

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

C.P. No.D-4363 of 2022

1. For orders on office objection
2. For hearing of Misc. No.18556/2022 (Stay):
3. For hearing of main case.

Petitioner : Through Mr. Muhammad Riaz,
Advocate

Respondents No.1, 8 & 9 : Through Miran Muhammad Shah,
Additional Advocate General

Respondents No.2-4 : Through Malik Khushhal Khan,
Advocate

Respondent No.5 : Through Qazi Abdul Hameed Siddiqui,
D.A.G

Respondent No.6 : Through Mr. Dhani Buksh Lashari,
Advocate a/w Ms. Humaira Jatoi
Advocate, Deputy Director East SBA
Rehan Ahmed (CNIC # 44101-6498130-
1) and Deputy Director SBCA district
East Ali Asad (CNIC # 42101-1375863-
7)

Date of hearing : 15.01.2024

ORDER

MOHAMMAD ABDUR RAHMAN,J: This is a petition that has been maintained under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 whereby the Petitioner has impugned the construction of a Basement + Ground + Three (03) Upper floors' construction on Plot No.GRE-467, Nawab Colony situated at New Lasbella Chowk, Karachi by the Respondents No.2 to 4 (*hereinafter referred to as the said property*).

2. The Petitioner contends that the said property has been subjected to various orders that have been passed by the Assistant Administrative Evacuee Property Trust i.e. Respondent No.5 and who have filed their comments stating that vide order dated 09.05.2005 said property had been declared to be owned by Basant Sindh Amil Dharamada Trust and

having been declared as an evacuee property and directions were given to the Deputy Administrator Evacuee Property Trust to take-over the management and control of the property immediately. A revision petition was preferred before the Secretary to the Government of Pakistan, Ministry of Religious Affairs & Harmony and which was dismissed.

3. It seems that the said property has now been mutated by the Mukhtiarkar in the names of Respondents No.2 to 4 despite letters of protest sent by the Respondent No.5 to the concerned Deputy Commissioners and construction is being carried out on the Said Property.

4. Today a report has been submitted by the Sindh Building Control Authority and which reads as under:

“ ... 1. *That this is case of construction whereby the owner has raised construction for Basement + Ground + 3 upper floors without having approved building plan, thereafter, the case of the completion plan has been submitted before the authority.*

2. *That the site inspection has been carried out by the field staff of "SBCA" on plot bearing No. 467/6, Garden East, District East, Karachi and reported that the building subject matter of this petition is at finished stage and partly occupied comprising of Basement Ground + 3 Upper Floor exist at site.*

3. *That since the entire building in question is constructed without having approved building plan and same is unlawful and liable to be demolished under Section-7-A of SBCO, 1979 (as amended up to date) but in order to rectify/legalize the structure subject matter of this petition the submitted case of regularization/completion plan has to be scrutinized as the owner/attorney has paid the requisite fee which includes; occupation charges, scrutiny fee, penalty fee, construction prior to approval, etc. vide Token dated: 13-12-2023. (Copy of completion/regularization token is attached as annexure "A")*

4. *That in the light of above, the completion plan is under process and shall be decided after scrutiny, verification of land, from lessor and other concerned Authorities, strictly in accordance with the rules framed under Karachi Building & Town Planning Regulations-2002 (as amended) particularly section 7-D (2) of SBCO 1979-82 and regulation No.3-2.14.3 of KBTP&R- 2002, under intimation to this Honorable Court. (Latest site photograph attached herewith as annexure "B").*”

5. Malik Khushhal Khan has appeared on behalf of the Respondents No.2 to 4 and has admitted that the construction on the Said Property has clearly been carried out by his clients without an approved plan but since they have caused the Said Property to be occupied ; that a regularization/ completion plan that has been submitted by them should be considered by the Sindh Building Control Authority and if found to be in accordance with law should be sanctioned.

6. Mr. Muhammad Riaz who entered appearance for the Petitioner contends that this is a case of patent encroachment on the Said Property and if such an order is passed not only the encroachment will be sanctified by this Court but the regularization plan that has been submitted and which would be considered by the Sindh Building Control Authority would be done under the cover of orders of this Court making this Court privy to a fraud.

7. Mr. Dhani Buksh Lashari has appeared on behalf of Sindh Building Control Authority has stated that the Authority has jurisdiction to consider such a plan once submitted under the provisions of Section 7-D/2 of the Sindh Building Control Ordinance, 1979 and under Regulation No. 3-2.14.3 of the Karachi Building & Town Planning Regulations, 2002.

