

IN THE HIGH COURT OF SINDH AT KARACHI**Suit No. 2224 of 2016****Abdul Samad & Others ----- Plaintiffs****Versus****Choudhry Abdul Waheed Nasir and Others ----- Defendants**

- 1) For hearing of CMA No. 14630/2016.
- 2) For hearing of CMA No. 14631/2016.
- 3) For hearing of CMA No. 17096/2016.
- 4) For non-prosecution of CMA No.12092/2016 as notice not issued as cost not paid nor copy supplied.

Date of hearing: 14.12.2016.**Date of Order: 30.01.2017.****Plaintiffs: Through Mr. Taimur Ali Mirza Advocate.****Defendants No1 to 5: Through Mr. Khawaja Shamsul Islam Advocate.****Defendant No.6(SBCA): Nemo****ORDER**

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration and Injunction whereby, the Plaintiffs have challenged the construction of a 4 (four) storey project of apartments by Defendants No. 1 to 5 on Plot No. 46, Survey No. JM 9-77, Sheet No. 11, measuring 1500 Square Yards, situated in Muslimabad Cooperative Housing Society Limited, Jamshed Quarters, Karachi (Suit Property).

2. The facts as stated are that Plaintiffs No. 1 to 10 are residents of Muslimabad Cooperative Housing Society (the Plaintiff No. 11, "Society") and are aggrieved by impugned construction of a 4 (four) storey building

of Apartments on Suit property being raised by Defendants No. 1 to 5. It is their case that in terms of the Byelaws of the Society no such construction of a 4 (four) storey building is permissible, except ground plus two and therefore, pending final adjudication of this Suit, the Defendants No. 1 to 5 be restrained from raising further construction and the official Defendants be directed to recall the NOC and other permission(s) so far granted.

3. Learned Counsel for the Plaintiff has contended that according to Clauses No. 66 to 68 of the Byelaws of the Society. the plot holders are in fact tenants of the Society and are subject to the rules framed by the Managing Committee, and therefore, the Defendants who have purchased the property in question without permission of the Society cannot raise the impugned construction. Per learned Counsel no NOC has been obtained from the Society for raising construction and despite objections by the Plaintiffs, the Defendants have proceeded with their project and NOC has been granted by Sindh Building Control Authority. Learned Counsel has contended that the Defendants are in fact changing the status of the plot by raising four floors of Apartments and as per the Lease conditions and the terms notified by the Society, no such construction can be raised. Learned Counsel has also referred to the subject Lease in favour of the predecessor in interest of the Defendants and so also two agreements with KMC dated 16.12.1950 whereby, only ground plus one storey has been permitted to be raised within the Society. Per learned Counsel the Defendants before purchasing the property in question were well aware of the Regulations of the Society and they only stepped into the shoes of their predecessor in interest who at the time of allotment of the plot had agreed to abide by such conditions. Learned Counsel has contended that the

Defendants are Builders and after raising construction they will sell the Apartments and go away, whereas, the residents of the Society would be adversely affected with such construction and therefore, listed application may be allowed. In support he relied upon the case reported as *Arif & another v. Jaffer Public School* (2002 MLD 1410).

4. On the other hand, learned Counsel for Defendants No. 1 to 5 has contended that the Defendants have not altered or changed the status of the plot as the construction being raised by them is purely residential in nature, and is according to the approved building plan. Per learned Counsel the Plaintiff No. 1 himself lives in a Townhouse which has also been constructed in violation of the alleged Bylaws of the Society, whereas, the construction which is being raised by the Defendants is in conformity with the approved building plan, wherein, they will abide by all the requisite conditions imposed by SBCA. Learned Counsel has referred to Regulations 25-9(f) of the Karachi Building and Town Planning Regulations, 2002 ("KBTPR-2002") and has contended that the floor area ratio of 1:1.75 is permitted on this plot and therefore, the construction is in accordance with law. Per learned Counsel there are various commercial buildings already constructed on the adjacent plots and in the vicinity of the plot in question against which the Plaintiffs never objected and therefore, they are estopped by their conduct. Learned Counsel has referred to the counter affidavit and various photographs annexed therein to support his case that in almost in the entire vicinity there are Apartments and Townhouses already constructed, therefore, listed application may be dismissed. In support he has relied upon *Standard Chartered Bank Limited V. Karachi Municipal Corporation and others* (2014 YLR 1689) and *Standard Chartered Bank Limited V. Karachi Municipal Corporation and others*

(2015 YLR 1303) and 2009 MLD 602. Insofar as SBCA is concerned, nobody has turned up on their behalf to assist the Court however, written statement has been filed and the same is being considered while deciding this application.

