

**ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI**

**Suit No.309 of 2024**

Mr. Owais Salam

Versus

Federation of Pakistan & Others

**AND**

**Suit No.670 of 2024**

Shaikh Faisal Naqi

Versus

Sindh Building Control Authority & another

**AND**

**J. M. No. 15 of 2024**

Mr. Owais Salam

Versus

Shaikh Faisal Naqi

---

Date:	Order with signature of Judge
-------	-------------------------------

---

Plaintiff in Suit No.309 of 2024,  
Defendant No 2 in Suit  
No. 670 of 2024 and Applicant  
In J.M No. 15 of 2024

: Mr. Taimur Ali Mirza & Mr. Ali  
Nawaz Khuhawar, Advocates.

Defendant No.3 in  
Suit No. 309 of 2024 and  
Defendant No 1 in Suit  
No. 670 of 2024

: Mr. Dhani Buksh Lashari,  
Advocate.

Defendant No.4 in  
Suit No. 309 of 2024

: Mr. Abdul Razzaq, Advocate.

Plaintiff in Suit No.  
670 of 2024 and  
Respondent No. 1  
In J.M No. 15 of 2024

: Mr. Muhammad Ali Lakhani,  
Advocate.

Date of hearing

: 18 July 2024, 1 August 2024 and  
3 August 2024

---

## J U D G E M E N T

**MOHAMMAD ABDUR RAHMAN,J:** Through this Judgment I will be deciding two suits bearing Suit No. 309 of 2024 and Suit No. 670 of 2024 each of which pertains to the construction that exists on Plot No.17/60, Block-03, Faran Cooperative Housing Society Limited admeasuring 1028 square yards (hereinafter referred to as the “Said Property”) and will also be deciding J.M. No. 15 of 2024 which has been maintained by the Plaintiff in Suit No. 309 of 2024 under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 impugning two orders dated 13 June 2024 and 25 June 2024 passed in Suit No. 670 of 2024 on the grounds that those two orders were obtained by the Plaintiff in Suit No. 670 of 2024 through fraud and misrepresentation.

### **A. Suit No. 309 of 2024**

2. The Plaintiff in Suit No. 309 of 2024 is the owner of the Said Property which was leased on 12 February 1969 by the Ministry of Housing and Works, Government of Pakistan to his predecessor in interest. The Plaintiff in Suit No. 309 of 2024 stated that he received a visit from an officer of the Sindh Building Control Authority (hereinafter referred to as the “SBCA”) on 23 March 2024 (a public holiday) and who alleged that the construction on the Said Property was not in conformity with the approval accorded to him by the SBCA. It is contended by the Plaintiff in Suit No. 309 of 2024 that the approval that was accorded for construction on the Said Property was issued by the SBCA on 5 December 2022 permitting the construction of a Basement + Ground + 1<sup>st</sup> Floor structure but which is contrarily depicted in the plan appended to that approval as disclosing a Lower Basement + Basement + Ground Floor + 1<sup>st</sup> Floor construction having been approved for construction on the Said Property. The Plaintiff in Suit No. 309 of 2024 contending inter alia that the action of the SBCA amounted to harassment has maintained this Suit seeking the following relief:

- “ ...
- a. *Declare that the Plaintiff is entitled to construct a Residential Dwelling House on Plot No. 17/60 Block No. 03, Admeasuring 1028 Square Yards Faran Co-operative Housing Society on the basis of Approved Building Plan Dated 05-12-2022; and*
  - b. *Declare that any without notice interference, inspection by officers acting under the charge of the Defendant No. 03 as being illegal, unlawful; and*
  - c. *Permanently restrain the Defendants, persons acting under their charge or on the basis of their instructions, from without notice and/or illegally inspecting, interfering with the construction activities of*

*the Plaintiff and/or from taking any action adverse and/or coercive to the right of the Plaintiff to construct a Residential Dwelling House on the basis of Approved Building Plan Dated 05-12-2022."*

Interim orders are operative in Suit No. 309 of 2024 stating that no interference should be caused to the Plaintiffs in their constructing on the Said Property in accordance with the approval given by the SBCA.

**B. Suit No. 670 of 2024**

3. This Suit has been maintained by the owner and a resident of a Plot No.70/11, Faran Cooperative Housing Society Limited, Karachi admeasuring 1000 square yards and which property is located in the same scheme in which the Said Property is located. The Plaintiff in Suit No.670 of 2024 has contended that:

- (i) the approval that has been issued by the SBCA for construction on the Said Property is contrary to the provisions of Sub section (1) of section 6 of the Sindh Building Control Ordinance, 1979 (hereinafter referred to as the SBCO, 1979) read with the provisions of Karachi Building & Town Planning Regulations, 2002 (hereinafter referred to as the "KB&TPR, 2002") and which does not permit two basements from being constructed on the Said Property;
- (ii) that under cover of the approval that has been issued by the SBCA and which is for a residential house/bungalow, the Plaintiff in Suit No. 309 of 2024 is constructing either town houses or apartments on the Said Property; and
- (iii) that the Plaintiff in Suit No. 309 of 2024 has in deviation of the approval sanctioned by the SBCA inter alia constructed on the compulsory open space and exceeded the permissible Floor Area Ratio that was required to be maintained by the Plaintiff in Suit No.309 of 2024 as per the approval accorded.

The Plaintiff in Suit No. 670 of 2024 seeks the following relief in that Suit:

- " ... a. A declaration that the plaintiff has a right/an expectation in the strict observance of the Karachi Building and Town Planning Regulations (2002);

- b. *A declaration that approval dated 05.12.2022 is in violation of the Karachi Building and Town Planning Regulations (2002);*
- c. *A (consequent) declaration that Building Works being undertaken by Defendant No. 2 at Plot No. 17/60, admeasuring 1028 Square Yards, situated in Faran Cooperative Housing Society Limited, located in Haider Ali Road Karachi;*
- d. *A Mandatory Injunction directing the defendants (including the persons acting under them, through them, and/or on their behalf) to demolish the structure erected on Plot No. 17/60, admeasuring 1028 Square Yards, situated in Faran Cooperative Housing Society Limited, located in Haider Ali Road Karachi;*
- e. *A Mandatory Injunction directing Defendant No. 01 (including persons acting under it, through it, and/or on its behalf) to expedite hearing and adjudication of the Plaintiff's pending appeal;*
- f. *A permanent injunction restraining Defendant No. 02 (including persons acting under him, through him, and/or on his behalf) from raising further construction at Plot No. 17/60, admeasuring 1028 Square Yards, situated in Faran Cooperative Housing Society Limited, located on Hyder Ali Road, Karachi;*
- g. *Grant of all other relief(s) deemed permissible, just, and appropriate in the given circumstances;*
- h. *Grant cost of proceedings."*

Interim orders are operating in this Suit directing the parties to maintain status quo in respect of the construction and on account of a purported violation of the order CMA No. 10026 of 2024 being an application under Article 204 of the Constitution of the Islamic Republic of Pakistan, 1973 has been maintained for contempt of court.

**C. J.M No. 15 of 2024**

4. J.M No. 15 of 2024 has been maintained by the Plaintiff in Suit No. 309 of 2024 under Sub-Section (2) of Section 12 of the Code of Civil Procedure, 1908 and which impugns two orders dated 13 June 2024 and 25 June 2024 passed in Suit No. 670 of 2024 on the grounds that those two orders were obtained by the Plaintiff in Suit No. 670 of 2024 through fraud and misrepresentation.

**D. Issues**

5. Both the abovementioned suits were listed before me on 18 July 2024 for hearing of applications and on which date Mr. Muhammad Ali Lakhani had concluded his arguments on various applications that were listed for hearing. The matter was listed again on 1 August 2024 and on

which date all the Counsels by consent appeared before the Court and stated that they were amenable to both the suits being decided on the basis of the material available on record. Accordingly and with their consent on 1 August 2024 the following issues were framed for adjudication.

- “
1. *Whether the suit is maintainable?*
  2. *Whether the approval has been accorded that has been accorded by the SBCA in accordance with the provisions of Sub-section (1) of Section 6 of the of the Sindh Building Control Ordinance, 1979?*
  3. *In the event that the approval is found in deviation thereof what should the consequences be on the construction going on?*
  4. *What should the decree be?”*

**E. Contentions of the Counsel for the Plaintiff in Suit No. 670 of 2024**

6. Mr. Muhammad Ali Lakhani appeared on behalf of the Plaintiff in Suit No.670 of 2024 and drew the attention of the Court to the Plaint and contended that he had pleaded that under the cover of the approved plan issued by the SBCA the Plaintiff in Suit No. 370 of 2023 was constructing flats and not a residential bungalow on the Said Property and which violated the approval that has been accorded to him by the SBCA. In addition it was contended that the construction on the Said Property violated the permissible Floor Area Ratio approved in Regulation 25-2 of the KB&TPR, 2002 and that therefore the construction on the Said Property deviated from the approval accorded by the SBCA as the Compulsory Open Space that was supposed to have been left in accordance with the approval had been deviated from. When confronted with the fact that while the deviations from the approval accorded did exist, but as clarified in the Nazir’s Report dated 12 June 2024 such deviations were within the perimeters of the KB&TPR, 2002, Mr. Muhammad Ali Lakhani stated that his objection can be maintained in terms of the fact that the completed construction should at all times be in consonance with the perimeters as contained in the KB&TPR, 2002 and any deviation from that should be demolished.

7. Additionally, Mr. Muhammad Ali Lakhani alleged that the approval that had been sanctioned by the SBCA to the Plaintiff in Suit No. 309 of 2024 to construct two basements was issued in violation of Regulation 25-2.2.4 of the KB&TPR, 2002 and which regulation reads as hereunder:

- “
- ... **One basement** at residential plots having a minimum plot area of 400 Sq. Yds. shall be permissible by maintaining the Compulsory Open Space and max height of plinth shall not exceed 2 ft. - 6 inches from Ground level. Area of such Basement shall not be included in permissible FAR but betterment charges shall be applicable at rate of Rs.

*50/= per sq. ft on covered area of basement or applicable rate per sq. ft whichever is less."*

On the basis of the above, he contended that as the construction is on a residential plot, only one basement is permitted and which, while correctly having been approved in the approval letter dated 5 December 2022 issued by the SBCA, runs contrary to the approved plan that has also been issued by the SBCA and wherein two basements, i.e. Lower Basement & Basement have been approved. He contended that the approval for the lower basement is therefore sanctioned illegally and which is liable to be demolished. Mr. Muhammad Ali Lakhani did not rely on any case law in support of his contentions.

***F. Contentions of the Counsel for the Plaintiff in Suit No. 309 of 2024***

8. Mr. Taimur Ali Mirza entered appearance on behalf of the Plaintiff in Suit No. 309 of 2024. He contended that the Plaintiff in Suit No. 309 of 2024 applied for and on 5 December 2022 obtained an approval from the SBCA to construct a lower basement plus Basement plus ground floor plus first floor structure on the Said Property and which was located on the slope of a hill on a non rectangular shaped plot. In addition to other regular charges, as mandated by Regulation 25-2.2.4 of the KB&TPR, 2002, a "challan" was issued for payment of "betterment charges" and which was also duly paid.

