (hereinafter referred to as the “SBCA”) under Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979 (hereinafter referred to as the “SBCO, 1979”). He contends that despite the fact that the construction that has been raised on the Said Property without the sanction of the SBCA having been obtained, this Court should maintain this Petition and restrain the Respondents from taking any action to demolish the construction on each of the Petitioners properties as the Petitioners have invested their life savings in each of the properties and their rights should therefore be secured by allowing them to obtain post facto approvals for such construction by regularising the construction.

3. We have heard Mr. Lashari on behalf of the Petitioner and have perused the memo of the Petition.

4. Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 prescribes that:

“ ... **4. Right of individuals to be dealt with in accordance with law, etc.**

*(1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen. Wherever he may be, and of every other person for the time being within Pakistan.*

*(2) In particular—*

*(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*

*(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*

*(c) no person shall be compelled to do that which the law does not required him to do.”*

5. The Honourable Supreme Court of Pakistan, in the decision reported as **Ch Manzoor Elahi vs. Federation of Pakistan**<sup>1</sup> while interpreting this section has directed that it was the duty of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to enforce Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973:

“ ... *In my opinion, the powers given to a High Court under Article 199 of the Constitution is wide enough to cover not only a case of infringement of Fundamental Right as contained in Part I of the Constitution, but also to enforce the inalienable right of a citizen as mentioned under Article 4 of the Constitution which runs thus:-*

*"4. (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.*

*(2) In particular-*

*(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;*

*(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and*

*(c) no person shall be compelled to do that which the law does not require him to do.”*

**It has been contended in this context that there is no remedy provided by the Constitution to enforce the rights and obligations mentioned in Article 4. The**

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<sup>1</sup> PLD 1975 SC 66

**contention is misconceived. In the first place, the injunctions contained in Article 4(2) are not only mandatory but they are also clothed in prohibitory language which indicate that the provisions are self-executing and no legislation is necessary to give effect to them. The rules of interpretation of a written Constitution as reproduced above support this view. Apart from the question of any machinery to enforce the right or obligation, as I have said earlier, nobody is relieved of the obligation to comply with them. In the second place, I am unable to conceive that a right or obligation so clearly and solemnly given or put can be without a content, meaning or purpose. Unless, therefore, on an examination of the Constitution I am led to the inevitable conclusion that the Courts are powerless to enforce the inalienable right or the obligation mentioned in Article 4, I am of the opinion that the Courts are bound to give the Article a meaning and a purpose. I have, however, already noticed that Article 199 of the Constitution gives indeed wide powers to a High Court to act for the enforcement of the rights and obligations mentioned in Article 4 of the Constitution.**

Article 4 may be compared with the due process of law in the American Constitution. The case of Government of West Pakistan v. Begum Agha Abdul Karim Shorish Kashmiri P L D 1969 S C 14, supports this view. In the case under report Article 2 of the 1962 Constitution which is corresponding to Article 4 of the Constitution was considered and the Court observed as follows:-

" The words 'in an unlawful manner' in sub-clause (b) of Article 98 (2) have been used deliberately to give meaning and content to the solemn declaration under Article 2 of the Constitution itself that it is inalienable right of every citizen to be treated in accordance with law and only in accordance with law. Therefore, in determining as to how and in what circumstances a detention would be in an unlawful manner one would inevitably have first to see whether the action is in accordance with law, if not, then it is action in an unlawful manner. Law is here not confined to statute law alone but is used in its generic sense as connoting all that is treated as law in this country including even the judicial principles laid down from time to time by the superior Courts. It means according to the accepted forms of legal process and postulates a strict performance of all the functions and duties laid down by law. It may well be as has been suggested in some quarters, that in this sense it is as comprehensive as the American 'due process' clause in a new garb. It is in this sense that an action which is mala fide or colourable is not regarded as action in accordance with law. Similarly, action taken upon extraneous or irrelevant considerations is also not action in accordance with law. **Action taken upon no ground at all or without proper application of the mind of the detaining authority would also not qualify as action in accordance with law and would,**

**therefore, have to be struck down as being action taken in an unlawful manner."**

As can be seen, under Sub-Article (1) of Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, every citizen of Pakistan has a right to enjoy the "protection" of the law and which right is classified by that Article as an "inalienable" right. Sub-Article (2) of Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973 clarifies clause (a) of Sub-Article (1) Article 4 by stating that no action can be taken which impinges on "*the life, liberty, body, reputation or property of any person **except in accordance with law;***" Clause (b) of Sub-Article (1) Article 4 further elaborates the principle that what is not "prohibited by law is permitted"; Clause (c) of Sub-Article (1) Article 4 also states that no person can be compelled to act in a manner not mandated by law. This provision of the Constitution to our mind embodies the principles of the Rule of Law and without which any civilized society cannot function.