5. Insofar as the facts of the case are concerned, as discussed hereinabove, it appears that Defendants No. 1 to 5 have purchased the Suit property on the basis of a Sale Deed dated 7.4.2016 executed in their favour by one Jan Muhammad Moon and Hanif Moon who had acquired the same by virtue of Indenture of Sublease dated 6.6.2007 and thereafter the old construction on the plot in question was demolished. The Sale Deed at 7.4.2016 Para 3 provides *that Vendees shall have and hold the said plot and shall use the same, subject to all the terms and conditions, if any, upon which the Vendors held the said plot.* It further provides in Para 8 *that the Vendee / defendants agree to observe and comply with all the terms and conditions of Lease in respect of the said plot.* The Plaintiff's case primarily is that on allotment of the plot in question there are certain restrictions originally imposed by the Society in respect of the use of the plot and the construction which can be raised. It is their case that the conditions originally imposed in the allotment order and the first Lease document continue to apply to the first owner as well as to the subsequent owners, and for such purposes the present Conveyance Deed has also been relied upon by the learned Counsel for the Plaintiff. The Plaintiff has further relied upon the Indenture of Sublease dated 6.6.2007 issued by the Society in favour of the predecessor in interest of Defendants and have specifically relied upon Clause 4, 6 and 9 of the said Lease Deed which reads as under:-

- “4) That the Sub Lessee shall comply with and observe all the rules and regulations, decisions and Bye laws of the Lessee and the Local Authority in charge of the area.

- 6) That the said plot and the building built thereon shall be used for Residential purpose only shall not be diverted to other use without express consent in writing of the Lessee, for breach [breach] of the convenient [covenants] the Lessee shall be entitled to forfeit the Lease and to remain [retain] the plot.
- 9) That to observe and perform the conditions, covenants [covenants] and obligation of the Lessee under which the sub Lessee plot is hold by the Lessee and shall at all times indemnify the Lessee against any breach of non-observance thereof.”

6. The Plaintiffs case is that the Defendants have only stepped into the shoes of the original allottees and the subsequent buyers of the plot who all had agreed and are bound by the terms and conditions of the Lease documents, as well as allotment orders issued in their favour and therefore, according to them before raising any construction and or seeking permission from the officials as well as other authorities, it was incumbent upon the Defendants to first approach Plaintiff No. 11 for seeking such permission. Though normally a person enjoys right to his property as guaranteed under Article 4 and 23 of the Constitution of the Islamic Republic of Pakistan, 1973, and cannot be asked or compelled to abide by the byelaws of the Society to raise construction according to their directions, if the same are in conflict with and statute or law on the subject. However, in the instant matter, the predecessor in interest of the Defendants No. 1 to 5 all along till the original allottee have categorically agreed to abide by the terms and conditions so notified by the Society, therefore, in the peculiar facts of this case, it cannot be said that the Defendants No. 1 to 5 can enjoy their property independently and without seeking any consent or approval from the Society insofar as raising of any construction beyond the permissible limits so notified by the Society is concerned. In clause 4 of the Sub-lease as above, the predecessor in interest of Defendants No.1 to 5, the sub-lessees have undertaken to comply with and observe all rules, and regulations, decisions and byelaws of lessee (Plaintiff No.11) and the local authority

