

IN THE HIGH COURT OF SINDH AT KARACHI

C. P. No.D-2524 of 2016

Present:

Mr. Justice Nadeem Akhtar &

Mr. Justice Muhammad Faisal Kamal Alam

- Dated of hearing : 29.06.2016
- Petitioners : Ali Muhammad and Salamat Bibi through Mr. Fiaz H. Shah, Advocate.
- Respondent No.1 : Federation of Pakistan, through Mr. Dilawar Hussain, Standing Counsel.
- Respondent No.2&4: The Executive Officer and through Miran Muhammad Shah, Additional Advocate General Sindh.
- Respondent No.3 : D.H.A. through M/s Nazar Hussain Dhoon and Aijaz Mubarak Khattak, Advocates.

ORDER

Muhammad Faisal Kamal Alam, J: - Being aggrieved by the inactions (as averred) on the part of Respondent No.3 (the Pakistan Defence Officer Housing Authority “DHA”), the Petitioners have invoked the extraordinary constitutional jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 and have sought the following relief:

- “i. To declare, direct and order the Respondents to issue/grant necessary approval for construction of Flat No.5 & Flat No.6 situated on 3rd Floor measuring 900 square feet each on Plot No.22-C, 25th Commercial Street, Phase-V, DHA, Karachi in term of Sub-Lease deeds dated 21.04.2010 and Letter dated 12.11.1991 of Respondent No.1;*
- ii. To order and direct the Respondents to act in terms of Letter dated 12.11.1991 whereby permission for proposed*

construction was accorded and to issue all such and relevant permission/NOC/instructions as required to the petitioner for construction of aforesaid Flats No.5 & Flat No.6, situated on 3rd Floor, measuring 900 square feet each on Plot No.22-C-, 25th Commercial Street, Phase-V, DHA, Karachi;

iii. Grant any other relief as the Honourable Court deemed just and appropriate in the circumstances of the case and Cost of the proceedings;”

2. The Petitioners are claiming to be the owners of Flat No.5 and 6 respectively, measuring 900 square feet, proposed to be located on third floor of a multistoried building proposed to be constructed on commercial plot of land bearing Plot No.22-C-, 25th Commercial Street, Phase-V, DHA, Karachi, admeasuring 200 square yards.

3. Considering the nature of present case and relief claimed, the above named two apartments shall hereinafter be referred to as “**Subject Flats**” and the building in question is to be referred to as “**Said Building**”.

4. The grievance of Petitioners is that the approval for construction of Said Building was given way back in 1991 by the Respondents but the third floor, in which the Subject Flats are supposed to be located, is yet to be constructed and Respondent No.3 (DHA in particular) is not granting the approval and since October 2015 is delaying the matter unnecessarily to the detriment of the rights and interests of the Petitioners. To a query, Mr. Fiaz H. Shah, learned counsel for the Petitioners has replied that the rights and interests of the Petitioners in respect of the Subject Flats have accrued in view of respective indentures of Sub-Leases executed between the owners of the Said Building and the aforesaid Petitioners and the said two registered Sub-Leases are already appended with the petition as Annexure “**P/1 & P/2**”. These two purported Sub-Leases are of 21.04.2010 and have

been registered by the Sub-Registrar-I, Clifton Town, Karachi. These two Sub-Leases may for the sake of reference be referred to as “**Sub-Leases in question**”.

5. Notices of this petition were served on all the Respondents but only Respondent No.3-DHA has filed its reply along with the relevant regulations, viz. Building Control and Town Planning Regulations, 2011 (“**the Regulations**”).

6. During the course of proceedings, it was observed that when the Subject Flats are non-existent then under what law and authority the concerned Sub-Registrar has executed the aforementioned indentures of Sub-Leases in question. By the order dated 10.05.2016, the concerned Sub-Registrar-I, Clifton Town, Karachi, was impleaded as Respondent No.4.

7. On 13.06.2016, it was felt necessary that District Registrar, Karachi should also appear before the Court for further assistance besides Respondent No.2 (the Executive Officer, Clifton Cantonment Board). The Petitioner’s counsel also filed a Statement dated 16.06.2016, whereunder certain documents were filed including approval of draft of Sub-Leases in question from the offices of the Military Estates Office, Karachi Circle, Karachi (“**MEO**”) and District Registrar, besides approval dated 12.11.1991 of Said Building given by Respondent No.2.

