

## IN THE HIGH COURT OF SINDH, KARACHI

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

### C.P. Nos. D-6627 & 4940 of 2022

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#### **C.P. No. D -6627 of 2022**

1. For hearing of Misc. No.2756/2023 (U/O. I R.10 CPC) :
  2. For orders as to maintainability
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#### **C.P. Nos.D-4940 of 2022**

1. For orders on Nazir report dated 13.09.2022 :
  2. For hearing of Misc. No.26947/2023 (U/S. 151 CPC) :
  3. For hearing of Misc. No.21087/2022 (Stay) :
  4. For hearing of Misc. No.21088/2022 (Stay) :
  5. For hearing of main case:
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Petitioner in CP No. D-6627 of 2022	:	Through Mr. Atiq-ur-Rahman , Advocate
Petitioner in CP No. D -4940 of 2022	:	Syed Haider Imam Rizvi, Advocate
Respondent No.4	:	Through Mr. Ashraf Ali Butt, Advocate
Respondent No.7	:	Through Mr. Muhammad Ilyas Warraich, Advocate
Respondent No.8	:	Through Mr. Shahid Ahmed, Advocate
Respondents No.1 & 9	:	Through Mr. Jawwad Dero, Additional Advocate General
Respondent No.10	:	Through Mr. Mamoon K. Sherwany, Advocate
Date of hearing:	:	18.12.2023 -----

### **ORDER**

**MOHAMMAD ABDUR RAHMAN,J:** By this order we will dispose of each of these two Petitions that have been maintained by the Petitioners under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 each relating to the construction on a residential plot Plot No.A-1/01, Capital Cooperative Housing Society Limited, Sector 35-A, KDA Scheme-

33, Karachi (hereinafter referred to as the "Said Property") and which is located within the jurisdiction Cantonment Board, Malir.

2. C.P.No.D-4940 of 2022 had been maintained by the Petitioner contending that the approval of Ground + One storey residential bungalow had been accorded to the Respondent No.10 while on the Said Property a Ground + Two storey construction has been constructed in deviation of the approval accorded by the Cantonment Board, Malir.

3. The Nazir of this Court was appointed as a Commissioner to inspect the Said Property and confirm the nature of the construction raised and whose report has confirmed that :

" ... **Conclusion of Inspection Proceedings**

*The grievance of petitioners regarding the construction of a portion at residential house is found reasonable, because every floor was found divided into two separate sections/ portions. Moreover, the construction of second floor appears to be unauthorized as its request for construction has already been regretted by Cantonment Board Malir. Furthermore, the deficiency in compulsory open space was also found as stated above."*

4. It seems that the Petitioner in CP No.D-667 of 2022 had maintained an application before the Cantonment Board, Malir seeking regularisation of that illegal construction that had been made by the Petitioner in CP No.D-667 of 2022 and which was rejected by the Cantonment Board, Malir vide its letter dated 16.08.2022. The Petitioner in CP No. D-6672 of 2022 has impugned the letter dated 16.08.2022 which while rejecting the regularisation had stated as under:

" ... *It is to inform you that your request for Regularization plan in respect of subject property is regretted/returned unactioned as you have carried out unauthorized constructed at 2<sup>nd</sup> floor against building bye laws. In this regard, this office issued notice vide letter under reference.*

*You are therefore, required resubmit regularization plan after removal of unauthorized construction from 2<sup>nd</sup> floor to proceed further in the matter."*

5. Mr. Atiq-ur-Rahman entered appearance on behalf of the Petitioner in CP No.D-6627 of 2022 and has contended that as there are other construction of a ground plus two storey structure that exists in the vicinity of the Said Property they have right to seek regularisation of the construction raised by them on the Said Property in terms of Section 185 and 186 of the Cantonments Act, 1924 and which reads as under:

" ... **184. Illegal erection and re-erection.**

*Whoever begins, continues or completes the erection or re-erection of a building-*

*(a) without having given a valid notice as required by sections 179 and 180, or before the building has been sanctioned or is deemed to have been sanctioned, or*

(b) without complying with any direction made under sub-section (1) of section 181, or

(c) when sanction has been refused, or has ceased to be available, or has been suspended by the Competent Authority, under clause (b) of sub-section (1) of section 52 ,

shall be punishable with fine which may extend to five hundred rupees.

