

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI

Date	Order with signature of the Judge
------	-----------------------------------

Present:

Mr. Justice Muhammad Iqbal Kalhoro.
Mr. Justice Muhammad Osman Ali Hadi .

C.P.No.D-7551 of 2015

Mr. Nadeem Afzal & others Petitioners

Vs.

Ministry of Defence, Federation of Pakistan & others..... Respondents.

20.02.2025.

M/s Altamash Arab and Shan ur Rehman, Advocates for petitioners

Mr. Abdullah Munishi, advocate for respondent No.2

Mr. Amel Kasi, advocate for respondents No.3,4 & 5.

Mr. Muhammad Qasim, DAG.

ORDER

=

MUHAMMAD IQBAL KALHORO J: Petitioners claim to be owners of units located in a building known as Forum situated in Plot No.G-20, Block 9, KDA Scheme No.5, Clifton Karachi and through this petition have prayed as under:-

DECLARE

A That the amendment made to Bye Law 116 A of the Construction Bye Laws of the Respondent No. 1 illegal, ultra vires or void.

B. That the Petitioners have a legitimate expectation arising out of the representations made by the Respondent No.1(iii) and Respondent No.2 and Respondent No. 3, the Respondent No.4, the Respondent No.5 and the Respondent No.6 that the construction will be in accordance with the approved plan issued by the Respondent No.1.

C. That the Respondent No.2. Respondent. No. 3. the Respondent No.4, the Respondent No 5 and the Respondent No 6 are estopped from using the Shopping Mall located in G-20, Block 9, KDA Scheme No.5, Clifton Karachi, in violation of the approved plan issued by the Respondent no. 1.

D. That the constructions available on the site are in violation of the approved plan or in violation of the regularization plan issued by the Respondent No. 2

E. That the sale of the shops on the basis of the Approved Plan creates a "building scheme" thereby creating a fundamental right in property which is protected under Article 23 and Article 24 of the Constitution.

F. That the Petitioners have a legitimate expectation to expect that the Respondent No. 1(iii) does not deviate from Cabinet Decision in Case No. 148/17/81 dated 8 February 1984.

DIRECT

A. Amendment made By Law 116 A.

B. the Respondent No. 1(iii) to demolish all construction on Plot No.G-20, Block-9, KDA Scheme No.5, Clifton, Karachi which are in violation of the approved plan issued by the Respondent No. 2.

C. On basis of original applications Terms and Condition.

RESTRAIN

A. The Respondent No. 1, Respondent No. 2, the Respondent No.3, the Respondent No.4, the Respondent No.5 and the Respondent No.6 from taking any action which would violate the Petitioners fundamental rights in their shops which are protected under Article 23 and 24 of the Constitution of the Islamic Republic of Pakistan, 1973.

GRANT

A. Costs.

B. Such other relief as this Honourable Court deems just and proper in the circumstances.

2. During course of arguments, it has transpired that some of the allottees including the petitioners have already filed suits No.1234/2004, 50/2006 and 28/2006 against more or less the same respondents seeking reliefs among others as under:-

A. Declare that the Plaintiffs being the lawful owners of their respective shops mentioned in the title of the suit in the shopping mall in the building namely "The forum constructed on Plot No. G-20, Block 9, Khayaban-e-Jami, Clifton, Karachi, are entitled to have individual electric meters in their names for their respective shops/units with direct billing by Defendant No.3 to each shop/unit without interference by the Defendants No.1 and 2 or their employees or agents

B. Declare that the air conditioning chiller unit installed at the building namely The Forum constructed on Plot No. G-20, Block 9, Khayaban-e-Jami. Clifton, Karachi, is the joint/common property of the owners/occupants of shops/units in the shopping mall including the Plaintiffs and is to be operated /maintained under their supervision by their representative Association without interference from the Defendants No.1 and 2 or their employees/agents.

C. Declare that the owners/occupants of shops/units in the shopping mall of the building namely 'The Forum' constructed on Plot No. G-20, Block 9. Khayaban-e-Jami, Clifton, Karachi, are entitled under the law to form their representative Association to look after their affairs including maintenance of the shopping mall including shops/units, common passage/area of the shopping mall/building and provision of services therein.