8. On 23.06.2016, Mr. Ghulam Abbas, District Registrar, Karachi along with Sub-Registrar Mr. Hamza Qureshi appeared along with Mr. Miran Muhammad Shah, learned Additional Advocate General Sindh, whereas, Respondent No.3-DHA was represented by its learned counsel Mr. Aijaz Mubarak Khattak. However, no one appeared on behalf of Respondent No.2 / Clifton Cantonment Board. However, despite being a

date and time fixed matter, no one appeared from the Petitioners' side and matter was again adjourned, in the interest of justice, for 29.06.2016 to be taken up at 11.30 a.m., on which date the instant petition was reserved for orders after hearing the Respondents and their counsel, as again no one was present for the Petitioners.

9. A reply has been filed on behalf of District Registrar, Karachi, wherein he has attempted to justify that registration of the Sub-Leases in question was lawfully done in terms of Section 17(1)(b) of the Registration Act, 1908. It was further urged on behalf of Registering Authority that Sub-Registrar is not required to physically ascertain the property proposed to be registered as envisaged under Section 21 of the Registration Act, 1908. The District Registrar has further invoked Rule 135 of the Registration Rules, 1929 and a decision of the Honourable Supreme Court of Pakistan reported as *1989 S C M R 570 (ABDUL BAQI MEHAR Vs. INSPECTOR GENERAL OF REGISTRATION & OTHERS)*, in support of his arguments, that even registering officers are not concerned with the validity of the documents brought to them for registration. It would be advantageous to reproduce the above relevant provisions of Registration Act, 1908 herein below:

“17. Documents of which registration is compulsory. (1) The following documents shall be registered if the property to which they relate is situate in district in which, and if they have been executed on or after the date on which, Act No. XVI of 1864, or the Indian Registration Act, 1866, or the Indian Registration Act, 1871, or the Indian registration Act, 1877, or this Act, came or comes into force, namely:--

(b) other non-testamentary instruments which purport or operate to create, declare, assign, limit or extinguish, whether in present or in future, any right, title or interest, whether vested or contingent of the value of one hundred rupees and upwards, to or in immoveable property;

[Explanation. In the case of an assignment of a mortgage the consideration for the deed of assignment shall be deemed to be the value for registration];”

Section 21

21. *Description of property and maps or plans.* (1) No non-testamentary document relating to immovable property shall be accepted for registration unless it contains a description of such property sufficient to identify the same.

(2) Houses in towns shall be described as situate on the north or other side of the street or road (which should be specified) to which they front, and by their existing and former occupancies, and by their numbers if the houses in such street or road are numbered.

(3) Other houses and lands shall be described by their name, if any, and as being in the territorial division in which they are situate, and by their superficial contents, the roads and other properties on which they abut, and their existing occupancies; and also, whenever it is practicable, by reference to a Government map or survey.

(4) No non-testamentary document containing a map or plan of any property comprised therein shall be accepted for registration unless it is accompanied by a true copy of the map or plan, or, in case such property is situate in several districts, by such number of true copies of the map or plan as are equal to the number of such districts.

(5) No non-testamentary document relating to the properties situated in the areas, for which the record of rights is maintained by the Revenue Department, shall be registered without a copy of computerized record certified by the Assistant Collector of the first grade appointed specifically for the service centre.

Provided that the areas for which the record of rights is not yet computerized, the Assistant Collector of first grade of respective jurisdiction shall certify the copy of record of rights.

West Pakistan Registration Rules, 1929:

135. Registering officers not concerned with validity of document.--- Registering officer should bear in mind that they are in no way concerned with the validity of documents brought to them for registration, and that it would be wrong for them to refuse to register on any such grounds as the following, e.g., that the executant was dealing with property not belonging to him, or that the instrument infringed that rights of third persons not parties to the transaction, or that the transaction was fraudulent or opposed to public policy. These and similar matters are for decision, if necessary, by competent Courts of law and registering officers, as such, have nothing to do with them. if the document is presented in a proper manner by a competent person at the proper office within the time allowed by law and if the registering officer is satisfied that the alleged executant is the person he represents himself to be, and if such person admits execution, the registering

officer is bound to register the document without regard to its possible effects.

10. Respondent No.3-DHA in its reply though did not dispute that approval for construction of Said Building was given way back in 1991 vide an approval letter dated 12.11.1991, but the owner of the afore-referred plot only constructed two floors of the Said Building, whereafter, no completion plan as required under the Cantonment Law, was issued in respect of the Said Building. The stance of Respondent No.3-DHA is that the MEO has wrongly approved the above Sub-Leases in question for registration, as third floor on which these Subject Flats are proposed to be located, **is not even constructed till date.** It is also mentioned in its Reply that a complaint has been lodged against the Said Building by neighbours, which is appended as Annexure “B” (with DHA Reply).