9. He submitted that as soon as construction commenced on the Said Property, a campaign of "harassment, blackmail and coercion" was orchestrated by the Defendant No. 4 and the Defendant No. 5 in Suit No. 309 of 2024 as against the Plaintiff in that suit and which has ultimately led to the filing of the subject suits as well as CP No. D-1657 of 2024, which was maintained by the Defendant No. 5 in the constitutional jurisdiction of this Court and in which the following ad interim order was passed on 5 April 2024 and which subsists to date:

" ... *the SBCA will ensure that no illegal construction be done in violation of the Approved Building Plan. The SBCA should file para wise comments before next date of hearing highlighting the violations, if any and what action has been taken so far.*"

To illustrate as towards the mala fides of the Defendant No. 4 and the Defendant No. 5 in Suit No. 309 of 2024 he contended that the approvals accorded by the SBCA to the construction on both of their properties showed that each of them had two basements that had been approved in

the structure that existed on each of the properties and which would also be violative of Regulation 25-2.2.4 of the KB&TPR, 2002 and having committed the same violation themselves they should be prohibited from maintaining Suit No. 670 of 2024.

10. On the maintainability of Suit No. 670 of 2024, Mr. Mirza relied on Section 20A of the SBCO, 1979 and which reads as hereinafter:

“ ... *Notice of the institution of Suit: No suit shall be filled against the Authority or any of its employees in respect of anything done or purported to be done by the Authority or such employee under this Ordinance except after expiration of sixty days next after notice in writing has been delivered to or left at the office of the authority or employee as the case maybe.*”

Contending that without first issuing a notice and allowing for the period of sixty days to expire, as mandated under Section 20A of the SBCO, 1979 a person could not maintain a suit as against the SBCA. He relied on a judgement of this court reported as **Four Square Enterprises vs. Karachi Building Control Authority**<sup>1</sup> in which while drawing an analogy as between Section 20A of the SBCO, 1979 and Section 80 of the Code of Civil Procedure, 1908 prior to its amendment in 1962, it was inter alia held that a suit was not maintainable before this Court until a notice as envisaged in Section 20A of the SBCO, 1979 was served on the SBCA and the requisite period had expired. He contended that as no notice had been served on the SBCA as mandated by Section 20 A of the SBCO, 1979 and as no evidence had been led to prove any mala fide on the part of the SBCA, Suit No. 670 of 2024 was barred.

11. Independent of the objection as to the maintainability of Suit No. 670 of 2024 on account of the bar contained in Section 20 A of the SBCO, 1979, Mr. Mirza also contended that the as Special Courts have been constituted under Section 18A of the SBCO, 1979 and which Special Courts had the jurisdiction to take cognisance of the issues involved in Suit No. 706 of 2024, the jurisdiction of this Court was ousted on account of the bar contained in Section 9 of the Code of Civil Procedure, 1908. He relied on a judgment of the Lahore High Court, Lahore reported as **Farooq Hamid and 2 others vs. Lahore Development Authority through Director General and 6 others**<sup>2</sup> to indicate the types of violation which could be complained or agitated before the Special Courts or this court.

---

<sup>1</sup> PLD 2000 Karachi 161

<sup>2</sup> 2006 YLR 1539

12. Relying on a decision of a Division Bench of this Court reported as **Datari Construction Co. (Pvt.) Ltd. vs. A. Razak Admajee and others**<sup>3</sup> he contended that to maintain a *lis* the Plaintiff cannot only show that a municipal rule or plan has been violated rather what had to be shown was that “real injury” was suffered by the persons whose interests and for whose protection the rules or regulations were framed and which was lacking in Suit No. 670 of 2024 and on account of which Suit No. 670 of 2024 was not maintainable. He also relied on the same decision to state that Suit No. 670 of 2024 was not maintainable as to maintain a suit for public nuisance compliance had to be made of Section 91 of the Code of Civil Procedure, 1908 and which had not been made.

13. Regarding as to whether the Plaintiff in Suit No. 309 of 2024 was entitled to construct two basements and as to the interpretation of Regulation 25-2.2.4 of the KB&TPR, 2002, he contended that the role of the SBCA was to “regulate” construction in the Province of Sindh as could be ascertained from the language of preamble of that statute. While relying on various definitions of the word “regulate”, emphasis was placed to state that the role of the SBCA was “not to forbid but to regulate” and as such the SBCA could not “forbid the enjoyment of rights appurtenant to and/or arising from the specific, special dimensions of a particular piece of land.” Arguing the structure that was being raised was a private residential building, he referred to Sub-Section (1) of Section 6 of the SBCO, 1979 and which he contended when read with Sub-Section (l) of Section 3 of the SBCO, 1979 meant that construction could not be raised on a property that fell within the jurisdiction of the SBCA without a sanction being accorded by the SBCA under the SBCO, 1979 and which sanction also had to be made in conformity with the provisions of the KB&TPR, 2002.

14. He next referred to Section 7 of the SBCO, 1979 which statutorily prescribes the manner in which building plans are to be prepared and contended that by interpreting Regulation 25-2.2.4 of the KB&TPR, 2002 to restrict construction to only one basement, the powers as conferred on town planners, architects and engineers as detailed in that section would render Regulation 25-2.2.4 of the KB&TPR, 2002 as ultra vires of Section 7 of the SBCO, 1979. He relied on the decision reported as **Multiline Associates vs. Ardeshir Cowasjee**<sup>4</sup> **In the Matter of Suo Moto Case No. 13 of 2009**,<sup>5</sup> **Mian Ziauddin vs. Punjab Local Government and others**<sup>6</sup> and **Pak Army**

---

<sup>3</sup> 1995 CLC 846

<sup>4</sup> PLD 1995 SC 423

<sup>5</sup> PLD 2011 SC 619

<sup>6</sup> 1985 SCMR 365



**Furnishing Stores vs. Ali Akbar Rizvi**<sup>7</sup> in support of this proposition to state that the provisions of delegated legislation could not go beyond the scope of the parent statute and if found to do so would have to give way to their parent statute.

15. In respect of the interpretation of Regulation 25-2.2.4 of the KB&TPR, 2002 he referred to Regulation 2.1.1 of the KB&TPR, 2002 which states as hereinunder:

“ ... 2.1. In the regulations hereinafter contained, the following terms and expressions shall have the meanings hereinafter respectively assigned to them, unless such meaning be repugnant to or inconsistent with the context or subject matter in such words or expressions occur:

2.1.1. Words imparting the singular number shall include the plural;”

16. Referring to the expression “singular number” in Regulation 2.1.1 of the of the KB&TPR, 2002 when read with the definition of the expression “Basement” as given in Regulation 2-19 of the KB&TPR, 2002 he contended that the word Basement should be read as the plural “Basements” and which therefore when used in the context of Regulation 25-2.2.4 of the KB&TPR, 2002 should permit the approval of two basements on the Said Property. Reinforcing this argument, he referred to Regulation 3-2.10 of the KB&TPR, 2002 regarding the manner in which a plinth is to be verified and which prescribes that:

“ ... every person who commences any building work except category I under these regulations, upon completion of plinth and in the case of basements upon the completion of foundations and shall give notice to authority in prescribed form ZP-4....”

Emphasising on the use of the expression “basements” in the plural, it was contended such use would add credence to the interpretation cast by him on Regulation 25-2.2.4 of the KB&TPR, 2002. He argued that:

- a. “One” is a word;
- b. “Basement” is a word;
- c. “One Basement” are two words;
- d. Regulation 2-1.1 states that words imparting the singular number shall include the plural;
- e. The word “single” is defined to mean individual;
- f. The word “number” means an arithmetical value, expressed by a word;

---

<sup>7</sup> PLD 1985 Karachi 201

- g. 01 is an arithmetical value. The spelling of 01 expressed as a word is "One";
- h. It followed that the words One Basement shall include the plural whereby meaning that Regulation 2-2.2.4 may be read as two basements;

17. In addition, Mr. Mirza also put forward an argument that a basement should be considered as any floor below the plinth level and hence the lower basement and the basement are approved should be considered as one structure and not two independent structures. He next referred to Regulation 9-14 of the KB&TPR, 2002 to state that Air Raid shelters and as per Regulation 10-8.3 "underground car parks" could also be constructed below the floor level and hence it was conceivable that if only one one basement could be constructed, in addition to a basement additional structures could be conceived such as Air Raid Shelters and underground car parks and which would give the impression that more than one storey below the ground level could be approved under the provisions of the KB&TPR, 2002.

18. He pointed that the shape of the Said Property was not rectangular in nature and referred to Regulation 20-2 of the KB&TPR, 2002 and which clarifies as hereinunder:

" ... *Plot shapes shall generally be rectangular quadrangles; provided, however that where this would cause practical difficulties arising from irregular or unique features of a plot the developer may apply for an exception.*"

Referring to this provision of the KB&TPR, 2002 he contended that the fact that the Said Property was not a rectangular quadrangle gave the Plaintiff in Suit No. 304 of 2024, the right to apply for an exception to be made for it from the "general standard" applicable to rectangular quadrangle shaped plots.

19. He next referred to Regulation 2-59 of the KB&TPR, 2002 which interprets the expression "Ground Floor" to mean:

" ... *the floor of any structure built just above the plinth level.*"

He next referred to Regulation 25-2.2.2 of the KB&TPR, 2002 which clarifies that two stories above the ground level can be constructed on plots the area of which is greater than 400 square yards. He contended that as the Said Property was carved out of a hill, the Plinth of the structure being

constructed on the Said Property should begin from the road level. Keeping in mind that the Plinth level has not been identified as being from the road level in the plan approved by the SBCA, he contended that the approval accorded can be altered by him under Regulation 3-2.4 (a) of the KB&TPR, 2002 and whereby the plinth level will be maintained above the lower basement and above which a ground plus two storey construction can be raised without violating the provisions of the K&TPR,2002 or in the alternative a plan can be submitted treating the lower basement as for as car parking and not as a basement.

20. Regarding the payment of betterment charges as envisaged in Regulation 25-2.2.4 of the KB&TPR, 2002 while noting that the expression was not defined in those regulations, he referred to the definition of the same expression in the Karachi Development Authority Order, 1957 and explained the context in which such betterment charges were payable under provisions of that statute.

21. Mr. Mirza further contended that the provisions of Section 6 of the SBCO, 1979 should be considered as directory and not mandatory therefore allowing for deviations from the KB&TPR, 2002 so as to allow more than one basement.

22. He further argued that by stating that in event that the Court came to the conclusion that this Court had the power to alter expressions so that a sensible meaning can be given to those expression and hence the word “one” in reference to a basement as contained in Regulation 25-2.2.2 of the KB&TPR, 2002 should be struck down as no such restriction has been imposed in Section 7 of the SBCO, 1979 and by giving such an interpretation no person/professional and/or Authority could ever approve a plan consisting of more than one basement.

23. He also argued that a regulation such as Regulation 25-2.2.2 of the KB&TPR, 2002 should be struck down as unworkable since it places one party in a dominating position as to dictate its terms. He placed reliance on a decision reported as **Karachi Building Control Authority and 3 others vs. Hashwani Sales and Services Limited**<sup>8</sup> wherein it was held that where a regulation created an imbalance as between parties bound by the regulations, the same should be considered as unfair, impracticable and contrary to the general policy of law and therefore unreasonable.

---

<sup>8</sup> PLD 1993 SC 210

24. He contended that while the plan showed the approval of a lower basement and a basement in fact they should be treated as a single contiguous structure and not as two independent structures.

25. He finally argued that while he could not plead that the doctrine of *locus poenitentiae* applied to such construction, the Plaintiff in Suit No. 309 of 2024 has a right under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973 to obtain the approval of a plan which is identical in substance to his immediate neighbour and all other persons in the locality. He relied on the decision reported as **Shaheen Construction Co. vs. Province of Sindh**<sup>9</sup> to support this contention.

**G. Contentions of the Counsel for SBCA**

26. Mr. Dhuni Bux Lashari appeared on behalf of the SBCA and conceded that as per the provisions of Regulation 25-2.2.2 of the KB&TPR, 2002 only one basement could have been approved and the same has been inadvertently been approved by the SBCA.

