

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

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

CP NO. D - 5876 of 2023

Rameez Ahmed

Versus

Province of Sindh & others

1. For hearing of Misc. No.27392/2022 (Stay) :
2. For hearing of main case

Petitioner : Through Mr. Muhammad Siddique Kaladia, Advocate.

Respondents No.1 : Through Jawwad Dero, Additional Advocate General Sindh.

Respondent No.2-3 : Through Mr. Dhani Buksh Lashari, Advocate a/w Jahangir Khan (CNIC # 45504-0852961-9), Deputy Director SBCA Karachi East.

Respondents No.4-5. Nemo.

Respondents No.6 : Through Mirza Shouja Baig, Advocate.

Date of hearing : 26.01.2024

ORDER

MOHAMMAD ABDUR RAHMAN, J.- The Petitioner through this Petition, maintained under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, has impugned the construction that has been carried out by the Respondent No. 6 on Plot No. 18 Survey Sheer No. RS-4, admeasuring 207 square yards (hereinafter referred to as the "Said Property").

2. The SBCA has filed its comments confirming that an approval for construction on the Said Property was sanctioned under Sub-Section (1)

of Section 6 of the Sindh Building Control Ordinance, 1979 for a ground plus three storey structure and that the construction that has been carried out by the Respondent No. 6 is in deviation of the approval in as much as:

- (i) the Arcade has been completely covered,
- (ii) the champfer, on the corner of the plot, to allow for traffic management on the road, has not been maintained;
- (iii) there are partition walls that have been incorrectly raised; and
- (iv) the entire Compulsory Open Space (hereinafter referred to as the "COS") throughout the entire building has been encroached.

While the deviation to the arcade, the Champfer and the partition walls have been removed, the COS that was required to be maintained has been completely covered and it is to be considered whether the same has to be demolished or not.

3. The building being constructed is a residential cum commercial building and is located in an area of Karachi called Ramaswami Quarters and which is part of what has come to be known as the "Old City Area" of Karachi. While generally constructions under the Karachi Building & Town Planning Regulations 2002 (hereinafter referred to as the "KB & TPR, 2002") of residential and commercial plots are regulated by either Regulation 25-2 or Regulation 25-3 of the KB & TPR, 2002, as excepted in each of those regulations, where the provisions of those regulations are "in conflict" with Regulation 25-9 of the KB & TPR, 2002. As such to the extent of any conflict, the provisions of Regulation 25-9 of the KB & TPR, 2002 will apply and override Regulation 25-2 and Regulation 25-3 of the KB & TPR, 2002.

4. In respect of the **Floor Area Ratio** (hereinafter referred to as the "FAR") to be maintained, Regulations 25-9.1, 25-9.2, 25-9.3, 25-9.4, 25-9.5 of the KB & TPR, 2002, permit a deviation from the FAR required to be maintained under Regulation 25-2 or Regulation 25-3 of the KB & TPR, 2002. In addition, while on account of Regulation 25-9.6.1 of the KB&TRP, 2002, the other conditions of Regulation 25-1 of the KB&TRP, 2002 would continue to apply, the provision of the COS in respect of a construction of a building in the "Old City Areas" are superimposed on Regulation 25-2 or Regulation 25-3 of the KB & TPR, 2002 and which to the "extent of a conflict" will be regulated by Regulation 25-9.6.2, 25-9.6.6 and 25-9.6.7 of the of the KB&TRP, 2002 and which reads as under:

“ ... 25-9.6.2. In case the depth of the plot is less than 25ft.(7.6m) it would be exempted from the rear COS.
...

25-9.6.6. For all **residential plots** facing more than 30ft.(9.13m) road / street width, the minimum COS and foot print as prescribed in Clause 25-2 shall be applied except the part of old city including following area.

Lyari Quarters(LY), Lea Quarters, Keamari Quarters, KPT area, Serai Quarters(SR), Railway Quarters(RY), Saddar Bazar Quarters(SB), Preedy Quarters(PR), Artillery Maidan(AM), Ghulam Hussain Kasim Quarters(GK), Old Town Quarters(OT), Bundar Quarters(BR), Market Quarters(MR), Napier Quarters(NP), Tahil Ram Quarters(TL), Wadhomal Oddahram Quarters(WO), Ranchore Line Quarters(RC), **Ramsawami Quarters(RS)**, Lawrance Quarters(LR), Harchand Rai Vishandas Quarters(HV), Soldier Bazar Quarters(Sol.B), Aram Bagh Quarters(RB).

25-9.6.7. For all commercial/residential-cum-commercial plots facing more than 10m. road/street width the minimum COS and foot print as prescribed in Clause 25-3 shall be applied.”

As is apparent the compulsory open space that has to be maintained under these regulations is controlled by three factors:

- (i) the size of the plot on which the construction is being carried out,
- (ii) the size of the roads located about the plot on which the construction is being carried out; and
- (ii) the nature of the construction i.e. residential or residential cum commercial.