in-charge of the area. I may reiterate that this is not a general rule but present case is an exception, wherein, from the allotment order till the Sublease and the subsequent Conveyance Deed all the parties to such documents have categorically agreed to abide by the conditions imposed by the Society. At the same time it may further be observed and noted that notwithstanding this, the Society cannot frame its byelaws which are directly in conflict with parent statute or law governing the subject. If anything is permissible in law, then perhaps the Society's byelaws cannot override the statute or law on such subject, rather, according to the settled canons of interpretation, must yield to it being subservient. Again it is of pivotal importance to observe, that lately it has been noticed that owners of plots/properties in Societies are obtaining permission and requisite approvals and NOC's from concerned departments without any recommendation and or approval of the Society. They at times not even inform the Societies regarding this. This needs to be deprecated as being unjust and against the law as well as the concept of forming a Housing Society under the Co-operative Societies Act, 1925. The Society is the custodian of its member's rights and obligations, whereas, the entire record of allotment as well as subsequent sale / purchase and transfers is also (and must be) with the Society. This is so because otherwise no proper data and record of the Society could be maintained, which in turn will affect the true and proper representation of the Society through its valid and genuine members. In the circumstances it is imperative that all proceedings in respect of every property in the Society are routed through it insofar as obtaining approvals / NOC's / permissions etc. from relevant departments are concerned, whereas, the Society is required to forward all such request(s) of allottees / owners of the properties to the said

departments immediately, with their comments either in favor or against, expeditiously. This however, does not, in any manner entitles or allows the Society to approve and or reject such requests on its own, as the same are to be dealt with and decided by the respective departments having authority and jurisdiction strictly in accordance with law. It may also be clarified that the Society cannot sit over such requests of the allottees and or owners of the property and the farthest they can go is to raise their proper objections, if any, as the allottees and or owners cannot be denied their property rights as envisaged in the Constitution. Needless to observe that a Society cannot and must not, frame its rules and regulations which are either in conflict and or are contrary to the statute on such subject. In the case of ***Muolana Muhammad Ali Jauhar Memorial Co-operative Housing Society v. City District Government, Karachi, (2009 MLD 602)***, the society had refused to recognize a subsequent buyer of a property as its member and had in fact approached the concerned authorities for cancelling the approval of building plan of the subsequent buyer, and the concerned authority had cancelled such approved plan. In addition to this the Society also filed a petition before this Court, whereby, the Society had objected on the construction being raised by the subsequent buyer of the property on the ground that there is no record of ownership of the subsequent buyer with them. A learned Division bench while repelling the contention of the Society held as follows;

After hearing the learned counsel we have examined section 17-B of Cooperative Societies Act which provide that a member of Cooperative Society after transfer of interests in the immovable property will cease to a member of the Society and the transferee be admitted as a member subject to the rule of society. In the present case, there is no dispute from the previous owner and the respondent No.6 is holding the property under registered sale deed, therefore, Cooperative Society would have acted in terms of its own byelaws as well as section 17-B of the Cooperative Societies Act and would have mutated the property in its record in the name of respondent No.6 but instead of doing so it has unnecessarily referred the respondent No.6 to various offices which were nothing but harassment. We further observe that the KBCA has wrongly cancelled the

approved building plan without realizing the legal position as its approval was on the basis of proper and legal documents and it would have not yielded to the pressure of society. We have also been informed that the house is completed in all respect in terms of the approved building plan without any violation and same has already been occupied.

In the above given circumstances, we do not find any reason for filing this petition and the issue could have been solved at the stage of officials of the society adopting a proper and reasonable way and would have saved the time of this court as well as other concerned which has not been done. Hence the petition is dismissed along with pending applications with cost of Rs.50,000 on the petitioner and Rs.25,000 on KBCA to be paid to respondent No.6 within a period of 15 days.

Here in this matter, the Society (Plaintiff No.11) does not disputes the ownership of defendant No.1 to 5, but has only objected to the construction permission and NOC issued by SBCA being against their rules / byelaws. As already observed, an owner of a property has the right to raise construction in accordance with laws framed by the regulating authority but at the same time he is also required to and bound by the condition(s) of allotment, lease and or sub-lease as the case may be, however, again subject to hereinabove observations.