27. I have heard Mr. Muhammad Ali Lakhani, Mr. Taimur Ali Mirza who was assisted by Mr. Ali Nawaz Khuhawar and Mr Dhuni Bux Lashari and have perused the record.

**H. Whether Suit 309 of 2024 and Suit 670 of 2024 are Maintainable?**

28. The first issue that was settled by me on 1 August 2024 was to “Whether the Suit is maintainable.” I have reframed the issue to read as to “Whether Suit 309 of 2024 and Suit 670 of 2024 are maintainable?”

29. Suit No. 309 of 2024 has been filed by the Plaintiff seeking a declaration that he has every right to construct on the Said Property in accordance with the approval dated 5 December 2022 accorded by the SBCA and that any interference in that construction that is carried out by the SBCA without first issuing a notice would be illegal and liable to be restrained.

30. Suit No. 670 of 2024 has been filed by the Plaintiff seeking a declaration that the approval accorded by the SBCA has been issued in

---

<sup>9</sup> 2000 MLD 1660

violation of the provisions of the KB&TPR, 2002 and is liable to be demolished.

(i) **Section 42 of the Specific Relief Act, 1877**

31. As is apparent both suits seek to impugn illegal acts of the SBCA and for which declarations are sought. While there was previously an opinion that such actions could not be impugned in a suit on account of the right to obtain such a declaration not being available within the perimeters of Section 42 of the Specific Relief Act, 1877, clarity was brought to this issue in the decision reported as **Messrs H.A. Rahim & Sons vs. Province of Sindh and another**<sup>10</sup> in which where the vires of a law was challenged in the Original Civil Jurisdiction of this Court it was held that:

“ ... 9. There is another aspect of the matter. The present suit has been filed for declaration and permanent injunction. A suit for declaration would lie under section 42 of the Specific Relief Act whereunder persons seek declaration with regard to their legal character in the sense of status or with regard to any right to property. The case of Muhammad Farooq Khan v. Sulaiman A.G. Punjurani PLD 1979 Kar. 88 is referred. The term right to, property can mean both tangible and intangible rights. In coming to this conclusion reliance is placed on the case of T.J. Trust, Bombay v. CIT (Appeal) PLD 1958 SC (Ind :) 140 and Ahmed Arif v. CWT (1969) 2 CC, 471, wherein it has been held that the term property is a term of the widest import, and subject to any limitation or qualification which the context might require, it signifies every possible interest which a person can acquire, hold or enjoy. In case of Ahmed Ali v. The State PLD 1957 Lah. 207 it was held that "property" may not have a market value for the person concerned yet it may not be quantifiable in monetary terms. In the present case the plaintiff has claimed his right to be dealt in accordance with Constitution. This right is a valuable property right as citizen of the country, though intangible in nature. Even otherwise the plaintiff 'has in substance claimed that it is not obliged to pay a certain amount of money as fee under an alleged invalid law. In other words, he right in money is substantially in issue. Traditionally the Courts have construed section 42 of the Specific Relief Act very strictly resulting in non-suiting litigants on mere technicality. The Courts thereafter have developed techniques to defeat the technicalities and provide substantial justice to litigants through the process of construction and interpretation. In Muhammad Ilyas Hussain v. Cantonment Board PLD 1976 SC 785 the Supreme Court had observed that it was not always necessary for the plaintiff to sue for declaration for his title as substantive relief for injunction only as a consequential relief. In Hyderabad Municipal Corporation v. Fateh Jeans Ltd. 1991 MLD 284 a learned Single Judge of this Court while interpreting section 42 of the Specific Relief Act was pleased to hold that even if the person was not an owner of the property he could be entitled to a declaration in relation thereto. In ICP v. S. Ahmed Sarwana, Advocate 1987 MLD 2442 another learned Single Judge of this Court found that even where a person was disentitled to, declaratory relief under section 42, he could be granted permanent injunction. A somewhat similar view was also taken by another learned Single Judge of this Court in Shahid Mahmood v. KESC 1997 CLC 1936 wherein it was observed that even if the plaintiff could not be granted a declaration as to legal character, relief by way of permanent injunction to prevent breach of an obligation could always be granted and this was independent of his right to seek damages. The traditional strict view of section 42 that the same is exhaustive now seems to have watered down. Earlier also in Robert Fischer v. Secretary of State of India (1899) ILR 22 Mad. 270 (Privy Council it was held that section 4.2 of the Specific

<sup>10</sup> 2003 CLC 649

*Relief Act was not exhaustive of the circumstances in which a person could ask for a declaratory relief. In the case of Shri Krishina Chandra v. Mahabir Parsad AIR 1933 All. 488 the Allahabad High Court categorically held that section 42 of the Specific Relief Act was not exhaustive so as to exclude all other forms of declaratory suits. Similar view have been taken in the case of Vangipuram Venkatacharyulu v. Shri Rajah Vasireddi AIR 1935 Mad. 964, Desu Reddiar v. Srinivasa Reddi AIR 1936 Mad. 605 and Sisir Kumar Chandra v. Smt. Monrama Chandra AIR 1972 Cal. 283 at p.290. The Supreme Court of India has also recognized in Ramasraghava Reddy v. Sheshu Reddy AIR 1967 SC 436 that where the declaration sought by the plaintiff falls outside the purview of section 42 of the Specific Relief Act, the declaration could be governed by the general provisions of the Civil Procedure Code like section 9 or Order VII, rule 7, I subscribe to latter line of cases and hold that. Section 42 of the Specific Relief Act is not exhaustive of the circumstances in which declaration is to be given. A declaration may well be given in circumstances not covered by section 42 of the Specific Relief Act in which case the general provisions of law shall govern the declaration sought. It serves no useful purpose to beat about the bush and spend enormous time and effort only to determine the much debated issue as to whether a plaintiff possesses the legal character so as to afford him a declaration under section 42. No doubt there is some conflict in judicial authority as to whether section 42 is exhaustive, however, the line of authorities which spell out that section 42 if not exhaustive is to be given preference. Even in Pakistan there is direct authority for the proposition that the section 42 is not exhaustive. The case of Salimullah Beg v. Motia Begum PLD 1959 Lah. 429 is referred. The Court in substance has to see whether the plaintiff in the facts and circumstances of the case should or should not be granted a declaration. At the end of the day the Court has to dispense substantive justice and assess what is fair or unfair in the attaining circumstances. The case of Imtiaz Ahmed v. Ghulam Ali PLD 1963 SC 382 is referred."*

The decision was followed and clarified by a Division Bench of this Court in the decision reported as Arif Majeed Malik vs. Board of Governors of Karachi Grammar School<sup>11</sup> and wherein it was held that:

" ... 18. We have given our anxious consideration to the question involved after having noticed that both view, as to section 42 being exhaustive or otherwise have been taken by superior Courts in the subcontinent. Possibly one reason for divergence of judicial opinion appears to be that when the Specific Relief Act was enacted in 1877 the concept of rights which could be enforced through Courts was largely confined to "status" as understood in a feudal social context or rights pertaining to property in a laissezefaire economy. With the development of jurisprudence over more than a century a large number of other rights which did not strictly speaking, relate to status of an individual or deal with tangible property came to be recognized by law and some of them in the form of guaranteed fundamental rights. The right of privacy, to carry on the business of one's choice, access to public information and, large body of social and cultural rights neither relate to status in the traditional sense nor tangible property. Keeping in view the well-settled principle that wherever there is a right there must always be a remedy to enforce it persuaded Courts not to remain bound within the technicalities of section 42 for the purposes of granting relief.

19. Moreover, Article 4 of the Constitution guarantees to every citizen the inalienable right to be treated in accordance with law. This guarantees, which has been often described as embodying the right of law does not operate merely against the instrumentalities of the State. Article 5 stipulates obedience to the law and the Constitution as the inviolable obligations of every citizen. It would indeed be anomalous to suggest that a victim of illegal action has to go without redress because, sub-

<sup>11</sup> 2004 CLC 1029

Constitutional legislation does not lay down the mode for enforcing his rights. For this reasons too, we are persuaded to hold that the view that the provisions of section 42 of Specific Relief Act are not exhaustive seems to be preferable.

20. Indeed it was urged by Mr. K.B. Bhutto with a great deal of emphasis that the respondent was a purely private school with an absolute unfettered discretion to admit or expel students and any interference in its absolute discretion either on the part of the Court or any other public authority was called for. Frankly with profound respects and acknowledging the autonomy available to the respondent in its working, we are not really impressed by the argument. Though no amount of Government control appears to be involved, any organization running a school by its very nature performs functions of great concern to the public. Perhaps the public interest involved in its working is far more than that in a joint stock company whose Directors have been held to be holders of public offices and for the purposes of Article 199 as held by the Honourable Supreme Court in *Maqbool Illahi v. Khan Abdul Rehman* PLD 1960 SC 266 and *Salahuddin v. Frontier Sugar Mills and Distillery Ltd.* PLD 1975 SC 244....

**22. In the circumstances, we are inclined to take the view that even when the respondent is not a department of the Government or an institution substantially owned and managed by it, an element of public duty to impart proper education to student's who fulfill the fee requirement and agreed to abide by the disciplinary and other regulations of the school is always present. Such duty like all public powers must be exercised fairly and honestly irrespective of any strict legal right existing in favour of the students. Such duty would amount to an obligation in terms of section 3 of the Specific Relief Act, which could always be enforced through a perpetual injunction under section 54. In Muhammad Ilyas Hussain v. Cantonment Board, Rawalpindi PLD 1976 SC 785 the Honourable Supreme Court held that even if declaratory relief could not be granted under the law the prayer for injunction could be treated as independent relief and could always be granted. It would therefore, follow that even if the appellants are found not to be entitled to a declaration as to their entitlement it was always possible for the Court to grant permanent injunction preventing the respondent from violating their obligations ordained by law as held in Arshan Bi v. Maula Bakhsh 2003 SCMR 318."**

As can therefore be understood, it is open for a Plaintiff to impugn an illegal act committed by a public functionary in this Court's Original Civil Jurisdiction and both suits cannot therefore be assailed as not being maintainable on this ground.

**(ii) Objections taken as to the maintainability of Suit No. 670 of 2024**

32. Objections have been taken by Mr. Taimur Ali Mirza to the maintainability of Suit No. 670 of 2024 and which can be summarised as hereinunder:

- (i) That Suit No. 670 of 2024 is not maintainable as the Plaintiffs in that suit have not come before this Court with clean hands;
- (ii) That Suit No. 670 of 2024 is not maintainable as it barred under Section 20A of the SBCO, 1979;

- (iii) That Suit No. 670 of 2024 is not maintainable as it barred under Section 9 of the Code of Civil Procedure, 1908 as the jurisdiction to decide that *lis* vests with the Special Courts constituted under Section 18A of the SBCO,1979; and
- (iv) compliance has not been made with the provisions of Section 91 of the Code of Civil Procedure, 1908 before instituting Suit No. 670 of 2024.

**(iii) Statutory Obligations and Mala Fide**

33. Dealing with each objection in turn, the Plaintiff in Suit No. 309 of 2024 has contended that the actions of the Plaintiffs in Suit No. 670 of 2024 are premised on mala fide as the Plaintiff has himself illegally constructed on his property and which cannot therefore allow them to maintain Suit No. 670 of 2024. In addition, it was contended that if action is to be taken as against the Plaintiff in Suit No. 309 of 2024 then corresponding action should be taken as against each and every person in the locality who has constructed illegally failing which Suit No. 670 of 2024 would not be maintainable as being discriminatory.