We are also of the opinion that such a mandate extends to this Court while exercising its Jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1979 as the provision of that Article beings with the expressions "Subject to the Constitution" and as such we also are compelled to ensure that while passing any Order we too do not fall afoul of Article 4 of the Constitution of the Islamic Republic of Pakistan, 1979. It is therefore incumbent on us to examine whether there is any law which exists which controls the rights of the Petitioner as guaranteed under Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973.

6. The law which is involved in this Petition is the SBCO, 1979 and the provisions of Sub-Section (1) of Section 6 of which provides that:

" ... 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.*

*Provided that in case of a building the construction whereof has commenced before coming into force of this Ordinance, the Authority's approval of the plan and No Objection Certificate shall be obtained not later than six months after the enforcement of the Ordinance."*

As is apparent the law mandates that in respect of an area which comes within the jurisdiction of the SBCA, as determined under Sub-Section (1) of Section 4 of the SBCO, 1979, no building shall be constructed **“before”** a plan is approved by the SBCA. The logic of having such a law is without fault, as to do otherwise would cause uncontrolled construction to be raised and which would have an adverse impact on the health and safety of the general public. We are therefore shocked to note that the Petitioners are brazenly asking us to grant a Petition which in its substances calls for the violation of the law! The basis taken by the Petitioner for maintaining the Petition is, as indicated in the prayer clause, under the Doctrine of Necessity and which has specifically been held by the Honourable Supreme Court to be “dead and buried.”<sup>2</sup> We are therefore clear that on this ground alone the Petition is not maintainable.

7. We have nevertheless considered any rights that the Petitioners may have in respect of the property held by them. This issue came to be considered by a Single Judge of this Court in the decision reported as **Muhammad Aslam Gatta And Another vs. Karachi Building Control Authority (K.M.C.), M.A. Jinnah Road, Karachi And 13 Others**<sup>3</sup> wherein the court was called on to consider the rights of allottees in 15 separate suits, in the context of Section 23 of the Contract Act, 1872; wherein each of the Plaintiffs had acquired title to units in buildings which had been constructed in violation of the Sub-Section (1) of Section 6 of the SBCO, 1979 and wherein each of the Plaintiffs claimed that they were bona fide purchasers who had no notice of the illegalities in the construction that they have purchased, it was held that:

“ .. 27. Section 23 of the Contract Act, 1872, makes all such agreements void, the object or consideration of which is unlawful. There are several instances incorporated in section 23 and under its illustrations which further envisage that where the agreement is forbidden by law or if it defeats the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or if the Courts regard it as immoral or if it is opposed to public policy falls within the category of void agreements. It was strenuously argued on behalf of plaintiffs that nowhere in section 6, in particular, and nowhere in the provisions of Ordinance, 1979 the builders are forbidden to enter into any agreement with the purchaser prior to completion of construction and, therefore, the agreements between allottees and builders are not hit by the provisions of section 6(2) of the Ordinance 1979, which view is not correct. One of the condition provided in section 23 of the Contract Act is that if any contract is of such a nature that if permitted it would defeat the provisions of law then such agreement is unlawful and void. In the instant case, there is a specific prohibition imposed on the builders that no

<sup>2</sup> See **Habibullah Energy vs. WAPDA through Chairman** PLD 2014 SC 47, **Syed Yousaf Raza Gillani vs. Assistant Registrar, Supreme Court of Pakistan** PLD 2012 SC 466

