

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

**Constitutional Petition No. D – 3937 of 2012**

Date	Order with signature of Judge
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Present :

1. Mr. Justice Irfan Saadat Khan
2. Mr. Justice Nadeem Akhtar

1. For Katcha Peshi :
2. For hearing of CMA No.41151/2012 (Stay) :

- Petitioner : Dr. Ali Muhammad Ansari, Muhammad Ibrahim Suleman and Amin Majeed, through M/S Khalid Jawed Khan and Ziaul Haq Makhdoom, Advocates.
- Respondent No.1 : Sindhi Muslim Cooperative Housing Society Ltd., Karachi, through Syed Ziauddin Nasir, Advocate.
- Respondent No.2 : Sindh Building Control Authority, through Rao Sarfaraz, Advocate.
- Respondent No.3 : The Registrar, Cooperative Societies (Sindh), through Mr. Miran Muhammad Shah, Addl. Advocate General, Sindh.
- Date of hearing : 19.05.2014.

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**ORDER**

**NADEEM AKHTAR, J.**– Through this Constitutional Petition, the petitioners have impugned the letter dated 14.03.2011 issued by the respondent No.1 Society, directing them to submit undertakings for completing the transfer / mutation process in their favour in respect of Plot No.70, measuring 850 sq. yds., Block 'A', Sindhi Muslim Cooperative Housing Society Ltd., Karachi (**'the plot'**).

2. The relevant facts of the case are that the plot is owned by five persons ; namely, Dr. Ali Muhammad Ansari (25% share), Asad Ansari (25% share), Bilal Ansari (16.67% share), Imran Ansari (16.67% share) and Mrs. Samia Ansari (16.66% share). The co-owner Dr. Ali Muhammad Ansari is the real father of the other above named co-owners. The plot was originally leased out by the respondent No.1 Society in favour of one Mr. Farrukh (sub-lessee) for a period

of 99 years commencing from 31.03.1948. All the above named co-owners are the successors-in-interest of the sub-lessee. In the year 1982, the status of the plot was converted from residential to commercial at the request of the then owners by the respondent No.1 Society vide letter dated 27.11.1982. On the basis of the said letter and after scrutiny of documents and payments of the requisite fee, respondent No.2 / SBCA, vide letter dated 08.02.1983 addressed to KMC, also approved the conversion of the plot from residential to commercial use. Respondent No.2 also issued a site plan for commercialization of the plot, whereafter the transferees constructed a ground plus two storied building thereon for commercial use as per the approved building plan.

3. Through an agreement of sale dated 22.10.2010, the above named co-owners agreed to sell the plot to petitioners 2 and 3 and four other persons (vendees), and the vendees agreed to purchase the same from the co-owners. After entering into the sale agreement, petitioner No.1 as well as petitioners 2 and 3, through separate applications and reminders, requested the respondent No.1 Society to issue a no objection certificate for sale of the plot, which was required by the respondent No.1 Society to transfer / mutate the plot in favour of the vendees. In response to their applications, the respondent No.1 Society, through the impugned letter, directed them to furnish undertakings duly signed by them containing *inter alia* the following terms and conditions :

- “i. That the plot shall not be used for the purpose of installation of any kind of Industry / Workshop / Godowns / Building / Flat Site / Office Plaza / Shopping Arcade / Super Market / Restaurant / Hotel / Wedding Lawn / Hall etc and the Plot shall not be bifurcated in any matter at all.*
- ii. That the proposed purchaser/ buyer shall not raise / add any further storey in the present structure (No third floor).*
- iii. That the proposed buyer shall not sub let or permit to any other or sale by part or portion in the present premises.*
- iv. That the proposed buyer shall not make any alteration / addition without the permission of the Society nor demolish the present structure without prior permission / NOC of the Society.*
- v. That the proposed buyer shall not create any Parking hazard or other nuisance to the neighboring member allottees of the Society.*
- vi. That proposed buyer shall not install or permit to install or rent out the roof top for any Mobile Phone tower or any other type of Antenna etc.*
- vii. That the proposed buyer shall not privately sub-divide the Plot.*
- viii. That proposed buyer shall not construct any Town House.”*

4. Mr. Khalid Jawed Khan, the learned counsel for the petitioners, submitted that under the law, particularly under the provisions of Karachi Building and Town Planning Regulations, 2002, the respondent No.1 Society has no authority or jurisdiction either to impose any of the above conditions, or to press the petitioners to execute the impugned undertakings, or to refuse the transfer and mutation of the plot in favour of the vendees on such ground. He contended that the only function of the respondent No.1 Society is to entertain and decide the applications for transfer / mutation of the properties within its jurisdiction, and to record the same in accordance with its Bye-Laws ; and, the respondent No.1 Society has no role to play insofar as the development, construction, building plans or use of the plot are concerned. He particularly emphasized that after commercialization of the plot in the year 1983 by the respondent No.1 Society itself, there was no justification for demanding the impugned undertakings from the petitioners. He argued that the petitioners are entitled to enjoy their valuable vested and proprietary in the plot by using it for commercial purposes, without any let or hindrance from the respondent No.1 Society. In support of his submissions, the learned counsel relied upon the order passed on 22.10.2004 by a learned Division Bench of this Court in Constitutional Petition No.941/2004 (*Sindhi Muslim Cooperative Housing Society Ltd. V/S City District Government Karachi and 2 others*), wherein it was held as under :

*“We have heard all the learned counsel. In view of the Karachi Building and Town Planning Regulations 2002, particularly Regulation 3.2.2 thereof, the Lessor, in this case the SMCHS, has a limited role to play in so far as the construction activity is concerned on the plot in question. This role has now been entrusted to the KBCA. In view of the same, we would, therefore, dispose of this Petition by directing the KBCA to ensure that the construction which is being carried out on the Plot in question should remain strictly in accordance with the approved building plan and that no deviation in made therefrom.”*

5. Mr. Ziauddin Nasir, learned counsel for the respondent No.1 Society, after seeking instructions from the Society, made a statement before us that the applications filed by the petitioners for the transfer and mutation of the plot in favour of the vendees, will be decided expeditiously by the respondent No.1 Society, and if all the required formalities are fulfilled by the petitioners, the plot will be mutated in favour of the vendees. He, however, defended the impugned undertakings by insisting that the petitioners will have to submit the same, as the construction of commercial nature on the plot is not permissible.

6. We have noticed that it is not the case of the respondent No.1 Society that the petitioners have violated any of the terms and conditions of the lease,

or have not fulfilled the other formalities required for transfer and mutation. In any event, after approving the conversion of the plot from residential to commercial use in the year 1983 through due process of law, the respondent No.1 Society is now *estopped* from raising any objection in this behalf at this belated stage, and that too without any lawful justification. The stance taken by the respondent No.1 Society is indeed surprising, especially when this Court has already held in the Society's own aforementioned case that the respondent No.1 Society has a limited role to play insofar as the construction activity on plots is concerned, and this role has been entrusted to respondent No.2 / SBCA (formerly KBCA) under the Karachi Building and Town Planning Regulations, 2002. The impugned action of the respondent No.1 Society is, therefore, not only without jurisdiction, but is also in violation of the aforesaid order passed by this Court in Constitutional Petition No.941/2004.

7. We, therefore, allow this petition as prayed, subject to the condition that respondent No.2 / SBCA shall ensure that the construction on the plot is carried out strictly in accordance with the approved building plan, and no deviation should be allowed therefrom. The listed application also stands disposed of.

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