34. To consider the issue of mala fide it would be expedient to first understand what the rights the Plaintiff in Suit No. 670 of 2024 is attempting to enforce. It is to be understood that it is the duty of the SBCA to ensure that any and all constructions that exists within it's jurisdiction is carried out in accordance with the approval sanctioned by it under the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979. If the SBCA act illegally in **either** issuing an approval in violation of the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 read with the KB&TPR, 2002 **or** where a person constructs without an approval having been accorded under Sub-Section (1) of Section 6 of the SBCO, 1979 or in deviation of such an approval, it is the right of any person residing within the scheme in which such construction exists to maintain a *lis* before this Court in its Original Civil Jurisdiction to impugn such an illegal action. This right has been affirmed by the Supreme Court of Pakistan in the decision reported as **Mian Fazal Din vs. Lahore Improvement Trust, Lahore and another**<sup>12</sup> and wherein it was held that:

“ ... *The next objection raised on behalf of the respondents is that the appellant had no such legal right in the matter as would entitle him to*

---

<sup>12</sup> PLD 1969 SC 223



object to the sale of the land to the respondent No. 2 or to the erection of a mosque thereon. The mere expectation of a market being built on some future date opposite to his house could not possibly give him a right to insist upon lands in the Scheme being utilized strictly for the purposes originally indicated in the Scheme.

Learned counsel for the appellant, however, contends that the fact that he had been induced to purchase Plot No. 86 E/I by the special attraction of the market proposed to be built opposite to his plot did give him a sufficient right for this purpose as this was not merely an illusory or 'an imaginary right.

In support of this contention learned counsel has also placed strong reliance upon the observations contained in a judgment of the High Court of West Pakistan in the case of *Montgomery Flour and General Mills Ltd. v. Director, Food purchases (P L D 1957 Lab. 914)* by Kaikaus, J. (as he then was) :-

"It is true," observed the learned Judge, "that a petitioner must have some right if he applies to the Court for a direction or order under Article 170 (now Article 98 of the Constitution of Pakistan) but he need not have a right in that strict sense of the term which is mentioned above. Whenever an enactment empowers a public officer to pass orders that benefit or harm a citizen, the citizen gets a right that in a matter in which he is concerned an order be passed in accordance with law. This too is a right that can be enforced by the Court in the exercise of its jurisdiction under Article 170 of the Constitution of Pakistan. If the officer concerned, passes an order that is not in accordance with law, any person whose interests are affected by the order can maintain a petition for a writ or direction under Article 170. All orders of executive officers are subject to challenge by those affected by the orders, and a person would be "affected" even if he loses some benefit or advantage which he would have gained if the order was in accordance with law. A public officer passing an order on an application submitted to him does not grant the applicant a favour. He is only granting the applicant his right in the sense that he has a right to have the matter determined in accordance with law and justice. It will be observed that even a fundamental right may not be a "right" in the strict sense of the term. A right to acquire or hold property, a right to carry on a profession, a right to move about freely, etc. are not rights in the strict sense because they do not cast any corresponding duties on any person. They are what writers on jurisprudence call "liberties". In a wider sense these too are recognised as rights by jurisprudence and they can form the basis of a writ petition."

This decision was approved by this Court in the case of *Ikram Bus Service v: Board of Revenue (P L D 1963 S C 564)* where this Court stated that Even an administrative body such as an R. T. A., is under a legal obligation to deal with all applicants before it fairly, justly and equitably and an applicant has a legal right to demand that the administrative body should determine the matter with whose decision it is charged, in accordance with the law.

It is clear from the above that the right considered sufficient for maintaining a proceeding of this nature is not necessarily a right in the strict juristic sense but it is enough if the applicant discloses that he had a personal interest in the performance of the legal duty which if not performed or performed in a manner not permitted by law would result in the loss of some personal benefit or advantage or the curtailment of a privilege or liberty or franchise.

Learned counsel has referred us to *Halsbury's Laws of England, Volume 25, Third Edition, p. 389* in order to point out that his client had a real and substantial interest in the setting up of the market, for, an owner of a market is under a duty to provide a place for the holding of a market of a size sufficient for the convenient accommodation of all who are ready to buy and sell in the market. This postulates a corresponding right in

*the prospective users of the market to insist upon the provision of the requisite accommodation.*

*This principle was propounded by all the Judges in England in their unanimous opinion on the Islington Alarket Bill (L R (1880) 14 Ch. D 458) referred to them by the House of Lords. They opined that if "after having once appropriated a particular site for the use of the public as a market place, he (the grantee) afterwards employs or permits it or part of it, to be employed for other purposes" he cannot prevent others from selling outside the market, for, he owes a duty towards the members of the public to provide sufficient space for the legitimate purpose of selling within it. This is, because, "an obligation is cast upon him by his acceptance of the grant, to provide convenient accommodation for all who are ready to buy and sell in the public market." Furthermore that a failure on the part of the grantee to discharge this public duty would not only entail a forfeiture of the grant but also give a right of action to any private individual who should have received any special injury thereby.*

*As against this, learned counsel for the respondent No. 2 his referred us to the decision of the Court of Appeal in England in the case of Ex parte : Sidebotham In re: Sidebotham (L R (1880) 14 Ch. D 458) in support of his contention that for the purposes of such proceedings a person aggrieved "must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him of something, or wrongfully refused him something, or wrongfully affected his title to something." It cannot, it is said, mean a person "who is disappointed of a benefit which he might have received if some order had been made."*

*This was a case in which the question which arose was as to whether a bankrupt or any of his creditors was entitled to appeal from an order of a Court refusing to act on a report by the Comptroller in Bankruptcy to the effect that a trustee in bankruptcy had been guilty of misfeasance, neglect or omission causing loss, to the estate, where the Comptroller himself had not preferred any appeal. The ratio of the decision there was that such a report was purely a matter between the Comptroller and the trustee and there was no decision or judgment or finding by the Court upon the report which could possibly have prejudiced any bankrupt or creditor or caused any embarrassment to such a person in any proceedings which he may wish to take against the trustee.*

*This principle governing an appeal cannot be invoked in the present case, particularly, since the abandonment of a privilege or facility undertaken to be provided by the Improvement Trust cannot but have prejudicially affected the residents of the locality who had come to live therein not only on the expectation but on the representation contained in the scheme, as sanctioned by the Government, that such a facility would be provided. **The deprivation of such a facility would in our opinion, confer a sufficiently valuable right upon the residents of the scheme to enable them to maintain an application for enforcing the Trust to discharge its obligation of executing the Scheme as sanctioned by the Government.**"*

A person possessing a right to ensure that a scheme in which a person resides is maintained in a manner as represented by the authority when the scheme was first devised, it would naturally follow that any construction that is carried out within a scheme can equally be impugned by any person to ensure that construction that is being carried out is in accordance with that scheme and not in deviation thereof. The Plaintiffs therefore clearly have a right to maintain this Suit and which is primarily because they are seeking to compel the SBCA to perform their statutory obligations and not enforcing a personal right. Mr. Mirza reliance on **Datari Construction Co. (Pvt.) Ltd.**

**vs. A. Razak Admajee and others**<sup>13</sup> while premised on the its own facts does not take into account the decision of the Supreme Court of Pakistan reported as **Mian Fazal Din vs. Lahore Improvement Trust, Lahore and another.**<sup>14</sup> I am therefore minded to follow the judgement of the Supreme Court of Pakistan and am of the opinion that the Plaintiff in Suit No. 670 of 2024 clearly had the right to maintain that suit.

35. The right of the Plaintiffs to maintain Suit No. 670 of 2024 having been determined, the next question that needs to be considered is as to whether the Plaintiffs have instituted the suit with mala fide as against the Plaintiff in Suit No. 309 of 2024. Mr. Dhuni Bux Lashari, who appeared on behalf of the SBCA, when confronted with the provisions of Regulation 25-2.2.4 of the KB&TPR, 2002 had conceded that the SBCA had overlooked this provision when according the approval dated 5 December 2022. If it is established that the approval accorded by the Sindh Building Control Authority is not in conformity with the provisions of the KB&TPR, 2002 and the contentions of the Plaintiff in Suit No. 670 of 2024 are that the permission granted by the SBCA for construction on the Said Property has prime facie been accorded illegally, then I can see little objection that can be raised to the maintainability of the *lis* on the ground that the Plaintiffs in Suit No. 309 of 2024 have acted with mala fide intent. This is on account of the fact that it is the statutory obligation for the SBCA, independent of the pendency of this litigation, to ensure that the permission accorded by it is conformity with Sub-Section (1) of Section 6 of the SBCO,1979 read with the provisions of the KB&TPR, 2002 and the very admission by the SBCA, that the approval accorded by it is not conformity with the provisions of those laws indicates at the best that the SBCA has acted at the best negligently and at the worst that there was in effect some collusion as between the Plaintiff in Suit No. 309 of 2024 and the SBCA which resulted in such an approval being accorded. The Plaintiffs in Suit No. 670 of 2024 simply seeking to ensure that the SBCA perform their statutory duty cannot in this regard be said to have maintained Suit No. 309 of 2024 with mala fide.

36. The second argument as to mala fide that was raised by the Plaintiff in Suit No. 309 of 2024 was that the Plaintiffs in Suit No. 670 of 2024 had also constructed two basements and they therefore cannot plead that the permission accorded by the SBCA has been accorded illegally. I am not impressed with such an argument. Firstly, the construction on the property owned by the Plaintiff in Suit No. 670 of 2024 has not been impugned in any

---

<sup>13</sup> 1995 CLC 846

<sup>14</sup> PLD 1969 SC 223

of litigation before me and as such I am unable to pass any judgement as to the legality of that construction. Secondly, to defend an illegality having been perpetuated by the Plaintiff in Suit No. 309 of 2024 by stating that “it is also being done by others” and that the Plaintiff in Suit No. 309 of 2023 is in effect being discriminated against as the law is only being enforced as against them and which would amount to mala fide on the part of the Plaintiffs in Suit No. 670 of 2024 is to my mind premised on a complete lack of understanding of the rule of law. To justify an illegal act on the basis of the same illegality is being committed by other persons would allow persons to collectively collude in committing illegalities to bypass the law. The argument is however not a novel one and which has specifically been rejected by the Supreme Court of Pakistan in the decision reported as and others **Messrs Excell Builders and others vs. Ardeshir Cowasjee and others**<sup>15</sup> in which while considering a similar argument it was held that:

“ ... 11. Reverting to Mr. Muhammad Farogh Nasim's fourth contention, it may be observed that there is no reliable materia record to support his above submission that other builders have been allowed to raise multi-storey buildings near the si Glass Towers without setback as envisaged by above-quoted Item No.30 of Schedule 'G' Part 9 to the Regulations. Even otherwise, if the above contention is assumed to be correct, the factum that earlier the above Regulation overlooked or breached would not justify the repetition of the violation of the same.”

Aside from being bound by the decision of the Supreme court of Pakistan, I am in complete agreement with the finding. Needless to say, if the Plaintiffs in Suit No. 670 of 2024 have constructed on their plots illegally, it could be the statutory duty the SBCA to remove such an illegality and independently of that statutory duty a *lis* can be maintained as against them on the same basis, as is being maintained as against the Plaintiffs of Suit No. 309 of 2024 and which will be adjudicated on it's own merits. The Plaintiffs in Suit No. 309 of 2024 therefore do not have a right to state that they are therefore being discriminated against under Article 25 of the Constitution of the Islamic Republic of Pakistan,1973 as they are the only person as against whom the law is being enforced as clearly the law does not preclude enforcement as against those other persons as well.

**(iv) Section 20A of the SBCO, 1979**

37. The next argument raised by Mr. Taimur Ali Mirza is that Suit No. 670 of 2024 was barred as compliance was not made of Section 20A of the SBCO,1979 before instituting that suit and which section reads as hereinunder:

---

<sup>15</sup> 1999 SCMR 2089

“ ... 20-A. Notice for Institution of Suit.-No suit shall be filed against the Authority or any of its employees in respect of anything done or purported to be done by the Authority or such employee under this Ordinance except after expiration of sixty days next after notice in writing has been delivered to or left the office of the Authority or employee as the case may be.”