<sup>3</sup> 1998 MLD 544

*building as mentioned in subsection (1) to section 6 shall be occupied by any person or shall be allowed by the builders to be occupied by any person or unless on an application of the occupant or owner the Building Control Authority has issued occupancy certificate in a prescribed manner. Therefore, in order to obtain permission to occupy any building or its portion by any occupant or owner the first requirement is that such building should have been constructed strictly in accordance with the approved building plan as provided under section 6(1) of the Ordinance, 1979. The second condition of grant of permission to occupy a building is that an occupant or owner must have obtained occupancy certificate from the Building Control Authority. In the present case, the defendant/KBCA has successfully established that all the buildings were raised in clear violation of the approved building plan. The plaintiffs were not able to show that prior to occupying their respective flats/shops, either they or any of the builders obtained occupancy certificate from the K.B.C.A. In my view this provision was enacted in order to keep check on the illegal and unauthorised construction and to ensure that all the buildings are raised strictly in accordance with section 6(1) of the Ordinance, 1979. It may be due to this reason that under subsection (4) to section 6, the Building Control Authority was empowered to grant permission after it is satisfied that the building so constructed is consistent with the approved plan. It, therefore, settled that where a possession of any building or its portion is delivered by a builder to an occupant, even through a written agreement, but without first obtaining occupancy certificate from the K.B.C.A. for a building which admittedly was constructed in violation of the approved building plan, it will amount to an agreement to defeat the provisions of Sindh Building Control Ordinance, 1979.*

*... Resume of all the case-laws above clearly indicates that where an agreement is made, even in absence of any clear prohibition in the law to execute such agreement, but if permitted to apply it would amount to defeat any provision of law or it is against public policy then, it is clearly permissible to a Court not to enforce it. In the circumstances of all these suits, I am of the considered view that since the plaintiffs were not able, prima facie, to show that their possession were not intended to defeat the provision of Ordinance, 1979, therefore, the equity does not lie in their favour.”*

8. This decision was approved by the Honourable Supreme Court of Pakistan in the decision reported as **Muhammad Saleem and 5 Others vs. Administrator, Karachi Metropolitan Corporation, KBCA (KMC), Karachi and 2 Others**<sup>4</sup> wherein while dismissing an application for leave to appeal it was held that:

“ ... 9. Learned High Court relied upon the judgment in the case of *Muhammad Aslam Gatta v. Karachi Building Control Authority* (1998 MLD 544), (inadvertently typed as 1989

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<sup>4</sup> 2000 SCMR 1748

*MLD 544) dealing with the agreements opposed to public policy as contemplated by section 23 of the Contract Act. In the reported case, a learned Single Judge of the Sindh High Court observed that in the face of specific prohibition contained in subsection (2) of section 6 of the Ordinance that no building mentioned in subsection (1) shall be occupied by any person or shall be allowed by the builder to be occupied by any person unless on an application of the occupant or owner the KBCA has issued occupancy certificate, submission that agreements of purchase between the builders and the purchasers, prior to completion of the construction were not hit by the provisions of section 6(2) of the Ordinance was not correct. Learned counsel seriously attempted to assail this observation followed by learned Judges of the Division Bench of the High Court by stating that in the city of Karachi there are a large number of Projects in which the people are lured to obtain allotments of shops, godowns and apartments in the under- construction building complexes. Be that as it may, it may be pertinent to observe that if the object of an agreement is to defeat the object of law the agreement may be rendered illegal and void it being against public policy. In the peculiar facts of this case in which the petitioners did not produce their title documents it would be difficult to say that they had obtained any valid and legal right, interest and title to property or that the contract entered into by them were bona fide. At any rate, the petitioners having come to know about the notices issued to the builders and having agitated their rights before the High Court C for the last five years do not appear to have equities in their favour and cannot be permitted to say at this stage that they were condemned unheard or seriously prejudiced in their defence.*

*10. Aforesaid view has been taken in a number of cases by the Sindh High Court which view was duly affirmed by this Court from time to time. Although in view of clear mandate of law contained in the statute itself it may not be necessary to refer many cases on the subject yet it may not be out of place to cite decided cases namely *Hawa Bai v. Haji Ahmed* (1987 CLC 558), *Qasimabad Enterprises v. Province of Sindh* (1997 CLC 1246), both by two different Single Judges of the Sindh High Court, *Shaukat Ali Qadri v. Karachi Building Control Authority* (1998 CLC 1387), a Division Bench case from the Sindh High Court, *Zubaida A. Sattar v. Karachi Building Control Authority* (1997 SCMR 243) and *Muhammad Khurshid Abbasi v. Administrator/ Assistant Commissioner* (1999 SCMR 2224)."*