D. Declare that the Defendants No.1 and 2 or their employees/agents have no lawful authority to interfere in matters relating to the maintenance of the shopping mall including shops, common area/passage and provision of services (air conditioning, security, cleaning etc.) in the shopping mall in the building namely The Forum' constructed on Plot No. G-20, Block 9, Khayaban-e-Jami, Clifton, Karachi

E. Declare that the representative Association of the owners/occupants of the shops/units in shopping mall of the building namely 'The Forum' shall be exclusively responsible for looking after the shopping mall including its maintenance and to provide other services including supply of water, electricity, air conditioning, cleaning, maintenance etc. to the shops/units and common passage/area in the shopping mall.

F. Declare that the amount of Rs. 35/- per square foot, as demanded by the Defendants No.1 and 2, and Rs. 20/- per square foot, as actually charged by the Defendants No.1 and 2 for maintenance services and air conditioning, is excessive, extortionate and unwarranted and direct the Defendants No.1 and 2 to account for the same and refund the excess amount charged by them in past

G. Declare that the temporary stalls/kiosk erected in or around the shopping mall and food shops by or under the Defendants No.1 and 2 are illegal and cannot be erected and direct the Defendants to remove all these stalls/kiosk immediately.

H. Declare that the two front entrances of the shopping mall have been illegally closed/blocked by Defendants No.1 and 2 and direct them to immediately open these entrances.

I. Declare that all the violations of the building plan and other easementary rights in the shopping mall in The Forum as pointed out in Architects Report dated 19.8.05 (Annex E) or otherwise, are liable to be removed/rectified by the Defendants No.1 and 2 at their expense solely.

J. Grant permanent injunction prohibiting the Defendants No.1 and 2, their employees or any other person from charging or raising any demand from the Plaintiffs at the rate of Rs. 20/- or Rs. 35/- per square foot by way of maintenance charges etc. and from disconnecting supply of electricity, air conditioning, cleaning, security or/and any other service to the shops/units in the shopping mall or from interfering with the lawful conduct of their respective businesses by the Plaintiffs in any manner whatsoever.

K. Grant mandatory injunction directing the Defendant No.3 to issue individual electricity bills to the Plaintiffs on the basis individual Sub meters already installed in the building.

L Grant mandatory injunction directing the Defendants to rectify violations of building plan and other easementary rights as pointed out in Architect's report dated 19.8.05 or otherwise including removal of all illegal stalls/kiosks/food shop/Restaurant (Timeout).

M. Grant any other relief deemed fit and proper in the facts and circumstances of the case.

N. Grant costs of the suit.

3. For and against arguments have been made by learned counsel representing the respective parties as to whether during pendency of the suits essentially seeking the same reliefs as agitated in this petition, whether the petition is maintainable or not.

4. Learned counsel for petitioners has argued that through this petition the reliefs which are independent of the suits have been sought by the petitioners and since they are admittedly atleast allottees of the units, the petition is maintainable as apart from the substantial reliefs, they have challenged vires of Bye-law 116-A of the Construction Bye-laws of Cantonment Board Clifton(Karachi) Building Bye-laws 2007 (Bye-laws 2007). Nonetheless, when pressed regarding remaining prayers in the petition which palpably overlap the reliefs sought by the petitioners in the

suits, learned counsel for petitioners have conceded remaining prayers by not pressing them and have confined their arguments to the challenge made against vires of aforesaid Bye-law.

5. On the other hand, learned counsel for respondents No.3,4 & 5 has questioned maintainability of the petition in presence of the suits and has proposed that if the learned single judge, where the aforesaid three suits are pending, is directed to expedite the suits by including the issue determining validity of the aforesaid bye-law and then decide all the suits within a reasonable period, say six months, he would agree to it.

6. Learned counsel for respondent No.2 has drawn our attention to ground (g) of the petition indicating that vires of bye-law 116 has been challenged on the ground of malafide. Learned counsel while relying upon PLD 1974 SC 151 has stated that even the question of malafide cannot be sorted out without recording evidence, hence the petitioners may be directed to amend the prayer clause in the suits by adding a question to the vires of bye-law 116-A and get a decision from the Civil Court in this regard as well.