Reliance was placed by Mr. Taimur Ali Mirza on the decision of a learned single Judge of this Court reported as **Four Square Enterprises vs. Karachi Buildings Control Authority**<sup>16</sup> and wherein it was held that:

“ ... To understand the argument of Mr. Naimur Rehman that Notice under section 20-A, SBCO, 1979 is mandatory it would be pertinent to first reproduce the provisions of section 80, C.P.C. as it stood prior to the amendment in 1962:

"80. No suit shall be instituted against the Government, or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of

-(a) .

(b)

(c) in the case of a suit against a State Government, a Secretary to that Government or the Collector of the district.

and, in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left.

" In the case of *Government of the Province of Bombay v. Pestonji Ardeshir Wadia and others* AIR 1949 Privy Council 143 at 146 their Lordships observed as follows:

"[16] . . . . .The provisions of section 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. In the present case it is not contended that any notice on behalf of plaintiffs 2 and 3 was served on the Government before the filing of the suit . . . . .For these reasons the suit against the Government must be held to be incompetent and the appeal fails."

Further, section 273(i) of the Cantonments Act, 1924 states that: "no suit shall be instituted against any Board or against any member of the Board . . . . in respect of any act done or purported to have been done in pursuance of this Act . . . . . until the expiration of two months after notice in writing has been left at the office of the Board . . . . .". The Supreme Court of Pakistan in *Muhammad Ilyas Hussain v. Cantonment Board, Rawalpindi* PLD 1975 SC 785, held that in the absence of two months' prior notice required under section 273(1), the suit was not competent. Similarly Article 131(1) of K. D. A. Order, 1957, reads as follows:

" 131. Notice of suit against Authority, etc.--(1) No suit shall be instituted against the Authority or any member or any person associated with the Authority or against any servant of the Authority or against any person or persons acting under the direction or authority of the Chairman or of any officer or servant of the Authority in respect of any Act purporting to be done under this Order or the Rules or Regulations made thereunder until the expiration of one month from the delivery of a written notice at the Authority office or the place of abode of such member, officer, servant or person, stating the cause of

<sup>16</sup> PLD 2000 Karachi 161

*action, the name and place of the intending plaintiff, and the nature of the relief sought. "*

*The above provision has been considered in several judgments of this Court and in all of them the Court has held that the requirement of a notice is mandatory and the suit would be barred for want of notice under Article 131 8 of K.D.A. Order, 1957 (See Zainab Hajiani v. Al-Hilal Cooperative Housing Society and 2 others PLD 1978 Karachi 848, Pakistan Railways v. Karachi Development Authority and 5 others PLD 1992 Karachi 71 and Zia ur Rehman Alvi v. Allahabad Cooperative Housing Society Ltd. and 2 others PLD 1995 Karachi 399.*

Now section 20-A of the Sindh Buildings Control Ordinance, 1979, reads as follows:

*"20-A. Notice for institution of suit.--No suit shall be filed against the Authority or any of its employees in respect of anything done or purported to be done by the Authority or such employee under this Ordinance except after expiration of sixty days next after notice in writing has been delivered to or left at the office of the Authority or employee as the case may be."*

*The wordings of section 20-A, S.B.C.O., 1979 reproduced above are in essence similar to wordings of the unamended section 80; C.P.C. section 273(i) of the Cantonments Act, 1924 and Article 131(1) of K.D.A. Order. 1957. In view of the various judgments reproduced above, it can be said without any hesitation that no suit can be filed against K.B.C.A. except after expiration of sixty days' written notice has been delivered to or left at the office of K.B.C.A.*

*The cases of Syed Azhar Imam Razvi v. Mst. Salma Khatoon 1985 SCMR 24 is in respect of Notice to transfer of ownership as envisaged under the West Pakistan Urban Rent Restriction Ordinance, 1959 and of Muhammad Bux v. Karim Bux 1987 CLC 13 relied upon by Mr. Malik is in respect of notice for vacating the premises under section 14 of Sindh Rented Premises Ordinance, 1979. Both statutes were enacted to regulate the relationship between landlord and tenant; are distinguishable and cannot be applied to the present circumstances of the case where a notice is required to be given to a statutory authority. The case of Syed Monawar Ali v. Tariq 1993 CLC 349 cited by the learned counsel is irrelevant as it relates to section 12 of the Specific Relief Act.*

*In view of the above, it is clear that this suit is not maintainable as the plaintiff did not give the required notice under section 20-A of SBCO, 1979."*

This provision has also been considered in numerous other decisions of this Court<sup>17</sup> and one of which is a decision reported as **Messrs Bambino (Pvt.) Ltd. though Director vs. Government of Sindh**<sup>18</sup> and in which it was held as hereinunder:

" ... The provisions of section 20-A of the Ordinance is reproduced for proper appreciation of the contentions raised by the learned counsel as under:--

*"20A. No suit shall be filed against the authority or any of its employee in respect of anything done or purported to be done by the Authority or such employee under this Ordinance except after expiration of 60 days next after notice in writing has been delivered to or left at the office of the Authority or employee as the case may be."*

<sup>17</sup> See **Noor Muhammad vs. Building Control Authority**, 1992 CLC 729; **Muhammad Amin vs. Karachi Building Control Authority** 1992 CLC 691; **Noor Muhammad And another vs. Building Control Authority and 2 others** 1992 CLC 729; **Datari Construction Co. (Pvt) Ltd. vs. Abdul Razzak Adamjee** 1995 CLC 846; **Muhammad Usman vs. K.B.C.A** 1999 YLR 1170; ; **Khudda Bux Chandio vs. Sattar** 1999 MLD 3199; **Messrs Falaknaz Builders vs. Karachi Building Control Authority and others** 2001 YLR 2542; **Messrs Bambino (Pvt.) Ltd. through Director vs. Government of Sindh** 2002 MLD 167;

<sup>18</sup> 2002 MLD 1673

Learned counsel for the defendants contended that the Government has power to withdraw the approval granted under subsection (1) of section 6 without notice and Government by exercising such power under subsection (5) of section 6 has cancelled the plan and N.O.C. in the public interest, as the same was inexpedient in absence of any service of notice and the suit itself is not maintainable and has placed reliance on for *Square Enterprises v. Karachi Buildings Control Authority* (PLD 2000 Karachi 161), wherein the learned Single Bench rejected the plaint by observing that the wording of section 20A of the Ordinance are in essence similar to the wording of unamended section 80, C.P.C., section 273(i) of the Cantonments Act, 1924 and Article 131(1) of K. D. A. Order, 1957. In view of the various judgments reproduced above, it cannot be said without any hesitation that no suit can be filed against K.B.C.A. except after expiration of sixty days' written notice has been delivered to or left at the office of K. B. C. A."

Learned counsel for the plaintiffs has vehemently opposed the application and contended that proper assistance was not provided to the learned Bench and maintained that consistent view of this Court is that the plea of bar is not available unless the act impugned was within the four corners of the statute. He further contended that from the various statutes, two types of bar can be spelled out, (i) absolute bar and (ii) conditional bar. The Statutes, containing absolute bar, are such as (i) Colonization of Government Lands Act, 1912 (section 36), (ii) Displacement Land Settlement Act, 1958 (repealed) (sections 22 and 25), (iii) Customs Act, 1969 (section 217), (iv) Income Tax Ordinance, 1979 (section 160) and (v) Frontier Crimes Regulation ---

The Statutes containing conditional bar are (i) unamended section 80, C.E.C., (ii) Cantonments Act, 1924 (iii) Cooperative Housing Societies Act (section 70-A) (iv) Article 131 of K.D.A. Order, 1957 and (v) section 20A of Sindh Buildings Control Ordinance.

Learned counsel for the plaintiff contended that the present case is of conditional bar and the bar would come into play if the impugned order passed by the Authority is within the four corners of law, otherwise, the bar would not come in the way of a party filing the suit. He further contended that even in absolute bar, Civil Court being the Court of ultimate jurisdiction and where the mala fide, has been attributed the absolute bar cannot be pleaded. He referred cases of (i) *Abdul Rauf v. Abdul Hamid Khan and others* (PLD 1965 SC 671) wherein it was held that question as to whether the act of executive or administrative officer, or quasi-judicial or of judicial tribunal is without jurisdiction and illegal and not binding on the party is a matter of civil nature and is always be decided by the Civil Court except to the extent to which the jurisdiction may have been taken away, (ii) *Muhammad Jamil Asghar v. The Improvement Trust, Rawalpindi* (PLD 1965 SC 698), wherein it was observed that "So far as special judicial tribunals are concerned they are given jurisdiction to determine certain facts but they are not Judges of the facts which are the foundation of their jurisdiction nor can they define the limits of their own jurisdiction. It is possible, of course, that Special Tribunal may be made the judge of its own jurisdiction, but this would be a very exceptional provision and one which should be made by altogether clear words. However, with respect to mala fides, the jurisdiction of the Civil Court can never be taken away for a mala fide act is in its very nature an illegal and void act and the Civil Court can always pronounce an act to be mala fide and therefore, void", (iii) *Usman Punjwani v. Government of Sindh* (1996 CLC 311), wherein the learned Single Bench while considering the question ouster of jurisdiction under the provisions of section 36 of the Colonization of Government Lands Act, 1912 observed as under:--

"On the question whether this Court has jurisdiction, the law is well-settled. It has been held in several reported cases that despite provisions of section 36 of the Colonization of Government Lands (Sindh) Act, 1912, the Civil Courts have jurisdiction to entertain a suit, if the order passed by the Revenue Authorities is bad in law, without lawful authority and mala fide."

So far as the case of conditional bar, the learned counsel for the plaintiff has referred (i) *Muhammad Amin v. Karachi Buildings Control Authority* (1992 CLC 691), wherein similar objection was raised about the maintainability of the suit for want of notice under section 20A of the Ordinance and it was held that section 20A will be attracted only .in respect of anything done or purported to be done by the Buildings Control Authority or its employee within the four corners of the said Ordinance and not otherwise and so also it will not be attracted where any act is done with mala fide intention or in colourable exercise of the Authority vested, (ii) *Asma Builders v. Government of Sindh* (1992 CLC 729), wherein a similar contention was raised that the suit is not maintainable as prior notice has not been served under section 20.A of the Ordinance. The contention, raised was repelled with the following observations:--

"The abovesaid provision provides that notice is necessary requirement in case of filing of suit to challenge anything done or purported to have been done by the Authority or its employee under the Ordinance. In order to appreciate this provision it would be necessary for the said defendant to show that the action of their, which is being challenged in the suit is an action under the Ordinance. As I have already said the act of the defendant No.2 is in violation of the authority vested in him said act cannot be said to be the act done under the Ordinance. No order can be said to be an order passed under the Ordinance or any statute if it was not passed in exercise of power granted by the said statute and, therefore, was without jurisdiction. "

Similar view was expressed by learned Single Bench in *Khuda Bux Chandio v. Sattar* (1999 MLD 3199), wherein the order passed by the learned Senior Civil Judge dismissing the application under Order 7, rule 11, C.P.C. filed by the applicant, pleading the bar of the suit for want of notice was examined in revisional jurisdiction of this Court, while dismissing the revision application it was observed that every statutory body or, public functionary was supposed to function in good faith honestly and within precincts, of its powers so that person concerned should be treated in accordance with law as guaranteed by Article 4 of Constitution of Pakistan. A departure from this grund norm will render actions destitute of validity and will resultantly strip off the cloak of protection provided to it under the law.