9. The decision of this Court, as approved by the Honourable Supreme Court of Pakistan, has been further reinforced by an amendment made on 30 October 2013 inserting Sub- Section (ii) of Section 18 G into the SBCO, 1979 and which clarifies that:

“ ... 18-G. Provision of utility services. No Authority shall –

*(i) provide the utility services including electric connection, gas connection, water connection and sewerage disposal facility to any premises unless the approved completion plan is produced before it; and*



*(ii) register the sale deed, lease or sub-lease in respect of the newly constructed premises unless the approved completion plan with the deed is produced before it.”*

The amendment clearly prohibits the registration of any “sale deed lease of sub-lease” without the issuance of a completion plan issued by the SBCA. As such, in the case of a building constructed in violation of Sub-Section (1) of Section 6 of the SBCO, 1979, a person cannot, on account of Section 18G of the SBCO, 1979, claim entitlement to have an instrument registered in their favour to convey a right, title or interest in a unit in building constructed on an immovable property in violation of Sub-Section (1) of Section 6 of the SBCO, 1979 without a completion plan having been issued by the SBCA. It follows, that a person who claims title to an immovable property that is in a building that has been constructed in violation of the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 cannot be said to have any right, title or interest therein; their entitlement being deemed on account of Section 23 of the Contract Act, 1872 to be void, such a person cannot also claim any right to have registered, in their favour, an instrument to convey any such right, title or interest in such a property as the registration of such an instrument has been prohibited under Sub-Section (ii) of Section 18 G of the SBCO, 1979 and therefore they have neither any right or title or interest in any unit constructed on a property in violation of the Sub-Section (1) of Section 6 of the SBCO, 1979.

10. We are therefore inclined to state that while the execution of a Sub-Lease may confer rights **to the land** e.g. if an undivided interest has been conveyed in the Conveyance Deed, it cannot in any manner confer a right in a property that has been constructed **on that land** in violation of the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 and as such we are in no doubt that the Petitioners have no right, title and interest as per law to the construction that exists on that property so as to maintain their rights under Article 23 or 24 of the Constitution of the Islamic Republic of Pakistan, 1973.

11. Mr. Lashari has next contended that despite not having any approval for construction, the law should mandate an approval by permitting “post facto” regularisation on the Said Property. What is referred to as a right to “regularise” is in fact to secure the approval of a deviation that exists in a construction that was made on the basis of an approved plan that had been sanctioned by the SBCA under Sub-Section (1) of Section 6 of the SBCO, 1979. The provisions which regulate such regularisation are found in clause (c) of Regulation 3-2-20 of the KB & TPR, 2002 and which reads as under:

“ ... **3-2.20. Regularization of Works Carried out in Violation of Regulations.**

3-2.20.1. *If the building works are commenced or carried out contrary to the provisions of these regulations the Authority shall,...*

- (c) **Regularize** *the violations in the existing structure after realization of regularization fee as per Table I & II, depends on the nature and merits of the case, provided that no violation shall be regularized:*
- (i) *Which have environmentally degrading activities such as manufacturing, storage of dangerous or inflammable or hazardous materials or Cater to the service of transport sector until such activities are removed;*
  - (ii) *-Building constructed within 3/4 mile (1.2 Km) radius of Quaid-e-Azam Mausoleum above podium level of 91 feet (27.72 meter) from the mean sea level;*
  - (iii) *Where parking space has not been provided or is intended for misuse for other purposes, until such space is restored to its original purpose;*
  - (iv) *Which has been constructed in violation of the reservation or road widening scheme or property line, or is in any hazardous use;*
  - (v) *If the building works or part thereof exceed the maximum permissible height and number of stories;*
  - (vi) *If the violations/deviations in building works do not exceed beyond Twenty percent of the permissible limit in respect of compulsory open space/covered area;*
  - (vii) *If the building work extends beyond the property limits except otherwise provided in pro- vision No. 9-5 KB&TPR-2002:*
  - (viii) *If the building work or part thereof violated fire or any other safety requirements;*
  - (ix) *For any other violation of the Master plan not falling in the above category.*
  - (x) (a) *Where approved arcade has not been provided or is misused for other purposes, until such space is restored to its original purpose.*  
 (b) *However recreation already approved may be allowed to be shifted/ relocated to any other suitable space, but it shall not be in basement and over parking space. Such shifting/relocation shall only be allowed*