**185. Power to stop erection or re-erection or to demolish.**

(1) A Board may, at any time, by notice in writing, direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the Board considers that such erection or re-erection is an offence under section 184, and may in any such case or in any other case in which the Board considers that the erection or re-erection of a building is an offence under section 184, within twelve months] of the completion of such erection or re-erection in like manner direct the alteration or demolition, as it thinks necessary, of the building, or any part thereof, so erected or re-erectioned:

Provided that the Board may, instead of requiring the alteration or demolition of any such building or part thereof, accept by way of composition such sum as it thinks reasonable:

Provided further that the Board shall not, without the previous concurrence of the Competent Authority, accept any sum by way of composition under the foregoing proviso in respect of any building on land which is not under the management of the Board.

(2) A Board shall by notice in writing direct the owner, lessee or occupier of any land in the cantonment to stop the erection or re-erection of a building in any case in which the order under section 181 sanctioning the erection or re-erection has been suspended by the Officer Commanding-in-Chief, the Command, under clause (b) of sub-section (1) of section 52, and shall in any such case in like manner direct the demolition or alteration, as the case may be, of the building or any part thereof so erected or re-erectioned where the Competent Authority, thereafter directs that the order of the Board sanctioning the erection or re-erection of the building shall not be carried into effect or shall be carried into effect with modifications specified by him:

Provided that the Board shall pay to the owner of the building compensation for any loss actually incurred by him in consequence of the demolition or alteration of any building which has been erected or re-erectioned prior to the date on which the order of the Officer Commanding-in-Chief, the Command, has been communicated to him.”

He relied upon the decision in case of **Muhammad Amin vs. Karachi Cantonment Board**<sup>1</sup> where in an appeal from the decree order the demolition of a building, a division bench of this Court was pleased state as follows:

“ ... 23. Chapter XI of the Cantonments Act, 1924, relates to control over buildings, boundaries, streets etc. and contains section 178-A to section 197, which provide for sanction, compensation, approval and condonation of deviations in

<sup>1</sup> PLD 2012 Sindh 1

*the approved building plan etc. It also includes powers to make bye-laws in terms of section 186 of the Cantonments Act. From perusal of sections 184 and 185, it appears that Cantonment Board and the Authorities have been given vast powers to condone and approve the deviations in the approved building plan by accepting composition fee, as held by a Division Bench of this Court in the case of Sibte-Mujtaba Kazmi v. Cantonment Board reported as 2008 MLD 793. It further appears that Building Bye-Laws 1983 of Karachi Cantonment framed under Section 186 of the Cantonments Act, 1924, published, approved and confirmed by the Federal Government as required by subsection (1) of section 284 of the Cantonments Act, regulate the erection and re-erection of, or addition and alteration to buildings in the Karachi Cantonment. From perusal of Cantonments Act, 1924 and Building Bye-Laws 1983, it further transpired that there are hardly any provisions in the subject bye-laws which define the nature and the extent of the deviations in the approved building plan, which could not be regularized in terms of the Cantonments Act and the Building Bye-Law. It further appears that there is no statutory bar upon the discretion vested in the Board and the Officers of the Cantonment, whereby the extent and the nature of the violations from the approved building plan could not be condoned or regularized after accepting composition fee. This aspect of the matter requires attention of the Cantonment Authority, who shall take step to bring necessary amendments in the existing law and Bye-Laws of the Cantonment to properly regulate the construction in the Cantonment Area strictly in accordance with law, rules and regulations and further to declare some specific policy regulating the construction activity in the Cantonment Area by defining the nature and extent of violations and deviations which could not be regularized or condoned on payment of composition fee. However, since we are not examining the propriety of the Cantonments Act, 1924 and the building bye-law 1983, we would refrain from issuing any directions at this stage to the respondents in this regard.*

*24. Keeping in view hereinabove facts and non-availability of statutory provision, rules or bye-laws, restricting the condonation, approval and illegal construction & deviation from approved building plan in the Cantonments Act and the Building Bye-Laws, we are of the view that the appellant has made out a case of discriminatory treatment given by the Cantonment Board as well as Director Military Lands & Cantonment Karachi Region Karachi, whereby the appellant's claim of regularization of deviations from approved plan has been declined. Under the circumstances, we would remand the case back to the respondent i.e. Director Military Lands & Cantonment Karachi Region, Karachi with a direction to reconsider the case of the appellant for approval in accordance with law and byelaws etc., keeping in view the treatment meted out to similar buildings, after providing complete opportunity to appellant to present his case and after assigning cogent reasons for such decision."*

6. Mr. Ashraf Ali Butt has appeared on behalf of the Cantonment Board, Malir and stated that they are unable to regularize the construction that exists on the Said Property as the approval was of Ground + One storey and which has now been converted into a ground plus two storey building rendering the structure to be considered as a multi storey building and not a residential house. He further contended that the entire second floor of the building

is liable to be demolished along with any internal deviations so as to bring the construction on Said Property in conjunction with the approved plan issued by the Cantonment Board, Malir.