8. We have heard the counsel for each of the parties and have examined the record.

(i) **Regularisation**

9. Sub-Section (1) of Section 6 of the Sindh Building Control Ordinance, 1979 makes it incumbent on every person who is constructing upon a property within the jurisdiction of Sindh Building Control Authority to obtain an approval from the Sindh Building Control Authority 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.*”

10. Mr. Malik Khusshal Khan had stated that the Intervenors were inclined to maintain an application for regularisation. What is referred to as a right to “reguarlise” a deviation finds reference in clause (c) of Regulation 3-2-20 of the

Karachi Building and Town Planning Regulations, 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,*

- (a) *by written notice require the person who is carrying out such building works forthwith to stop all works;*
- (b) *by written notice require the person who is carrying out or has carried out such building works on or before such day as shall be specified in such notice by a statement in writing given by him or by an agent duly Authorized by him and addressed to the Authority to show sufficient cause why such building works or such part thereof should not be removed or altered to comply with these regulations;*
- (c) *require the said person on such day at such time and place as shall be specified in such notice to attend personally or through an agent duly authorized by him and show sufficient cause why such building works or part thereof should not be removed or altered*

3-2.20.2. *If such person fails to show sufficient cause to the satisfaction of the concerned Authority why such building works or part thereof should not be removed or altered, the Sindh Building Control Authority may take the following actions.*

- (a) *require the person who has carried out the works against the provisions of these regulations or any other statute, to demolish the whole building or part thereof;*

OR

- (b) *to alter the works so as to bring it into conformity with these regulations;*

OR

- (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 pro- vision 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.]*
- (d) *The building which has already been considered/ approved for Regularization / Revision/ Addition Alteration under the KB & TP Regulations 1979 shall not be further considered for regularization/ addition/alteration/revision/extra floors on the existing building as per KB & TP Regulations 2002 except residential bungalow upto 399 Sq. Yds. subject to stability certificate duly signed by Licensed Structural Engineer and for amenity plots subject to stability certificate by a Licensed Structural Engineer duly endorsed by a "A" category Proof Engineer. However, other than above categories, the plan approved under regulations 1979 shall only be considered under the same regulations viz. 1979."*

11. 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. Clearly the power conferred under a Regulation being delegated legislation cannot go beyond the perimeters of the statute under which such regulations are passed.¹

¹ 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*

12. 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 also 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.

13. Finally, in the decisions of the Honourable Supreme Court of Pakistan reported as **Abdul Razak v. Karachi Building Control Authority and others**.² and **Ardeshir Cowasjee vs. Karachi Building Control Authority (KMC), Karachi**³ 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”?⁴ and
- (b) the SBCA does not have a right to regularise construction which would “prejudice the rights of third parties”⁵

14. The expression “complexion” has been defined in the Oxford English Dictionary⁶ to mean:

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

The expression “Character”⁷ 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 should be interpreted in light of the decisions in **Abdul Razak v. Karachi Building Control Authority and others**.⁸ In that case a construction of a ground plus two storey structure for a house was converted into a ground plus two structure containing

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

² PLD 1994 SC 512

³ *op cit.*

⁴ *op cit.* at paragraph 21

⁵ *op cit.* at paragraph 17

⁶ Persall J and Trumble B. (2008) **Oxford Reference Dictionary** OUP, Delhi

⁷ *Ibid*

⁸ PLD 1994 SC 512

apartments 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 include the right to regularise a change the amount of storeys of the building as that would change the “complexion” of the i.e. the face of it and can also not change 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 Pakistan⁹ 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 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.”¹⁰

The Honourable Supreme Court elaborated this point in the decision reported as **Ardeshir Cowasjee vs. Karachi Building Control Authority (KMC), Karachi**¹¹ 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.

⁹ *op cit.* at paragraph 17

¹⁰ *op cit.* at paragraph 16 as approved in Paragraph 17

¹¹ *op cit.* at paragraph 21

(ii) **Approval Being Sanctioned after the Construction has been Completed.**

15. Mr. Dhuni Bux Lashari, on behalf of the SBCA has contended that they continue to have powers under the provisions of Section 7-D of the SBCO, 1979 and under Regulation No. 3-2.14.3 of the Karachi Building & Town Planning Regulations, 2002 to grant post facto approval to construction that was constructed without an approved plan. While noting that there is clearly a typographical error that has been made in the SBCO, 1979 as there are two Section 7D, the Section entitled 7D that has been referred to by Mr. Dhani Bux Lashari reads as under:

“ ... 7-D. *Erection and re-erection of buildings.*

(1) No person shall erect or re-erect a building or commence to erect or re-erect a building unless the site has been approved, and the building plan has been sanctioned by the Authority.

(2) A person intending to erect or re-erect a building shall apply for sanction in the manner provided in the bye-laws and shall pay such fees as may be levied by the Authority with the previous sanction of Government.