*provided that activity on approved non-saleable/exempted area is maintained within such building.*

- (xi) *Where approved passage and stairs have been altered or misused for other purpose until such space is restored to its original purpose as per approved plan, however alteration/addition/variation upto 10% of the combined total exempted spaces as mention in Proviso 25-1.7.1(b) & 25. 1.7.2(b) shall be considered for completion/regularization.*
- (xii) *Where approved air raid shelter has been altered or misuse for other purpose until such space is restored to its original purpose as per approved plan. Furthermore owner/builder shall hand over the possession of the air raid shelter to the association of flats/units allottees.”*

12. The title of the SBCO, 1979 includes the word “Control” and this is manifested in the Preamble of the SBCO, 1979 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 Sindh.”*

It is clearly therefore the intention of Parliament to ensure that whenever a construction is regulated in the Province of Sindh to ensure that an approval is obtained prior to such construction as to do otherwise would barely amount to “controlling” the construction and would reduce the mandate of that statute to a rubber stamp. We are therefore clear that the very concept of regulating construction requires an approval to be sanctioned prior to construction commencing and that the concept of “Regularisation” presumes that there is an approval that has been accorded by the SBCA under the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 and on the basis of which construction occurred and a deviation from which is sought to be regularised. To permit a construction that has been made without any approval to be regularised to our minds violates Sub-Section (1) of Section 6 of the SBCO, 1979 and sets at naught that entire section and renders it redundant as, by permitting such a construction to be regularised, the approval for the entire construction is being permitted **after** the construction has been completed and which is directly in conflict with that section which mandates that approval is required to be obtained **before** any construction is commenced. There being no provision within the SBCO, 1979 which permits “post facto” approval of a construction any interpretation of clause (c) of Regulation 3-2.20 of the

KB&TPR, 2002 in such a manner would clearly exceed the provisions of the statute and be ultra vires as clearly the power conferred under a Regulation being delegated legislation cannot go beyond the perimeters of the statute under which such regulations are passed.<sup>5</sup>

13. We are clear that if we are to cast any other interpretation to that section, it would amount to stating that an approval is, in law, not required and can be obtained after the construction has been completed. This would in fact mean that the SBCA would not have the power to stop any construction being raised and would also render the power of SBCA to seal a property under Section 7A of the SBCO, 1979, as redundant.

14. Finally, in the decisions of the Honourable Supreme Court of Pakistan reported as **Abdul Razak v. Karachi Building Control Authority and others**.<sup>6</sup> and **Ardeshir Cowasjee vs. Karachi Building Control Authority (KMC), Karachi**<sup>7</sup> it was held that:

- (a) the SBCA has a right to regularise construction which does not change the “complexion” or “character of the originally proposed construction”?<sup>8</sup> and
- (b) the SBCA does not have a right to regularise construction which would “prejudice the rights of third parties”<sup>9</sup>

The expression “complexion” has been defined in the Oxford English Dictionary<sup>10</sup> to mean:

“ ... *the natural colour, texture of the skin, esp of the face.*”

The expression “Character”<sup>11</sup> has also been defined in the Oxford English Dictionary to mean:

“ ... *the collective qualities or characteristics , esp. mental and moral that distinguish a person or thing.*”

<sup>5</sup> See **Province of East Pakistan vs. Nur Ahmad and another** PLD 1964 SC 451; **Khawaja Ahmad Hassan vs. Government of Punjab** 2005 SCMR 186; **Zarai Taraqati Bank Limited and others vs. Said Rehman and others** 2013 SCMR 642; **Azam Wazir Khan vs. Messrs Industrial Development Bank of Pakistan and others** 2013 SCMR 678; **Muhammad Amin Muhammad Bashir Limited vs. Government of Pakistan through Secretary Ministry of Finance, Central Secretariat Islamabad and others** 2015 SCMR 630; **Mir Shabbir Ali Khan Bijrani and 3 others vs. Federation of Pakistan and others** PLD 2018 Sindh 603. **Messrs Asio African Co. (Pvt.) Ltd. and others vs. Federation of Pakistan** 2019 PTD 1368

<sup>6</sup> PLD 1994 SC 512

<sup>7</sup> *Op Cit*

<sup>8</sup> *Op Cit* at paragraph 21

<sup>9</sup> *Op Cit* at paragraph 17

<sup>10</sup> Persall J and Trumble B. (2008) **Oxford Reference Dictionary** OUP, Delhi