Learned counsel for the plaintiff has referred the plaint and maintained that the action of the defendant has been challenged on the grounds of mala fide and violation of principle of natural justice. He contended that, the plaint cannot be rejected without opportunity to the plaintiff to prove these facts at the trial. He further urged that for the purpose of rejection of the plaint, the allegations made in the plaint are to be accepted as correct though the plaintiff may not ultimately succeed in establishing the allegations in the plaint. He referred the observation in case of *Hakim Bashir Ahmed v. Government of Sindh* (1984 CLC 3061), which reads as under:--

"It is well-settled that in order to reject the plaint under Order 7, rule, 11, C.P.C. the plaint must be showing to be barred under some law on the basis of averments made in the plaint. The Court at this stage is neither entitled to look into the plea raised or nor can examine the merits of the allegations made in the plaint. Every allegation made to the plaint has to be accepted to be correct while rejecting the plaint under Order VII, rule 11, C.P.C. The fact that the plaintiff may not ultimately succeed in establishing the allegation made by the plaintiff in the plaint cannot be a ground for rejecting a plaint under Order VII, rule 11, C.P.C."

It is well-settled that ouster of the jurisdiction can be claimed when impugned order/action is found to be within the four corners of the statute under which it is passed or taken. It is consistent view of the superior Court that the provisions contained in Statute ousting the Court of general jurisdiction is to be construed very strictly and unless case falls within the letter and spirit of the barring provisions it would



not be given effect to. On this point observation of Supreme Court in *Abbasi Cooperative Bank v. Hakeem Hafiz Muhammad Ghaus* (PLD 1997 SC 3), with advantage can be reproduced as follows:--

"It is well-settled law that where the jurisdiction of the Civil Court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal, and (d) that in passing the order or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a Civil Court. As a necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the Civil Court in spite of a provision in the statute barring the jurisdiction of Civil Court."

The case in hand is to be examined in the light of the above observations.

38 The decision in **Four Square Enterprises vs. Karachi Buildings Control Authority**<sup>19</sup> is not binding on this Court. I am minded to rather follow the decision in **Messrs Bambino (Pvt.) Ltd. though Director vs. Government of Sindh**<sup>20</sup> and wherein while holding that the provisions of Section 20A of the SBCO, 1979 are mandatory it was considered that such "ouster clauses" do not ipso facto prevent the institution of a suit before a court when it is **alleged** that the actions of the SBCA are exercised either:

- (i) in excess of jurisdiction conferred on the SBCA under the Ordinance;
- (ii) with mala fide intention; or
- (iii) in a manner which violated the principles of natural justice;

39. While Mr. Taimur Ali Mirza has raised an objection in respect of the institution of Suit No. 670 of 2024 without first complying with the provisions of Section 20 A of the SBCO, 1979, the question that begs to be asked is as to how Suit No. 309 of 2024, having itself been instituted without a notice under Section 20 A of the SBCO, 1979 being issued, would be maintainable. On a perusal of both suits, it is noted that each have alleged that the actions of the SBCA are in excess of the jurisdiction conferred by

---

<sup>19</sup> PLD 2000 Karachi 161

<sup>20</sup> 2002 MLD 1673

the SBCA. In addition in Suit No. 309 of 2024 it is additionally alleged that the actions of the SBCA are in violation of the provisions of Section 7A of the SBCO, 1979 and the principles of natural justice while in Suit No. 670 of 2024 it is additionally contended that the SBCA is acting with mala fide. The relevant provisions of Suit No. 309 of 2024 are reproduced hereinunder:

“ ... 3. *The Plaintiff is aggrieved by the illegal and without notice visit of an alleged inspector of the SBCA on the 23<sup>rd</sup> of March 2024. ...*

12. *The Plaintiff also have a right to be dealt with in accordance with law and as required by way of Article 10 A and the Sindh Building Control Ordinance liable to be issued a show cause notice in the event that any construction is found not in accordance with the approved building plan. No such notice has been issued. ... ”*

The Plaintiffs in Suit No. 670 of 2024 have also pleaded:

“ ... 9. *The Proposed (Concept) Plan filed by the Defendant No. 2 denigrates the 2002 Regulations. For instance, the Proposed Plan seeks permission to excavate 2 Basements and further provides for an “open terrace” attached to the “ Upper Basement”. Defendnat No. 1 has , whilst seemingly observing limitation invoked by the 2002 Regulations, permitted construction of a single Basement without and adjunct thereto. ...*

21. *For reasons which obviate in malice, Defendant No. 1 is abetting with Defendant No. 2 in ensuring that the offensive construction is protected. As opposed to discharging its regulatory functions, rooted in elements of public trust; it is providing protection to the offensive construction. Extraneous consideration are seemingly the motivating factor. ...”*

Allegations having been made in the pleadings of Suit No. 309 of 2024 that the actions of the SBCA are in excess of the jurisdiction conferred on it by the SBCA, in violation of the provisions of Section 7A of the SBCO, 1979 and that the principles of natural justice have not been complied with and I the pleadings of Suit No. 670 of 2024 it having been contended that the actions of the SBCA are in excess of the jurisdiction conferred on it by the SBCO, 1979 and that the SBCA is acting with mala fide. In the face of such pleadings and on the principles as indicated hereinabove, I am of the opinion that the bar contained in Section 20 A of the SBCO, 1979 ousting the jurisdiction of this Court cannot be sustained. Both Suit No. 309 of 2024 and Suit No. 670 of 2024 are therefore maintainable.

(v) **Special Courts constituted under Section 18 A of the SBCO, 1979**

40. The next objection that was pressed by Mr. Taimur Ali Mirza was that Suit No. 670 of 2024 was not maintainable as the jurisdiction of this court was ousted on account of Special Courts having been constituted under

Section 18A of the SBCO, 1979 and which would render this Suit as not being maintainable on account of the bar contained in Section 9 of the Code of Civil Procedure, 1908. Again, the question that begs to be asked is that if Suit No. 670 of 2024 cannot be maintained on account of jurisdiction vesting in the “Special Courts” constituted under Section 18 A of the SBCO, 1979, then how is Suit No. 309 of 2024 maintainable! I have again considered the jurisdiction of this Court to entertain both the suits on the threshold of this objection. Section 9 of the Code of Civil Procedure, 1908 which *inter alia* regulates the jurisdiction of this Court states as hereinunder:

“ ... 9. The Courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred.”

As can be seen this Court has the jurisdiction to try all suits of a civil nature unless either expressly or impliedly barred. It is therefore to be seen as to whether there is any provision of the SBCO, 1979 including but not limited to Section 18A, of the SBCO, 1979 that expressly or impliedly ousts the jurisdiction of this Court. The provisions of Section 18 A, 18 D and 18 E of the SBCO, 1979 which have some relevance to this issue are reproduced and read as hereinunder:

“ ... 18A. Establishment of special court.-

(1) Government shall by notification in the official gazette, establish as many Special Courts as it considers necessary and appoint a Judge for each of such Courts and where establishes more than one Special Court, it shall specify in the notification, the place of sitting of Judge of each Special Court and the territorial limits within which it shall exercise the jurisdiction under this Ordinance.

(2) A Judge of Special Court shall be appointed by Government after consultation with the Chief Justice of the High Court of Sindh and no person shall be appointed as Judge of the Special Court unless he is or has been a Sessions Judge, Additional Sessions Judge or has ten years standing as an Advocate.

(3) **Notwithstanding anything contained in the Code of Criminal Procedure, 1898, all cases relating to the violation of the provisions of this Ordinance, shall be triable exclusively by a Special Court.**

(4) All cases relating to the violation of the provisions of this Ordinance, pending in any court immediately before the appointment of a Judge of Special Court, shall stand transferred to the Special Court, having jurisdiction over such cases.

(5) In respect of cases transferred to a Special Court by virtue of subsection (4), the Special Court shall not, by reason of the said transfer, be bound to recall and re-hear any witness, who has given evidence in the case before transfer and may act on the evidence already recorded by or produced before the Court which tried the case before transfer. ...

18-D. Procedure of Special Court.

(1) A Special Court **shall take cognizance of an offence falling under this Ordinance**, on receiving the complaint and a report in

*writing by any police officer for violating the provisions of the Ordinance which constitute an offence under the Ordinance.*

*18-E. Jurisdiction of Special Court. A Special Court shall try the offences exclusively falling within the provisions of the Ordinance"*

While a Special Court has been created by the provisions of Sub-Section (1) of Section 18A of the SBCO, 1979, the jurisdiction of that Special Court comes to be determined under Sub-Section (3) of Section 18A of the SBCO, 1979 and which while excluding the application of the Code of Criminal Procedure, 1898 states that all cases relating to the violation of the provisions of the SBCO, 1979 would be triable exclusively by the a Special Court. While the expression "all cases relating to the violation of the provisions of the Ordinance" could go so far as to include a *lis* maintained to restrain a construction being carried out in breach of Sub-Section (1) of Section 6 of the SBCO, 1979 and whereby nearly all suits impugning construction would therefore be "triable" before the Special Court, I am clear that this is not the case. Firstly, the exclusion being made to the Code of Criminal Procedure, 1898 and not the Code of Civil Procedure, 1908 I cannot see how the express bar contained in Section 9 of the Code of Civil Procedure, 1908 is attracted. Secondly, when read with Section 18D of the SBCO, 1979, which regulates the procedure of the Special Court, it becomes apparent that the procedure relates to taking **cognizance of offences** falling under the Ordinance and which offences are detailed in Section 19 of the SBCO, 1979. While the language used in Sub-Section (3) of Section 18A of the SBCO, 1979 i.e. "**all cases relating to the violation of the provisions of this Ordinance**" clearly varies from the language used in Section 18D of the SBCO, 1979 i.e. "**take cognizance of an offence falling under this Ordinance**" and which would, on a literal interpretation of each section, alert the Court to a different intention being imputed by the legislature, however keeping in mind that the exclusion is made in Section 18 A to the Code of Criminal Procedure, 1898, I am of the opinion that this Court's jurisdiction under Section 9 of the Code of Civil Procedure, 1908 has not been ousted and that the jurisdiction of the Special Court is limited to only try offences for violation of the provisions of the SBCO 1979 as identified in Section 19 of the SBCO, 1979 and nothing more. Both Suit No. 309 of 2024 and Suit No. 670 of 2024 are therefore maintainable.

(vi) **Section 91 of the Code of Civil Procedure, 1908 and Public Nuisance**

41. The final objection that was taken as to the maintainability of Suit No. 670 of 2024 by Mr. Taimur Ali Mirza was that compliance had not been

made with the provisions of Section 91 of the Code of Civil Procedure, 1908 i.e. obtaining the consent of the Advocate General of Sindh before instituting this Suit and which section reads as hereinunder:

“ ... (1) *In the case of a public nuisance the Advocate-General, or two or more persons having obtained the consent in writing of the Advocate-General, may institute a suit, though no special damage has been caused, for a declaration and injunction or for such other relief as may be appropriate to the circumstances of the case.*

(2) *Nothing in this section shall be deemed to limit or otherwise affect any right of suit which may exist independently of its provisions.”*

This provision codifies what is referred to as a “Relator Action” and which in this section is limited to the institution of Suit for public nuisance.<sup>21</sup> I have perused the prayer maintained by the Plaintiff in Suit No. 670 of 2024 and am clear that no prayer seeking a declaration of public nuisance has been maintained, rather it has been contended that the approval sanctioned by the SBCA for the construction on the Said Property has been issued illegally. Section 91 of the Code of Civil Procedure, 1908 is therefore clearly not applicable and no permission of the Advocate General of Sindh was required to maintain that Suit and I am at a loss to understand why this objection was even pressed by Mr. Taimur Ali Mirza.