(3) All building applications presented under this paragraph shall be registered in the manner provided in the bye-laws and shall be disposed of as early as possible but not later than sixty days from the date of the registration of the application and if no order is passed on an application within sixty days of its registration, it shall be deemed to have been sanctioned to the extent to which it does not contravene the provisions of the building bye-laws and the Master Plan or Site Development Scheme, if any.

(4) The Authority may for reasons to be stated in writing reject a site plan or a building plan, but any person aggrieved thereby may appeal to Government within thirty days of the order of rejection, and the order passed by Government in appeal shall be final.

(5) The Authority may, sanction a site plan or a building plan, subject to such modifications or terms as may be specified in the order of sanction.

(6) Nothing in this paragraph shall apply to any work, addition or alteration which is declared by bye-laws to be exempt.”

While relying on the Sub-Section (2) of Section 7 of the SBCO, 1979, Mr Lashari referred us to the provisions of Regulation 3-2.14.3 and which reads as under:

“ ... 3-2.14.3.

Where a person erected or re-erected or commenced to erect or re-erect a building without submitting to the concerned authority building plan for sanction then not with-standing and in addition to, any other action that the concerned authority may take under the relevant statute and these regulations, the concerned authority may give notice in writing directing such persons to submit to the authority within such time as specified in the notice, building plans in accordance with these regulations showing the buildings so erected or re-erected or proposed to be re-erected for the authority's approval. The authority shall accord approval after levying a composition fee in addition to the scrutiny fee if the building is constructed as per these regulations.”

We regret to say but the interpretation that has been cast by Mr. Lashari on Sub-Section (2) of Section 7 of the SBCO, 1979 is misplaced. We are of the opinion that the Sub-Section referred to him must be interpreted in conjunction with Sub-Section (1) of Section 7 of the SBCO, 1979 and which clarifies that a construction of a building shall **not be commenced** “*unless the site has been approved*” and “*building plan has been sanctioned by the Authority.*” The Section therefore prescribes that the construction cannot be commenced unless a site plan has been approved and building plan has also been approved i.e. a building plan sanctioned under Sub-Section (1) of Section 6 of the SBCO, 1979. Sub-Section (2) of Section 7 of the SBCO, 1979 then prescribes that any person “**intending**” to construct or reconstruct a building shall apply for sanction in the manner provided in the bye-laws. The provision, even if considered as an independent provision, clearly overlaps with Sub-Section (1) of Section 6 of the SBCO, 1979 and which also authorizes the SBCA to sanction an approval for construction in the “prescribed manner” i.e. by Regulations and which prohibits construction without permission being sanctioned “before” construction is commenced.

16. While considering the provisions of the sections, we conclude that the expression “intending” used in that sub-section indicates an action that is to be performed in the future and hence cannot be interpreted to give cover to construction that has already been constructed. While interpreting the section we also note that there is no power within the provisions of SBCO, 1979 to make “bye-laws” and the only power that exists in the SBCO, 1979 is under Section 21 to make “rules” and under Section 21A to frame “Regulations.” Clearly if we are to interpret the reference in that Section to Bye-Laws then such an interpretation would

lead to an absurdity as the SBCO, 1979 does not permit the framing of Bye laws. We are therefore clear that the reference to “bye-laws” as made in that section must be considered to mean “Regulations” framed under Sub-Section (1) of Section 21 A of the SBCO,1979 i.e. the Karachi Building and Town Planning Regulations 2002 as any other interpretation would lead to absurdity and must be avoided.¹² Read together, clearly the approval that has to be sanctioned has to be sanctioned for construction that is to be constructed in the future and not for “post facto” approvals and that being so the provisions of Regulation 3-2.14.3 of the KB&TPR, 2002 which apparently permits such “post facto” approvals is clearly beyond the scope of the provisions of both Sub-Section (1) Section 6 of the SBCO, 1979 and also of Sub-Section (2) of Section 7 of the SBCO,1979 and to the extent is ultra vires of that statute and is void.¹³ The right of the Intervenor to apply for regularisation without having first secured an approved plan or for that matter to apply for a first approval after the construction has already been raised is therefore clearly misplaced.

17. 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.

18. 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

¹² Reliance is placed on House Building Finance Corporation vs. Shahinshah Humayun Cooperative House Building Society 1992 SCMR 19 and Haji Adam Ali Aqaria vs. Asif Hussain 1996 MLD 322

¹³ 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

the legality of the construction when they see utility connections provided by the utility agencies to such illegal constructions.

19. 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:

- (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 both the in public as well as 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 prosectively; and
- (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.

22. For the foregoing reasons, the Petition is allowed directions to the SBCA to demolish the entire construction on the Said Property which has been constructed without any approval having been accorded by the SBCA under the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 within a period of one month and to file a report with the MIT-II through its concerned Director confirming the implementation of the order of this Court.

Karachi:
Dated:

JUDGE
JUDGE