<sup>11</sup> *Ibid*

15. The meaning of these expressions must be interpreted in light of the decisions in **Abdul Razak v. Karachi Building Control Authority and others**.<sup>12</sup> In that case against a permission for the construction of a ground plus two storey structure for a house the construction was converted into a ground plus two structure containing flats and which declined by both this Court and by the Honourable Supreme Court of Pakistan as incapable of being regularised. It would therefore seem that where approval is given of a structure, the authority that the SBCA has to regularise does not include the right to regularise a change in the amount of storeys of the building as that would change the “complexion” of the i.e. the face of it and also does not include a change in the “character” of the building i.e. they cannot convert the nature of the approval e.g. from a residential bungalow to apartments or to shops or offices. In addition, and as held by the Honourable Supreme Court of Pakistan<sup>13</sup> the construction raised could not prejudice the rights of third parties and which as identified therein would mean that it was incumbent on the SBCA while considering an application to regularise a construction to not mechanically look at the matter from a mathematical point of view to an extent of a percentage in deviation but rather to examine the regularisation application maintained by the owner of the construction and to see as to whether the regularisation would or would not:

“ ... ensure safe and hygienic conditions of living for the citizens in general. They do not concern any one individual alone.”<sup>14</sup>

The Honourable Supreme Court elaborated this point in the decision reported as **Ardeshir Cowasjee vs. Karachi Building Control Authority (KMC), Karachi**<sup>15</sup> wherein it was held that:

“ ... The Regulations should be applied for the benefit of the public and not for favouring an individual. Simpliciter the factum that on account of tremendous increase in ‘the population in Karachi the situation demands raising of high-rise buildings, will not justify the conversion of residential plots originally intended to be used for building ground-plus-one and allowing the raising of high-rise buildings thereon without providing for required water, electricity, gas, sewerage lines, streets and roads etc.”

16. Clearly, where no approval has ever been sanctioned, it cannot be considered that a regularisation of such a construction would not change the

<sup>12</sup> PLD 1994 SC 512

<sup>13</sup> *Op Cit* at paragraph 17

<sup>14</sup> *Op Cit* at paragraph 16 as approved in Paragraph 17

<sup>15</sup> *Op Cit* at paragraph 21

complexion of the construction or would not affect third party rights as held by the Honourable Supreme Court of Pakistan.

17. Finally, by seeking such a relief, the Petitioners are seeking to carve out rights for themselves on the basis of being a separate class of persons who having violated the law and therefore seeking to be differentiated from the general public who have followed the law. This issue was addressed by a Learned Single Judge of this Court in the decision reported as **Muhammad Usman vs. K.B.C.A.**<sup>16</sup> and in which it was held that:

“ ... *It is an admitted position that the plaintiff has violated the approved plan but the plaintiff contends that the violation is only in respect of the internal construction of the building. Basic structure of the building continues to remain the same as per the approved plan. Furthermore, the plaintiff contends that the violation of the internal construction was itself necessitated by the architectural plans and under the regulations cited above these can be regularised upon payment of penalty. In so far as the defendant No.1 is concerned while they admit that certain deviation from the approved plan can be regularised under these regulations, there are certain exceptions to the rule which have been clearly laid down in these regulations and the plot ratio which in this case was 1:4 is one such exception. Consequently, there is no possibility of regularisation of this deviation. Moreover, they contend that as per the Government of Sindh notification such regularisation in any case has now been banned.*

**The concept of regularisation of deviation from the approved plan is, I must admit, quite unpalatable to me. One might ask what is the purpose of making a rule or regulation which can be deviated from and such deviation can be compounded upon payment of penalty. Surely this would be contradiction in terms, for, rules are made to be obeyed and not to be deviated from. If such be the case then that would tantamount to allowing premium on deviation from the rules and, thus, those who choose to obey the rules would suffer and would be at a disadvantage as compared to those who choose not to obey the rules. Town Planning and Building Regulations had been introduced in major cities the world over in the aftermath of the first world war due to great influx of population from the villages to the cities. Purpose of Town and Building Regulations basically is to prevent the builders from construction which can in any way interfere with the tangible as well as intangible rights of other citizens of city. While tangible rights need not be dwelled upon here, the intangible rights relate to right of a citizen to, amongst other things, enjoy a good quality of life by having a better environment around him. Need it be said that it is human nature to try and obtain maximum advantage even if it is to the detriment of the others. The civilized societies introduce rules and regulations**