7. We have heard the learned counsel, learned counsel for the respondents and have perused the record.

8. It is common ground as between all the parties that the approval that has been accorded for the construction on the Said Property was for a “Ground + One Floor Bungalow” and which has been deviated from by the owners of the Said Property and on which at present is a Ground + Two storey structure exists. Bye-laws known as then Building Byelaws 2023 (hereinafter referred to as the “Bye Laws 2023”) have been passed by the Cantonment Board, Malir and which define a building known as a “Multistorey Building” under sub-section (r) of Section 1 of the Bye Laws 2023 as:

“ ... means any building above ground plus two stories”

It is therefore apparent that the Petitioner in CP No.D-667 of 2022 having applied for the construction of a residential bungalow had deviated from the approved plan and had constructed a structure of a completely different nature from what was approved.

9. It is also apparent that at the time when the decision reported as **Muhammad Amin vs. Karachi Cantonment Board**<sup>2</sup> was passed no regulations had been framed by Cantonments to regulate the compounding of deviations under the provisions of the Cantonment Act, 1924. This position has been varied by the Cantonment Board, Malir having framed the Building Byelaws 2023 and under which it has the authority to consider a deviation to a plan under Bye-Law 13 of Chapter 2 and which reads as under:

“ ... **Submission of Deviated Plans:-**

*Where a person her erected or re-erected a building which is not in conformity with the building plan sanctioned by the board such person shall, together with report of completion of the building, submit a completion plan showing the building exactly completed and the deviations made in the building from the sanctioned building plan in Form 7 for consideration of the board.”*

It seems that the ground plus two storey plan was presented before the Cantonment Board, Malir and which has refused to authorize the deviation by stating that the Petitioner in CP No. D-6627of 2022 had “carried out unauthorized constructed at 2<sup>nd</sup> floor against building bye laws” and which refusal has been impugned in CP No. D-6627 of 2022 by the Petition primarily on the ground that similar construction to what has been constructed on the Said Property exists in the area where the Said Property is located. We are not at all impressed with such an argument. It is apparent from the Note to Clause (1) of Bye-law 15 of the Chapter III of the Building Bye Laws 2023 which regulates residential construction which specifically clarifies that:

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<sup>2</sup> PLD 2012 Sindh 1

“ ... *Note:-*

*The number of storeys shall be restricted to ground plus one.”*

It would therefore seem that the Cantonment Board Malir has therefore issued the letter dated 16.08.2022 in conformity with the Building Byelaws 2023 and to which no exception can be taken. The argument of the Petitioner in CP No.D-667 of 2022 that construction greater than a ground plus one has been permitted by the Cantonment Board, Malir is also not sustainable. The Said Property is a residential plot and which is regulated under Chapter III of the Building Byelaws 2023, while the pictures of the constructions that are attached to the Petition may well be for constructions on plots which are designated as “Flat Sites” and which permit structures under Chapter IV of the Building Byelaws 2023.

10. We are therefore clear that the entire second floor has been constructed without requisite approval as mandated under section 185 of the Cantonments Act, 1924 and which deviation cannot be compounded under the provisions of the Building Byelaws 2023 and which being illegal is liable to be demolished. That being the case CP No.D-667 of 2022 cannot be sustained and must be dismissed and conversely C.P.No.D-4940 of 2022 which seeks the demolition of the construction in deviation of the approval sanctioned by the Cantonment Board, Malir must be allowed. In the circumstances and for the foregoing reasons:

- (i) CP No.D-667 of 2022 is dismissed, along with all listed applications, with no order as to costs;
- (ii) C.P.No.D-4940 of 2022 is granted with directions to the Cantonment Board, Malir to demolish the entire construction on the second floor of the Said Property which is in deviation of the approval sanctioned by it and to ensure the remaining construction on the Said Property is restored to a state where it is conformity with the approval sanctioned by the Cantonment Board, Malir.

JUDGE

JUDGE