

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. D– 2241 of 2023 a/w

C.P. No. D–5192 of 2023

Date	Order with Signature of Judge
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C.P. No. D– 2241 of 2023

1. For hearing of Misc No.585/2024 (Intervener) :
2. For hearing of Misc No.586/2024 (Recalling) :
3. For hearing of Misc No.10853/2023 (Stay) :
4. For hearing of Misc No.10854/2023 (Appointment of Nazir) :
5. For hearing of main case.

C.P. No. D–5192 of 2023

1. **For hearing of Office Objection**
2. **For hearing of Misc No. 23801 of 2023**
3. **For hearing of Main Case**

24.01.2024

Mr. Rashid Rajar Advocate for the petitioner IN CP D No.2241 of 2023.

Moulvi Iqbal Haider, Advocate for the Intervener

Mr. Ghulam Abbas Lashari, Advocate for SBCA a/w Asim Ansari
Deputy Director SBCA Dsitric East

Mr. Khurram Ghayas, Advocate for the KDA

Mr. Muhammad Abdullah, Advocate for the K-Electric

Mr. Miran Muhammad Shah, Additional Advocate General

These two petitions have each been filed under the provisions of Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 impugning the construction on the same property i.e. Plot No. A-138, Block-1, Gulshan-e-Iqbal, Karachi, admeasuring 240 square yards (hereinafter referred to as the "Said Property") in which approval has been accorded for Ground + One structure on 15.03.1982 and which apparently has since been demolished and a new Ground + Three Structure exists without any approval from the Sindh Building Control Authority (hereinafter referred to a the "SBCA").

A. CP No. D- 2241 of 2023

1 & 2. An application has been filed by four Interveners who are owners of units on the 3rd Floor of the building constructed on said property

and which, while sub-leased in their favour, also does not disclose any sanction having been accorded by the SBCA for construction of the said property for their units.

In subsection (1) of Section 6 of the Sindh Building Control Ordinance, 1979 (hereinafter referred to as the "SBCO, 1979") it is incumbent on every person who is constructing upon a property within the jurisdiction of SBCA to obtain an approval from the SBCA BEFORE raising such construction. The section reads as under:

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

The intervenors have pleaded before us that on the basis of the title that they have under the sub-lease they have a right to occupy their units and therefore they have a right in the property that is the subject matter of these Petitions and should be made a party to these proceedings.

(a) **Rights of Sub-Lessees in properties constructed without an Approval under Sub-Section (1) of Section 6 of the SBCO, 1979**

The rights of such sub-lessees was determined by a Single Judge of this Court reported as **Muhammad Aslam Gatta And Another vs. Karachi Building Control Authority (K.M.C.), M.A. Jinnah Road, Karachi And 13 Others**¹ 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*

¹ 1998 MLD 544

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 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.”

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 Others²

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 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).”

² 2000 SCMR 1748

The decision of this Court, as approved by the Honourable Supreme Court of Pakistan, has been further reinforced by an amendment made by the insertion of Sub- Section (ii) of Section 18 G of 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.

We are therefore inclined to state that while the execution of a Sub-Lease may confer rights to the land, it cannot in any manner justify a construction on a property that has been made in violation of Sub-Section (1) of Section 6 of the SBCO,1979 and as such we are in no doubt that the Interveners have no right, title and interest as per law and as such the application is not maintainable and is dismissed.

(b) Compounding / Regularisation

Mr. Moulvi Iqbal Haider had stated that the Intervenors were inclined to maintain an application for regularisation. What is referred to a right to “regularise” a deviation of an approved plan that has been sanctioned by the SBCA under Sub-Section (1) of Section 6 of the SBCO, 1979 is 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 provision 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.”*

Without going into the validity of these Regulations, suffice to say that the very 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.³

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.

Finally, in the decisions of the Honourable Supreme Court of Pakistan reported as **Abdul Razak v. Karachi Building Control Authority and others**.⁴ and **Ardeshir Cowasjee vs. Karachi Building Control Authority (KMC), Karachi**⁵ 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”?⁶ and
- (b) the SBCA does not have a right to regularise construction which would “prejudice the rights of third parties”⁷

³ 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

⁴ PLD 1994 SC 512

⁵ *Op Cit*

⁶ *Op Cit* at paragraph 21

⁷ *Op Cit* at paragraph 17

The expression “complexion” has been defined in the Oxford English Dictionary⁸ to mean:

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

The expression “Character”⁹ 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.*”

The meaning of these expressions must be interpreted in light of the decisions in **Abdul Razak v. Karachi Building Control Authority and others**.¹⁰ 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 Pakistan¹¹ 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.*”¹²

⁸ Persall J and Trumble B. (2008) **Oxford Reference Dictionary** OUP, Delhi

⁹ *Ibid*

¹⁰ PLD 1994 SC 512

¹¹ *Op Cit* at paragraph 17

¹² *Op Cit* at paragraph 16 as approved in Paragraph 17

The Honourable Supreme Court elaborated this point in the decision reported as **Ardeshir Cowasjee vs. Karachi Building Control Authority (KMC), Karachi**¹³ 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.*”

Clearly, where no approval has ever been sanctioned, it cannot be considered that a regularisation of such a construction would not change the complexion of the construction or would not affect third party rights as held by the Honourable Supreme Court of Pakistan. The right of the Intervenors to apply for regularisation is therefore clearly misplaced.

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 intervenors. 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 happy 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.

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.

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:

¹³ *Op Cit* at paragraph 21

- (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 through 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

3. Order for demolition has already been passed in respect of the construction that has been impugned in this petition as such this application has served its purpose and is disposed of.

4. Inspection of the construction on said property has already been carried out and reports have been filed by the SBCA, as such this application having served its purpose is disposed off

5. By an order dated 21 December 2023 we had ordered demolition of the construction on the said property and the concerned Deputy Commissioner and S.S.P were directed to provide assistance to the SBCA in order to avoid any law and order situation. We had also directed the utility agencies to disconnect the utility connections to the said properties and which K-Electric confirms has been done. The SBCA also state that they have obtained the requisite support from the concerned Deputy Commissioner and the SSP and have proceeded to demolish the construction on the said property and requests for further thirty (30) days' time to complete such demolition.

In the circumstances, the petition stands disposed off with directions to the concerned Deputy Commissioner, SSP, Director and Deputy Director SBCA to complete the demolition of the building within thirty (30) days and file a report to the MIT-II of this Court immediately thereafter but not later than one week after expiry of thirty (30) days period.

B. C.P. No. D-5192 of 2023

1,2 & 3. By an order dated 21 December 2023 we had ordered demolition of the construction on the said property and the concerned Deputy Commissioner and S.S.P were directed to provide assistance to the SBCA in order to avoid any law and order situation. We had also directed the utility agencies to disconnect the utility connections to the said properties and which K-Electric confirms has been done. The SBCA also state that they have obtained the requisite support from the concerned Deputy Commissioner and the SSP and have proceeded to demolish the construction on the said property and requests for further thirty (30) days' time to complete such demolition.

In the circumstances, this petition stands disposed of with directions to the concerned Deputy Commissioner, SSP, Director and Deputy Director SBCA to complete the demolition of the building within thirty (30) days and file a report to the MIT-II of this Court immediately thereafter but not later than one week after expiry of thirty (30) days period.

The petition having served its purpose stand disposed of in the above terms with no order as to costs.

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