7. Without prejudice to the above, there is another aspect of the matter which needs to be considered as well, as the Society and the plaintiffs have raised an objection that the impugned construction intended to be raised is not in accordance with mandate of law as the approval has been granted in violation of law. The SBCA has filed its written statement and has referred to certain Regulations of KB&TP Regulations, 2002 including Regulations 25-2.1 and 25-9.1 and 25-9.1.2. Clause 25-2.1 reads as under:-

“ [25-2.1 Building Bulk Standards

All Residential houses / bungalows / buildings shall observe the following standards, except where any of these standards are in conflict with Clause 25-9, in which case Clause 25-9 shall prevail.]

PLOT SIZE (sq. yds.)	FOOT PRINT	FAR	MINIMUM CO FRONT	MINIMUM COS SIDES	MINIMUM COS REAR
—	—	—	—	—	—

—	—	—	—	—	—
—	—	—	—	—	—
—	—	—	—	—	—
1000 (840.3 m) & large	50%	1:1	15 ft. (4.56 m)	7 ft. (2.1 m)	10 ft. (3 m)
—	—	—	—	—	—

Similarly Clause 25-9.1.1 and 25-9.1.2 provides as under:-

“25-9 OLD CITY AREAS

25-9.1. ZONE “A”

25-9.1.1. The following areas are included in this zone.

- (a) Lyari Quarters (LY)
- (b) Lea Quarters
- (c) Kemari Quarters
- (d) K.P.T. Area
- (e) Queens Quarters (QR)
- (f) Jamshed Quarters (J.M) Muslimabad**
- (g) Hyderabad Colony – Fatima Jinnah Colony
- (h) Garden East Quarters (G.E.)
- (i) Garden West Quarters (G.W.)

25-9.1.2. Floor area ratio shall be followed according to the use as laid down hereunder:

- (a) Residential uses **1:1.75**
- (b) Industrial uses 1:1.75
- (c) Residential cum commercial uses 1:2.00
- (d) Commercial uses 1:2.50”

8. Perusal of the aforesaid Regulations reflects that all Residential houses / bungalow / buildings in terms of Reg: 25-2.1 are required to observe the standards as provided in the Table hereinabove; however, when such conditions and standards are in conflict with Clause 25-9, in that case Clause 25-9 shall prevail. The plot in question is of 1500 square yards and according to Regulation 25-2.1 the floor area ratio (FAR) should be 1:1; however, the plot being situated in old city area, by virtue of Clause 25-9.1.1 (f) read with clause 25-9.1.2 can have FAR of 1:1.75. This is because of the provision as above which provides that

Clause 25-9 shall prevail. However, the exception under Clause 25-9 is only in respect of FAR and not in respect of the other conditions including the Foot Print and the minimum compulsory open space as mentioned hereinabove. The plot in question is of 1500 square yards which is equal to 13500 square feet, whereas, the permissible foot print is 50% which means that the construction on the ground floor can only be raised to a maximum of 6750 square feet and the FAR @ 1:1.75 works out to be 11812.5 square feet and not beyond that. Whereas, the approved building plan as relied upon by Defendants No. 1 to 5 and supported by SBCA permits them to raise construction on approximately 24000 square feet. This working has been based by the Defendants and approved by SBCA is in the following manner as reflected from the approved building plan:-

SCHEDULE OF AREA		
TOTAL AREA OF PLOT	=	1500.00 SQ. YDS
OR	=	13500.00 SQ. FT
ALLOWABLE FOOT PRINT 50%	=	6750.00 SQ. FT
ALLOWABLE (FAR) = 1.1.75	=	23625.00 SQ. FT
ALLOWABLE RECREATION 2%	=	472.50 SQ. FT

9. The above calculation has been made and permitted by SBCA by taking into account the permissible FAR of 1:1.75 on the entire area of the plot by ignoring the limits of the foot print and the compulsory open space. When the definition of floor area and floor area ratio (FAR) as provided in Regulations 2-55 and 2-56 are perused and examined, it reflects that the "Floor Area" means *horizontal area of floor in a building covered with roof, whether or not enclosed by walls but excluding ancillary covered spaces and projection allowed under these Regulations.* Whereas, "Floor Area Ratio" means *the total floor area of a building divided by the area of the plot.* What SBCA has done is that they have

