

ORDER SHEET
THE HIGH COURT OF SINDH, KARACHI
CP No. 3725 of 2023

Dated: Order with signature of Judge(s)

1. For hearing of CMA No.23725/2023
2. For hearing of CMA No.23726/2023
3. For hearing of CMA No.23727/2023
4. For hearing of CMA No.17097/2023
5. For hearing of CMA No.17098/2023
6. For hearing of Main Case.

25.10.2023:

Mr. Moulvi Iqbal Haider, Advocate for the Applicant

1. Granted

2 & 3. The Applicants have maintained two applications in this Petition. CMA No. 23726 of 2023 is an Application under Order 1 Rule 10 of the Code of Procedure, 1908 whereby the Applicants pray to be impleaded as Respondents in these matters as they state that they have title to units in a building the construction of which has been the subject of an order dated 16 October 2023 passed in this Petition and whereby directions had been given for the demolition of that building which had been constructed without an approved plan in violation of the provisions of Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979. The Applicants maintain that the order dated 16 October 2023 impacts their right, title and interest to their units constructed in the building and hence they are necessary parties to this *lis* and should be added as Respondents. They have also maintained CMA No. 23727 of 2023 being an application under Order 39 Rule 4 of the Code of Civil Procedure, 1908 seeking to modify the order dated 16 October 2023 that was passed by this Court stating that the order was passed without considering their right, title and interest in building that was constructed.

The Petitioner in this Petition impugns an illegal construction that has been carried out on Plot No. 3F-16/13, Nazimabad No. 03, Karachi (hereinafter referred to as the "Said Property") and which the Sindh Building Control Authority has confirmed has been constructed without an approved Plan.

The Intervenor claim to be owners of the units constructed in the Said Property and submit that as they hold title to the units in the construction carried out on the Said Property on the basis of an Agreement of Sale executed in their favour by one Kashif Moin, who purportedly acted on the basis a registered Power of Attorney issued to him by the owners of the Said Property i.e. Hafiza Begum and Khalid Jamil Khan and on which basis each of them claim to be necessary parties to this Petition. They claim they are bona fide purchasers for value and were not aware of the law when they purchased each of their units in the building constructed on the Said Property.

At the very outset we inquired from the Applicant as to whether the construction on the Said Property has been carried out under an approved plan issued by the Sindh Building Control Ordinance, 1979 **and which the Advocate for the Applicant has categorically stated has not been obtained.**

Section 6 of the Sindh Building Control Ordinance, 1979 prescribes 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 therefore, on payment of such fee as may be prescribed.

(2) No building mentioned in subsection (1) shall be occupied by any persons or shall be allowed by the builder to be occupied, before the Authority has, on application of the occupant or owner, issued occupancy certificate, in such manner as may be prescribed.

Under Section 7A of the Sindh Building Control Ordinance, 1979 where there is a violation of Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979 the Sindh Building Control Authority (hereinafter referred to as the "SBCA") has the requisite jurisdiction to both seal the building and call for the ejection of the occupants therein:

" ... 7-A. Violation of certain provisions.—

Where the provisions of sub section (1) of section 6 are violated the building may without prejudice to any other action including sealing of the building or ejection of the occupants be ordered by the Authority or any officer of the Authority authorized in this behalf to be

demolished, at the cost of the builder in the case of public buildings and the owner in other cases.

A further restraint exists in Sub-Section (1) of Section 12 of the Sindh Building Control Ordinance, 1979 in respect of the sale of units in building without having a specific approval sanctioned by the Sindh Building Control Authority and which reads as under

“ ... 12. *Sale of buildings:*

(1) No builder shall sell or advertise for sale any buildings, through any audiovisual aids or any other means before he has obtained approval in writing of the Authority, and he shall mention such fact in the advertisement which will further specify all such details about the building as may be prescribed.

The above quoted provisions came to be interpreted 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**¹ where a single judge of this Court while considering 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 Sindh Building Control Ordinance, 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 had purchased, and wherein 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*

¹ 1998 MLD 544

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.*

² 2000 SCMR 1748

Administrator/Assistant Commissioner (1999 SCMR 2224).”

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 Sindh Building Control Ordinance, 1979 and which clarifies that:

“ ... 18-G. Provision of utility services.

No Authority shall –

(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 is now well settled, an agreement of sale does not give a person any right, title or interest in an immovable property³. Further, in the case of a building constructed in violation of Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979, a person cannot, on account of Section 18G of the Sindh Building Control Ordinance 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 Sindh Building Control Ordinance, 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 Sindh Building Control Ordinance, 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 Sindh Building Control Ordinance, 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 Sindh Building Control Ordinance, 1979.

³ See *Muhammad Iqbal vs. Nasrullah* 2023 SCMR 273; *Rao Abdu Rehman (Deceased) vs. Muhamamd Afzal (Deceased)* 2023 SCMR 815; *Syed Imran Ahmed vs. Bilal* PLD 2009 SC 546; *Muhammad Yousaf vs. Munawar Hussain and others* 2000 SCMR 204

Admittedly the Applicants are claiming to have a right title or interest in a unit in a building that has been constructed without an approved plan having been issued under Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979 to sanction the construction. They submit that they were deceived by the attorney of the owner and were ignorant of the law and hence their plea should be entertained. We are clear that the admission on the part of the Applicants that the building that has been constructed on the Said Property has been constructed in violation of Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979 is not only fatal to their claim to have any right, title or interest in the units constructed on the immovable property but also to their right to have a registered instrument conveying such a right executed in their favour. The Applicants therefore having no right, title or interest to any portion of the Said Property, cannot be either necessary or proper parties to this *lis* and hence CMA No. 23726 of 2023 is clearly not maintainable and is dismissed in limine.

The Applicant's application, to be joined as a party to this *lis*, having been dismissed hence CMA No. 23727 of 2023 being an application under Order 39 Rule 4 of the Code of Civil Procedure, 1908 being presented by a person who is not party to this *lis* is also not maintainable and is also dismissed in limine.

5. Deferred.

4, & 6. SBCA is directed to ensure that compliance is made of the order of this Court that was passed on 16 October 2023 by the next date of hearing. Relist on **7 November 2023 at 11:00 am**.

JUDGE

JUDGE

Nasir PS.