42. For the foregoing reasons, I am of the opinion that both Suit No. 309 of 2024 and Suit No. 670 of 2024 are maintainable before this Court and this issue is decided accordingly.

***I. Whether the approval has been accorded that has been accorded by the SBCA in accordance with the provisions of Sub-section (1) of Section 6 of the of the Sindh Building Control Ordinance, 1979?***

43. The provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 reads as hereinunder:

“ ... 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 thereof on payment of such fee as may be prescribed.*

*Provided that in case of a building the construction whereof has commenced before coming into force of this Ordinance, the Authority's approval of the plan and No Objection Certificate shall be obtained not later than six months after the enforcement of the Ordinance.*

<sup>21</sup> See ***Mir Alam and 2 others vs. Sahibzada*** 2007 SCMR 1157; ***Islamuddin vs. Ghulam Muhammad*** PLD 2004 SC 633; ***Shafi Mohammad Khan vs. Abdul Rehman and 5 others*** 2021 MLD 416;

*Explanation.- The word "construct" with all its variations used in this section and hereafter shall include 'reconstruct' with all its variations and, additions or alterations."*

The expression prescribed as used in Sub-Section (1) of Section 6 of the SBCO, 1979 has been defined in Sub-Section (l) of Section 3 of the SBCO, 1979 to mean:

“ ... (l) "prescribed" means prescribed by rules or regulations made under this Ordinance;

Reading Sub-Section (1) of Section 6 of the SBCO, 1979 in the context of the definition of the expression “prescribed” as give in Sub Section (1) of Section 3 of the SBCO, 1979 leads to the following conclusions. Firstly, that it is mandatory for any person constructing to obtain an approval on a plan for such construction and which plan has to be approved in accordance with the “rules” or “regulations” made under the SBCO, 1979. While no rules exist that have been passed under Section 21 of the SBCO, 1979 that regulate such construction, the KB&TPR, 2002 have been passed under Sub-Section (1) of Section 21A of the SBCO, 1979 and which inter alia regulates the manner in which an approval can be sanctioned for construction in the Province of Sindh excluding cantonments. As such where a plan is found to have been sanctioned in violation of the provisions of the KB&TPR, 2002 this Court’s jurisdiction can be invoked to challenge the approval so accorded as having been issued in excess of the jurisdiction conferred on the SBCA under Sub-Section (1) of Section 6 of the SBCO, 1979. Secondly, where a construction has been approved by the SBCA in accordance with the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979, the proponent of the construction has to at all times to construct in accordance with the approval so accorded and which if found to be in violation of the approval sanctioned can also be challenged before this Court.

44. Mr. Muhammad Ali Lakhani has maintained Suit No. 670 of 2024 challenging the construction on each of these grounds. He invokes the jurisdiction of this Court by first contending that there had been deviation from the approval sanctioned by the SBCA. When it was clarified that such deviations were not in excess of the limitations permissible under the KB&TPR, 2002 he contended that in this regard he would be satisfied if a direction may be given to the SBCA to ensure that construction was in accordance with the provisions of the KB&TPR, 2002. He next contended that the approval that has been sanctioned by the SBCA, according approval for two basements to be constructed on the Said Property, is in violation of Regulation 25-2.2.4 of the KB&TPR, 2002 and which restricts

a person applying for permission to construct a building on a residential plot to “***One basement*** at residential plots having a minimum plot area of 400 Sq. Yds. shall be permissible by maintaining the Compulsory Open Space and max height of plinth shall not exceed 2 ft. – 6 inches from Ground level.” Emphasising that the SBCA has approved the construction of two basements he contended that such sanction was in violation of the provisions of Regulation 25-2.2.4 of the KB&TPR, 2002 and hence in excess of the jurisdiction conferred on the SBCA.

45. In reply Mr. Taimur Ali Mirza has raised various disjointed arguments to justify that the construction approved by the SBCA did not violate Regulation 25-2.2.4 of the KB&TPR, 2002. Each are dealt with in turn.

- (i) Emphasising that the purpose of the SBCA was to regulate and not prohibit construction he contended that the SBCA could not “forbid the enjoyment of rights appurtenant to and/or arising from the specific, special dimensions of a particular piece of land.”

I have no cavil with the former part of this argument that the purpose of the SBCA is to “regulate” or as used in the language in the title of the statute to “control” construction. The reason that the SBCA is mandated to “regulate” or “control” construction is inter alia to ensure that the quality of the construction that is raised is not compromised and that construction does not develop in a haphazard manner and which if not regulated would result in cities becoming unmanageable and which could inevitably lead to various socio and socio economic issues impacting the area.

To achieve this the regulation of construction therefore begins from the development of a master plan, which generally designates the size of the property and its usage and the kind the structure that can be raised thereon. A person usually will purchase a property on conditions as stated in the master plan and would be bound by them. Thereafter they would apply for approval for construction and which would thereafter be approved under the supervision of licensed professionals i.e. architects and engineers to ensure that the construction raised complies with the conditions imposed in the master plan and inter alia also with various safety requirements. To state that the purpose of the SBCO, 1970 and the KB&PR, 2002 is not to “forbid the enjoyment of rights appurtenant to and/or arising from the specific, special dimensions of a particular piece of land” is therefore incorrect as in the process as outlined above certain rights

which can be considered “appurtenant to and/or arising from the specific, special dimensions of a particular piece of land” are curtailed and regulated in the interests of proper town planning and in the interests of public health and safety and which is the true purpose of the provisions of the SBCO, 1979.

- (ii) Relying on Regulation 2.1.1 of the KB&TPR, 2002 he argued that while interpreting the provisions of the KB&TPR, 2002 words imparting the singular number were to include the plural and which when read with the definition of the expression “Basement” as given in Regulation 2-19 of the KB&TPR, 2002 should be read as the plural “Basements” and which therefore when used in the context of Regulation 25-2.2.4 of the KB&TPR, 2002 should permit the approval of two basements on the Said Property. Reinforcing this argument, he referred to Regulation 3-2.10 of the KB&TPR, 2002 regarding the manner in which a plinth is to be verified and which prescribes:

“ ... *every person who commences any building work except category I under these regulations, upon completion of plinth and in the case of **basements** upon the completion of foundations and shall give notice to authority in prescribed form ZP-4....”*

Emphasising on the use of the expressions basements in the plural, it was contended such use would add credence to the interpretation cast by him on Regulation 25-2.2.4 of the KB&TPR, 2002. He argued that:

- a. “One” is a word;
- b. “Basement” is a word;
- c. “One Basement” are two words;
- d. Regulation 2-1.1 states that words imparting the singular number shall include the plural;
- e. The word “single” is defined to mean individual;
- f. The word “number” means an arithmetical value, expressed by a word;
- g. 01 is an arithmetical value. The spelling of 01 expressed as a word is “One”;
- h. It followed that the words One Basement shall include the plural whereby meaning that Regulation 25-2.2.4 may be read as two basements;

Mr. Taimur Ali Mirza in the alternative also contended that the expression “one” used in Regulation 25-2.2.4 of the KB&TPR, 2002



on the principles of statutory interpretation should be “omitted or eliminated” as no sensible meaning could be given to that word in the context of Regulation 25-2.2.4 of the KB&TPR, 2002.

I have considered these arguments and cannot find myself to agree with any of them. Regulation 2.1.1 of the KB&TPR, 2002 is premised on the expression “singular number” and which is defined to mean a “number that refers to one member of a designated class.”<sup>22</sup> As can be understood the expression is meant to refer to a member of a class such as a cricketer, lawyer, accountant etc. and which can include a structure such as an attic or a basement. When used the expression would of course be interpreted, **unless the context demanded otherwise**<sup>23</sup>, to include the plurals i.e. cricketers, lawyers, accounts, attics or basements. However, in the context of Regulation 25-2.2.4 of the KB&TPR, 2002 as the expression basement is preceded by the word “one” the noun is qualified and as the context does demand otherwise, the expression “basement” as used therein must be interpreted only in the singular. I am therefore of the opinion that only a single basement could be authorised to be constructed on the Said Property.

The meaning of these expression in Regulation 25-2.2.4 of the KB&TPR, 2002 being quite clear the reliance made by Mr. Taimur Ali Mirza to the principles of interpretation, whereby a Court ascertains the meaning of a word by reference to other sections, cannot be considered as the reference in Regulation 25-2.2.4 of the KB&TPR, 2002 is to a basement in a residential building and must be read in that special context. Similarly, the other rules of interpretation that were pressed by Mr. Taimur Ali Mirza i.e. that the expression “one” used Regulation 25-2.2.4 of the KB&TPR, 2002 can be “omitted or eliminated” if no sensible meaning can be given to that word are also not sustainable as a very sensible meaning can be given to the literal interpretation of that expression in the context of Regulation 25-2.2.4 of the KB&TPR, 2002 i.e. that only one basement can be permitted to being constructed on a residential property so as to prevent over densification of the area.

- (iii) In the context of the provisions of Section 7 of the SBCO, 1979, which prescribes the manner in which approvals for construction are

<sup>22</sup> <https://glossary.sil.org/term/singular-number>

<sup>23</sup> See Regulation 2-1 of the KB&TPR, 2002

to be prepared by professional such as town planners, architects and engineers, it was contended that the interpretation cast on the word “one” in Regulation 25-2.2.4 of the KB&TPR, 2002 would render section 7 of the SBCO, 1979 as redundant as no person/professional and/or Authority could ever approve a plan consisting of more than one basement and that it would lead to an absurdity as plots of a special nature such as the Said Property which require special consideration would never be issued an approved plan. On this basis it was premised that the provisions of Section 25-2.2.4 of the KB&TPR, 2002 restricting such professionals from constructing more than one basement is ultra vires of Section 7 of the SBCO, 1979.

I cannot see how such an argument can possibly be accepted. Clearly the restriction of one basement being permitted in residential buildings as clarified in Regulation 25-2.2.4 of the KB&TPR, 2002 does not impede on the general power of town planners, architects and engineers to draw up plans for approvals in accordance with Sub-Section (1) of Section 6 of the SBCO, 1979. That being said one can hardly say that redundancy is being attributed to Section 7 of the SBCO, 1979 as such classes of persons can quite clearly exercise their statutory duties as contained therein to make a plan and submit it for approval, they are just limited to doing so in terms of the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 and which mandates various restrictions as contained in the KB&TPR, 2002 of which Regulation 25-2.2.4 is simply one of them. To say that they are completely restrained from performing such an obligation is absurd as they can clearly design a plan for construction on the Said Property with only one basement. There is therefore no inconsistency as between the provisions of Section 7 of the SBCO, 1979 and Regulation 25-2.2.4 of the KB&TPR, 2002 and which regulation is clearly intra vires of Section 7 of the SBCO, 1979 as the class of persons indicated in that section are not prohibited entirely from performing their functions as envisaged in that section.

- (iv) It was next contended that Regulation 25-2.2.4 of the KB&TPR, 2002 was a directory and not a mandatory provision and it was contended that the approval sanctioned by the SBCA in deviation of that Regulation would not invalidate the approval accorded by the SBCA to the Plaintiff in Suit No. 309 of 2024.