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<sup>16</sup> 1999 YLR 1170

**to prevent free play to such primitive instincts and the hallmark of such societies is the observance of such rules. Consequently if a rule is made and is violated and then it is condoned the entire structure of a society can collapse. A rule, a regulation or law by its very nature must be enforced because only if it is enforced there is purpose to its formation. Rules assume meaning only when they are enforced and it is only when such enforcement is without any discrimination and without any consideration of status or position of the violators of the rules that the enforces of rules acquire credibility. A wrong once committed cannot be righted by payment of penalty, for that would be a wrong in itself and two wrongs cannot make a right. The concept of penalty was devised as a punishment for a wrong and not as condonation of it. It essentially entails two things. First the reversion to the original state and then payment of fine for having committed the offence. If the first element is missing then it is not a penalty but a disguised mode of permitting the perpetuation of a wrong. It is the availability of such discretion with the State functionaries that leads to corruption and opens windows for wrong doing whereby Government officials use this opportunity to black mail others and relying on the avaricious nature of human being exploit them to extract money. In my view the concept of compounding of an offence is relevant only to criminal law where an illegal act of an individual affects another individual/individuals or the State. On the other hand in civil law where illegal act of an individual affects society at large compounding would amount to discrimination between law abiding and non law abiding citizens and, thus, violative of Article 25 of Constitution of Pakistan and hence to that effect would be of no legal effect.”**

While the provisions of Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 recognise and accept that a classification can be made and which should be “reasonable and rational” against the criteria of “*intelligent differentia*” we find it impossible to accept such a classification, as is being suggested by the Petitioners, on the basis of persons who follow the law as opposed person who don’t. To our mind such a classification is neither a reasonable or a rational classification and agree with the Learned Single Judge that such acts “**would amount to discrimination between law abiding and non law abiding citizens**” and if made would actually prejudice persons who follow the law and embolden persons who violate the law to continue to act in violation of the law. Such a classification cannot be sustained, is clearly misplaced and the right of the Petitioners to maintain this Petition for regularisation on the ground is rejected. It is evident that they have already enjoyed the benefit of living in an illegally constructed property for a substantial time and cannot now seek to earn a premium on their illegality by seeking relief through this Petition.

18. While parting we are pains to state the manner in which the affairs of the Sindh Building Control Authority are being run and which is directly responsible for the loss suffered by persons such as the Petitioners is deplorable. Despite being the regulators of constructions in the Province of Sindh, buildings are being constructed either without approval or in deviation of approval and which could only happen with the collusion of officials of the SBCA or on account of the negligence of the officers of the SBCA all of whom have failed to ensure that such construction are not raised without an approval granted by it.

19. Similarly utility agencies such as K-Electric issue electricity connections to such illegal constructions, also in violation of Sub-Section (1) of Section 18G of the Sindh Building Control Ordinance, 1979 and persons who are purchasing units in such constructions are misled as to the legality of the construction when they see utility connections provided by the utility agencies to such illegal constructions.

20. While one may have some compassion to the plight of such persons we are equally concerned with the fact that by allowing such construction to subsist or by allowing a “post facto” approval to be granted, we would:

- (i) be authorizing the SBCA to act outside the purview of subsection (1) of Section 6 of the Sindh Building Control Ordinance, 1979 and we would be sanctifying such illegality;
- (ii) be discriminating against people who follow the law in favour of persons who do not thereby prejudicing them;
- (iii) be encouraging corruption and negligence within the SBCA by allowing such illegal constructions to be ratified post facto as a perception would therefore be created within the SBCA that they are permitted to ignore the obligations to regulate construction on the premise that the breach of their duty can be ratified though an order of this court;
- (iv) allowing such officers of the SBCA to use the orders of the court as a defence in any proceedings that are instituted as against them, including but not limited to references for corruption; and
- (v) by allowing the public at large to raise constructions with following the law and/or in violation of the law.



21. For the foregoing reasons this Petition is clearly misconceived and is not maintainable and for which reasons we had dismissed this Petition on 31 January 2024, and these are reasons for that Order.

J U D G E

Dated:12 February 2024.

J U D G E

Nasir.