7. We have heard the parties and perused material available on record. A perusal of contents of the petition and the suits already filed against the respondents by the allottees of the units including the petitioners show a chain of overlapping facts as well as the reliefs sought by the petitioners. At the time when suits were filed, the amendment in bye-law 116, which reads as under, was not brought about, hence it is not the subject matter of the suit.

116. Formation of association and maintenance of utilities. The allottees would form an association to handle the affairs of the project and maintenance of the services and amenities. The rights of easement, appurtenances and other common rights shall be transferred to such association.

8. The relevant amendment introducing the bye-law 116-A was brought about through SRO dated 08.05.2013. This amendment reads as under:-

"116A. Maintenance and management of buildings by developers. In case of a building where the developers and their designated management intends to maintain and manage the building and shopping mall the provision of bye-law 116 shall not apply"

It is a well settled proposition of law that if during pendency of the suit between the parties any development occurs affecting any of the rights pending adjudication before the civil court, such development can be brought into notice of the court and the court is competent to look into and decide it accordingly. When all the substantial issues regarding controversies between the parties were pending in the suits filed by the petitioners and others, the petitioners would have been well within their rights to bring the subject amendment in bye-laws in the notice of the civil court and civil court equally competent to look into it, as otherwise the suits would have been rendered incompetent. For, without determining the same, even if the suits were to be decreed, the fruit of such decree would not have been available to the petitioners in presence of bye-law 116-A. The petitioners, instead of avoiding multiplicity of litigation on the same cause of action by seeking amendment in the prayer clause of the suits by challenging the vires of bye-law 116-A, preferred to file this petition which since 2015 is pending adjudication.

9. No valid ground has been put forward by the learned counsel for petitioners not to seek amendment in the prayers of the suit by challenging the vires of bye-law 116-A except that constitution petition is an expeditious remedy. Looking at the flux of time, the petition has consumed in coming up for hearing since 2015, learned counsel's argument seem to be invalid and without any footing. Even otherwise on this ground the petition cannot be allowed to be maintained, because if so permitted, it will open a flood gate and anyone stuck in the civil suit for any reason would rush to file a constitution petition on the ground of indecision in the civil suit.

10. More so, the petitioners have challenged the vires of bye-law by alleging malafide against respondents. The Supreme Court in the case reported as PLD 1974 SC 151 (supra) has held while defining malafide that malafide is one of the most difficult thing to prove and onus is entirely upon the person alleging malafide to establish it because, there is a

presumption to regularity with regard to official acts and until that presumption is rebutted the action cannot be challenged merely upon a vague allegation of malafide. Further defining the malafide, the Supreme Court has laid down that malafides literally means any action taken in bad faith is usually an action taken maliciously in fact, that is to say, in which the person taking action does so out of personal motive either to hurt the person against whom action is taken or to benefit oneself. It is, therefore, necessary for a person alleging that an action has been taken malafide to show that the person responsible for taking action has been motivated by any one of the considerations mentioned above. A reading of the ratio laid down by the Supreme court makes it clear that petitioners have to prove that amendment in bye-law 116 has been motivated by the relevant authority to hurt their interest and to benefit themselves. The burden of proving that such action is rooted in maliciousness is in fact upon the petitioners. Unless that burden is discharged by them and it is established that the action taken is in bad faith, the amendment cannot be declared ultra vires of the Act. Since the subject amendment has occurred during pendency of the civil suits and the existence of this amendment in the law has a direct nexus with the outcome of the civil suits pending between the parties, we are of the view that instead of maintaining the petition on this issue, the petitioners should seek the same relief by amending the prayers in the suits challenging vires of the bye-law 116-A of the Bye-laws 2007, if they so wish.

11. That said, there is no question to violation of fundamental rights of the parties. The dispute appears to be rooted in personal aggrandizement than in altruism. The provision fought for and against favours one party by allowing it to keep maintenance of the building. This context also entails determination of circumstances establishing right of one party or otherwise on maintenance of the building. Hence, once such amendment is brought on record subject to all exceptions, the learned single judge shall frame the issue in respect of vires of the bye-law 116-A, hear the parties and decide it first within a period of two months from framing of such issue before proceeding further to determine rights of the parties in respect of reliefs sought in the suits. We, therefore, dispose of this petition in the above terms.

The petition stands disposed of in the above terms alongwith listed applications.

JUDGE

JUDGE

A.K