This argument also cannot be sustained. Firstly, no reason whatsoever has been forwarded by Mr. Taimur Ali Mirza as to why Regulation 25-2.2.4 of the KB&TPR, 2002 should be treated as directory. To my mind as the provisions of Sub-Section (1) of Section 6 of the SBCO, 1979 commencing with the negative expression<sup>24</sup> “No” and there being consequences specified for a breach of Sub-Section (1) of Section 6 of the SBCO, 1979 in Section 7A and Section 19 of the SBCO, 1979 would render that section as being a mandatory provision<sup>25</sup>. Consequentially, as clarified hereinabove, any approval sanctioned by the SBCA under Sub-Section (1) of Section 6 of the SBCO, 1979 must be in accordance with the provisions of the KB&TPR,2002 as each of the approvals have to be approved in the “prescribed” manner i.e. as per the KB&TPR, 2002. It is therefore clear that the SBCA is mandated by that section to approve every plan in accordance with each and every provision of the KB&TPR, 2002 failing which such approval would not be in accordance with that section and would amount to such an approval being issued in excess of the jurisdiction of the SBCA.

- (v) A further argument that was forwarded by Mr. Taimur Ali Mirza was that the Said Property was located at the bottom of a cliff and if the second basement would not be constructed, it would lead to a “void between the depression/gradient of the bedrock and the underside of the structure”.

This is clearly incorrect. The plan for the structure to be erected on the Said Property that was presented to the SBCA showed two basements. It was clearly available to the Plaintiff in Suit No. 309 of 2024 to have only one basement as permitted under Regulation 25-2.2.4 of the KB&TPR, 2002 and which would be located where the lower basement currently exists and thereafter to have the ground floor and the first floor above the sole basement. There would therefore be no “void between the depression/gradient of the bedrock and the underside of the structure” as is being contended

- (vi) It was contended that despite the fact that plan approved showed a lower basement and a basement, the structures were in fact

<sup>24</sup> See Commissioner Inland Revenue Large Taxpayers Office, Islamabad vs. Pakistan Oilfields Ltd., Rawalpindi. 2024 SCMR 853; Chief Minister through Secretary Government Of Punjab, Irrigation Department, Lahore vs. Muhammad Afzal Anjum Toor 2024 PLC(CS) 147

<sup>25</sup> See Commissioner Inland Revenue, Zone-Ij, Regional Tax Officer (Rto), Mayo Road, Rawalpindi Vs. Sarwaq Traders, 216/1-A, Adamjee Road, Rawalpindi 2022 SCMR 1333; Province Of Punjab Through Secretary Excise And Taxation Department, Lahore Vs. Murree Brewery Company Limited (MBCL) 2021 SCMR 305

contiguous structures and should therefore be considered as one structure and hence one basement.

This argument also cannot be accepted. The approval that has been accorded has been accorded for two distinct structures each within their own floor and ceiling. The structures being independent one of the other and have been approved as distinct structures cannot be considered as one structure.

- (vii) Mr. Taimur Ali Mirza next contended that the Plaintiff in Suit No. 309 are constructing a "private building" as defined in Sub-Section (m) of Section 3 of the SBCO, 1979 and which would mean a structure not exceeding three floors including the ground floor. Referring to the definition of the expression "Ground Floor" as given in Regulation 2-59 of the KB&TPR, 2002 to mean "*the floor of any structure built just above the plinth level*" when read with definition of the expression "plinth" as given in Regulation 2-93 of the KB&TPR, 2002 would mean that the ground floor would have to be level with the road serving the plot and which could not be applied to the Said Property as it was located on a cliff. He therefore contended that as Regulation 25-2.2.2 permits a residential house/bungalow to have at least two stories above the plinth level therefore the plinth should not be taken from ground level but instead should be taken from the level of the ceiling of the upper basement and which will thereafter comply with Regulation 25-2.2.2. of the KB&TPR, 2002.

In addition he contended that floors below the ground floor do not always need to be basements as it was envisaged in Regulation 9-14 and Regulation 10-8.3 of the KB&TPR, 2002 that Air Raid Shelters, Underground Car Parks and the generic "other enclosures" could be constructed under the ground floor and which the lower basement should be considered to be substituted for.

I have considered this contention. The expression Plinth comes to be defined in Regulation 2-93 of the KB&TPR, 2002 to mean:

" *the height of the finished floor level of the ground floor, measured from the top of the finished surface of the road serving the plot, taken from the centre of the property line of the plot along the road.*

*In case of more than one road serving the plot, the plinth will be measured from the road providing principal access at the higher level.*

***The height of the plinth shall be minimum +1'-0" and maximum upto 4'-6", except on plots where the natural contours are more than 4-6" over at***

*least 40% of the plot area as measured from the point at the centre of the property line of the road adjacent to it*

In terms of the definition, the plinth of the structure that is being constructed on the Said Property does not have to be at the same level as the road serving the plot as contended by Mr. Taimur Ali Mirza. A plinth, as defined hereinabove, is the height of the finished floor level of the ground floor, measured at the center of the property line of the Said Property, when compared from the top of the center of the finished surface of the road serving the plot and which has to be at least one foot above the finished surface of the road and at the most four feet six inches above the finished surface of the road. The definition however creates an exception for a situation where the contours of the plot are more than four feet six inches over at least forty percent of the plot and for which, interestingly, no upper or lower limits for the location of the plinth have been prescribed in the definition. This however is subject to the specific height of the plinth as contained in Regulation 25-2.2.4. of the KB&TPR, 2002 and which restricts the height of the plinth to a maximum of “2 ft. – 6 inches from Ground level” and the height restriction of the entire structure as contained in Regulation 25-2.2.2 of the KB&TPR, 2002

I have reviewed the approved plan that has been filed by the Plaintiff in Suit No. 309 of 2024 and the contour plan and which on the face of it would indicate that more than 40% of the Said Property is above four feet six inches as compared against the height of the road. I also note that in the plan that has been produced by the Plaintiff in Suit No. 309 of 2024, the structure proposed to be constructed, when examined in a cross section does not seem to indicate where exactly the road level is. This is particularly important as the definition of the word “basement” as given in Regulation 2-19 of the KB&TPR, 2002 is given as “a storey of a building partially or wholly below ground level.” That expression when considered in light of the definition “ground floor” as indicated in Regulation 2-59 of the KB&TPR, 2002 to mean “the floor of any structure above the plinth level” can therefore only lead to a conclusion that any construction below the plinth level is to be defined as a basement. The road level not being identified in the sanctioned approval, one can only assume from the building plan as produced by the Plaintiff in Suit No. 309 of 2023, that any floor constructed below the level of the ground as shown on that plan is to be classified as a basement and for which

approval has been sanctioned for two separate basements in violation of Regulation 25-2.2.4 of the KB&TPR, 2002.

I have also considered the argument that structures below the ground floor can be considered to be Air Raid shelters, Underground Car Parks and other enclosures. It is noted that none of these expressions are defined in the KB&TPR, 2002, on account of the definition of the expression basement to mean “*a storey of a building partially or wholly below ground level*” would therefore include any structure that could be classified as a storey which was partially or wholly below the ground level and which would lead to the conclusion that such structures would also have to be classified as basements.

46. For the foregoing reasons, the SBCA has incorrectly exercised its jurisdiction to approve two basements. The approval that has therefore been accorded by the SBCA for the construction on the Said Property has therefore been accorded in breach of the provisions of Regulation 25-2.2.4 of the KB&TPR, 2002 and hence in breach of Sub-Section (1) of Section 6 of the SBCO, 1979.

**J. *In the event that the approval is found in deviation thereof what should the consequences be on the construction going on?***

47. Having come to the conclusion that the approval that has been accorded by the SBCA to the construction that has been carried out on the Said Property has been approved in violation of Sub-Section (1) of Section 6 of the SBCO, 1979 it remains to be answered as to what the consequences of such an illegality should be. Mr. Taimur Ali Mirza had contended that as Regulation 20-2 of the KB&TPR, 2002 permitted exceptions to be made from the general regulations for plots such as the Said Property which were not “Rectangular Quadrangles” and which could include a deviation from Parking requirements as contained in Regulation 24 and the Plaintiff in Suit No. 309 of 2024 should be permitted to apply for an alteration of the approval granted under Regulation 3-2.4 of the KB&TPR, 2002 and this Court should therefore not carte blanche order for the demolition of the entire construction that exists on the Said Property.

48. I am minded to agree with this contention but not for the reasons as stated by Mr. Taimur Ali Mirza. It is not the case of the Plaintiff in Suit No. 670 of 2024 that no construction at all can occur on the Said Property. The objection that had been raised was initially that the construction on the Said Property under the pretext of a residential building was actually for flats and

which objection having been discounted as the approval obtained was clearly for a residential house, there can be no doubt that the Plaintiff in Suit No. 309 of 2024 is allowed to raise construction on the Said Property for a residential house/bungalow and for which he had applied and was accorded approval. While on account of Regulation 25-2.2.4 of the KB&TPR, 2002, approval cannot be accorded for two basements, it can possibly be conceived that the space currently allocated for the lower basement could **sans two walls but while retaining the structural pillars** exist and which on account of not having walls might be not considered as basement and could be instead identified as a "Car Porch" as defined in Regulation 2-28 of the KB&TPR, 2002. I do not propose that this example that I have given is in consonance with the provisions of the KB&TPR, 2002 and which should be followed and approved by the SBCA. What I am saying is that there may well be a plausible solution, in the facts and circumstances of this particular matter, whereby changes can be made to the building plans for the Said Property to bring them into conformity with the provisions of the KB&TPR, 2002. To be able to achieve this a revised plan, as opposed to an alteration plan, would have to be applied for under Regulation 3-2.5 of the KB&TPR, 2002 by the Plaintiff in Suit No. 309 of 2024 so as to bring the approval within the perimeters of the KB&TPR, 2002 and the Plaintiff in Suit No. 309 of 2024 cannot be deprived of this opportunity.

49. I am therefore of the opinion that in the particular circumstances the Plaintiff in Suit No. 309 of 2024 should be restrained from any further construction on the Said Property for a period of two months and within which period they may present a revised plan to the SBCA for approval and which application will be considered and decided by the SBCA within a period of two weeks of being received. If the approval is accorded to the revised plan by the SBCA, the injunction passed by this Court will forthwith be vacated and the Plaintiff in Suit No. 309 of 2024 will be at liberty to construct on the Said Property in consonance with the approval granted. In the event that the revised plan is not maintained or is rejected, the SBCA is directed to ensure that no further construction occurs on the Said Property and to take further action to remove the illegal construction that exists on the Said Property.

**K. What should the decree be**

50. For the foregoing reasons all applications, except CMA No.9614 of 2024 and CMA No. 10152 of 2024 pending in Suit No. 670 of 2024, are

dismissed and Suit No. 309 of 2024 and Suit No. 670 of 2024 are decreed in the following terms:

- (i) Suit No. 309 of 2024 and Suit No. 670 of 2024 are each maintainable before this Court;
- (ii) the Approval dated 5 December 2022 issued by the SBCA in respect of the construction on the Said Property has been issued in violation of Sub-Section (1) of Section 6 of the SBCO, 1979;
- (iii) that the Plaintiffs in Suit No. 309 of 2024 are restrained from raising any constructing any further on the Said Property until an application for a revised plan is approved by the SBCA;
- (iv) any construction that is approved by the SBCA must be approved in accordance with the provisions of the KB&TPR,2002
- (v) In the event that the revised plan is rejected, if the Plaintiff in Suit No. 309 of 2024 does not maintain an application for revising the plan, the SBCA will be obligated to ensure that no further construction exists on the Said Property and to take further action to remove the illegal construction that exists on the Said Property; and
- (vi) There will be no order as to costs.

51. J.M. No. 15 of 2024 that had been maintained by the Plaintiff in Suit No. 309 of 2024 seeking to set aside two orders dated 13 June 2024 and 25 June 2024 passed in Suit No. 670 of 2024 being interim orders and having been superseded by this Judgement is dismissed as having become infructuous with no order as to costs. Office is directed to draw a decree in Suit No. 309 of 2024 and Suit No. 670 of 2024 within two weeks.

J U D G E

Karachi;  
Dated; 31 August 2024.