granted Floor Area Ratio of 1:1.75 on the entire area of the plot by ignoring the applicability of other restrictions regarding foot print and compulsory open space, whereas, the construction has to be in accordance with Regulations 25-2.1 in respect of foot print and compulsory open space, and according to Regulation 25-9 in respect of the Floor Area Ratio. The law provides that 25-9 will only prevail to the extent of its conflict with Regulations 25-2.1 and not in its entirety. It is only the FAR provided in Clause 25-9 which will prevail upon the FAR provided in Regulations 25-2.1, whereas, the foot print and COS will remain intact and are to be followed by the Defendants. It further appears that there is another regulation i.e. 25-9.6.6 which must also be taken in consideration and reads as under:-

“25-9.6.6. [For all residential plots facing more than 30 ft. (9.13 m) road / street width, the minimum COS and foot print as prescribed in Section 25-2 shall be applied subject to Clause No. 25-9.3 except the part of old city including following area.]”

10. The aforesaid clause under the head of “General” Regulation No 25-9.6 being applicable to regulations in this Chapter, very clearly and explicitly provides for an exception that in case of all residential plots facing more than 30 ft (present plot is facing a 40 ft wide road) road / street width, the minimum COS and foot print as prescribed in Section 25-2 shall be applied subject to clause 25-9.3 (Zone “C”, not relevant for the present purposes) with a further exception in respect of certain part of the Old City Area, which again is not relevant here inasmuch as the plot in question as per the case of defendants falls under Zone “**A**” of the Old City Area and not Zone “**C**”. However, one thing is very clear from the aforesaid clause (25-9.6.6) that the condition of foot print and COS (compulsory open space) is applicable without any exception on plots facing more than 30 ft wide road / street, irrespective of the fact that such plot

falls in Old City Area under 25-9 except 25-9.3 (Zone “C”). It is only the FAR prescribed in Reg:25-9 which would be applicable as against the FAR of Reg:25-2, but insofar as foot print and COS (compulsory open space) is concerned, the same would be applicable as per Regulation 25-2 and the table thereto.

11. In view of hereinabove facts and circumstances of this case I am of the view that insofar as the objection of Plaintiff No.11 regarding violation of their byelaws in raising construction is concerned, the same can be sustained in respect of its conditions of allotment, lease and or sub-lease (as the case may be), only to the extent of and in the manner, it is not in conflict with any law, rules or regulations promulgated by the competent authority. In the contrary it is the law / statute and or rules / regulations which shall prevail. Insofar as the case of other plaintiffs (residents) is concerned, they are entitled to raise objections on the construction being raised on the suit property, and as discussed hereinabove, the permission, approval and NOC granted by SBCA appears to be contrary to the KB&TPR 2002, specially regulations 25-2 and the applicability of foot print and COS. In the circumstances I am of the view that the plaintiffs have made out a prima facie case for indulgence, as apparently there seems to be a clear cut violation of the regulations as discussed hereinabove, materially affecting the interests of Plaintiffs, whereas, balance of convenience lies in their favor, and irreparable loss would be caused to them if the injunctive relief as prayed is refused. On the other hand the defendants No.1 to 5 have apparently obtained the permission for construction of a 4 (four) storey apartment building on the suit property by misapplication of law / rules in respect of foot print and COS, and therefore, they will not suffer any irreparable loss if the injunction is granted. In the circumstances,

applications listed at Serial No. 1 & 2 are allowed to the extent that defendants No.6 shall not permit raising construction on the suit plot over and above 50% foot print, with compulsory open space as provided in regulation 25-2 and FAR of 1:1.75 as provided in clause 25-9.1.2. They may issue an amended building plan if so approached by defendants No.1 to 5, and till then neither any construction be raised nor any third party interest shall be created in the Suit plot. The application at Serial No.3 has become infructuous in view of the aforesaid order and is accordingly dismissed as such, whereas, notice of application at Serial No.4 be repeated upon the alleged contemnors for the next date of hearing after deposit of cost. It is needless to observe that the aforesaid observations are tentative in nature for deciding the injunction application and shall not have any bearing on the final outcome to the Suit after trial.

Dated: 30.01.2017

J U D G E

ARSHAD/