A literal interpretation of these regulations leads to the conclusion that:

- (i) if the **depth of the plot** is **less** than 25 feet, regardless of the nature of the construction being carried out being residential or residential cum commercial or commercial, the compulsory open space at the rear of the building need not be maintained;
- (ii) If the road facing the plot on which the construction is being raised is more than 30 feet, the minimum COS as prescribed in regulation 25-2 for a **purely residential building** will be applied “except the part of old city” and which as per the listing given includes “Ramaswami Quarters” and therefore where the plot is located in a

part of the “Old City Area” listed in that regulation and the road facing the plot is more than 30 feet, then no COS is required to be maintained;

(iii) if the construction is **residential cum commercial** and the road facing the plot is **more than 10m**. the minimum COS and foot print as prescribed in Clause 25-3 shall be applied.

5. We have examined the abovementioned regulations in the context of the construction that is being carried out on the Said Property. The plot is a rectangular shaped plot and the depth of the plot is indicated as 39 feet 8 Inches. The depth of the plot being excess of 25 feet we are clear that the provisions of Regulation of 25-9.6.2 of the KB&TRP cannot be pressed into service to exempt the COS at the rear of the plot from being maintained. **Admittedly, the construction that currently exists on the COS at the rear of the Said Property has apparently completely been completely covered.**

6. In addition, as the construction that exists on the Said Property is a **residential cum commercial** construction, the provisions of 25-9.6.6 of the KB&TRP would not come to the rescue of the Respondent No. 6 to exempt them from maintaining the prescribed COS and instead as per 25-9.6.7 of the KB & TPR, 2002 the provisions of Regulation 25-3 of the KB&TRP would continue to apply.

7. In the circumstances, the illegality of the construction having been established we are left to consider as to whether deviations are of a nature that can or cannot be regularised under the provisions of the SBCO, 1979 or the KB&TRP, 2002.

8. What is referred to as a right to “regularise” a deviation of an approved plan that has been sanctioned by the SBCA under Sub-Section (1) of Section 6 of the SBCO, 1979 is found 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 provision 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."

9. The Honourable Supreme Court of Pakistan came to consider the authority of the SBCA to regularise such construction in the decision reported as **Abdul Razak v. Karachi Building Control Authority and others**.¹ and **Ardeshir Cowasjee vs. Karachi Building Control Authority (KMC), Karachi**² wherein 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"?;³ and
- (b) the SBCA does not have a right to regularise construction which would "prejudice the rights of third parties"⁴

The expression "complexion" has been defined in the Oxford English Dictionary⁵ to mean:

" ... *the natural colour, texture of the skin, esp of the face.*"

The expression "Character"⁶ 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 must be interpreted in light of the decisions in **Abdul Razak v. Karachi Building Control Authority and others**.⁷ In that case against a permission for the construction of a ground plus two storey structure for a house the construction was converted into a ground plus two structure containing flats 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

¹ PLD 1994 SC 512

² *Op Cit*

³ *Op Cit* at paragraph 21

⁴ *Op Cit* at paragraph 17

⁵ Persall J and Trumble B. (2008) **Oxford Reference Dictionary** OUP, Delhi

⁶ *Ibid*

⁷ PLD 1994 SC 512

of a structure, the authority that the SBCA has to regularise does not include the right to regularise a change in the amount of storeys of the building as that would change the “complexion” of the i.e. the face of it and also does not include a change in 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 Pakistan⁸ 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 in deviation 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.”⁹

The Honourable Supreme Court elaborated this point in the decision reported as **Ardeshir Cowasjee vs. Karachi Building Control Authority (KMC), Karachi**¹⁰ 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.”

10. We have been furnished with a report, which is not disputed that all the violations that existed have been removed sans the violation that exist in the compulsory open space of the building. We have considered the issue and are of the opinion that a deviation from the approved plan by encroachment of the construction into the compulsory open space, and by which the entire compulsory open space has been covered would both change the complexion of the construction and would also have an impact on third parties i.e. the owner of the neighbouring plot as the entire construction would be now placed literally on their boundary wall and which would also restrict movement of air as between the two buildings.

⁸ *Op Cit* at paragraph 17

⁹ *Op Cit* at paragraph 16 as approved in Paragraph 17

¹⁰ *Op Cit* at paragraph 21

The remaining deviation that has been made in the construction on the Said Property therefore cannot be regularised.

11. For the foregoing reasons, we direct the concerned Director and Deputy Director of the SBCA to ensure that the deviation in the construction that exists on the Said Property is removed by demolishing the entire encroachment made by the Respondent No.6 in the area that was marked as Compulsory Open Space in the plan approved for construction on the Said Property. The Petition is allowed in above terms and all listed applications are disposed of with no order as to costs.

J U D G E

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