11. To a very specific query, learned Additional Advocate General Sindh has apprised us that in the past there are various orders of this Court in which it has been specifically mentioned with regard to multistoried buildings that unless there is a duly approved and issued completion plan/Occupancy Certificate by the competent authority for such multistoried buildings, their sub-leases cannot be registered by the concerned Registrars. Copies of these orders have been placed on record by the learned Additional Advocate General Sindh, which have been passed in C.P.No.D-160 of 1998, then subsequently in C.P.No.D-2652 of 2009 and C.P.No.D-1932 of 2008. It would be relevant to reproduce the order dated 13.02.2007 passed in C.P.No.D-160 of 1998 herein below:-

“However, in order to avoid further complications and creation of third party interest, it is directed that no sub-leases/conveyance to be executed in respect of commercial / residential apartment / buildings without occupancy certificate from KBCA as required under section 6(2) of the Ordinance of 1979. To come up immediately after three weeks. Copy of this order may be served on

Registrar of the Properties with directions to convey directions to all the Sub-Registrars for due compliance”.

12. As per the stance of Government of Sindh, the Registration Act, 1908 has been subsequently amended and accordingly by a Sindh Act No.VI/2014, dated 20.03.2014, subsection (5) in Section 21 has been added, which has been reproduced hereinabove, with the object that a property brought for registration should have an ascertainable description.

13. After going through the entire record with the assistance of the learned counsel for the parties, we are unable to subscribe to the arguments / stance of District Registrar and Sub-Registrar as mentioned hereinabove. With regard to plea of Respondent No.4 and his much reliance on the subsection (1)(b) of Section 17 of the Registration Act, 1908, that even the future right, title or interest in respect of immovable properties can be registered, therefore, the above two Sub-Leases in question were rightly registered, although the Subject Flats admittedly at the time of registration and even today are non-existent, is not tenable and fallacious, for the reasons that:

i. A plain reading of Section 17 of the Registration Act, 1908, which has been reproduced hereinabove, clearly shows that it is in respect of property which is situated in a District.

ii. Even the above referred clause (b) of subsection (1), points out that it relates to an immovable property which has been defined in sub-section 6 of Section 2 of the Registration Act, 1908, and definition whereof is reproduced herein under:-

“[6. “immovable property” includes land, buildings, benefits arise out of land and things attached to the earth, or permanently fastened to anything attached to the earth, hereditary allowances, rights to ways, lights, ferries and fisheries but does not include---

(a) standing timber, growing crops or grass whether immediate severance thereof is intended or not;

(b) fruit upon and juice in trees whether in existence or to grow in future; and

(c) machinery embedded in or attached to the earth, when dealt with apart from the land;

In this definition of immovable property, the words buildings and things attached to the earth are of significance, in order to explain that an immovable property should be a tangible one and physically exists.

- iii. The two Sub-Leases in question in respect of Subject Flats have been examined and it appears that each flat has been subleased for a meager amount of Rs.1000/- (Rupees One Thousand only) being the full occupancy value and Rs.10/- (Rupees Ten only) as yearly rent. However, clauses-24 and 30 of the Sub-Leases in question show that through these instruments in question ownership rights were transferred to Petitioners, but without mentioning the sale consideration.
- iv. Law does not work in a vacuum. In the event, if Respondents on some valid grounds do not allow the construction of the third floor in which the Subject Flats are proposed to be built, then the validity of the Sub-Leases in question will otherwise become questionable.
- v. If such a practice is allowed then it would lead to a chaotic situation, specially, in the city like Karachi, where already there is an unchecked growth of number of illegal buildings, which are being occupied unlawfully by adopting various deceitful tactics including the one with which we are dealing at present in this petition.
- vi. The aforementioned orders in various other cases were passed in the larger public interest and therefore these orders are *in rem*. No registration can be done without a completion plan/Occupancy Certificate, so that specific details and descriptions of an immovable property / Subject Flats / units in a multistoried building can be identified and to ensure that a building is Regulations compliant, particularly, having structural stability.

vii. The Registering Authority, even District Registrar and Sub-Registrars like any other Government functionary have to discharge their functions in a prudent manner which requires an application of fair mind and officials cannot act in such a callous manner as it is apparent from the conduct of the concerned Sub-Registrar (Respondent No.4), who at that relevant time had registered the Sub-Leases in question. Consequently, we conclude that the Sub-Leases in question have been registered illegally and are void. Consequently, no transaction can be done on the basis of Sub-Leases in question and Petitioners cannot create any third party interest either on the basis of these Sub-Leases or in respect of non-existent Subject Flats No.5 and 6 in the Said Building. A decision given by the Honourable Supreme Court of Pakistan reported in 2000 S C M R 1748 (*MUHAMMAD SALEEM AND OTHERS Vs. ADMINISTRATIVE, KARACHI METROPOLITAN CORPORATION, KBCA (KMC) KARACHI & OTHERS*) and another decision handed down by a Division Bench of this Court reported in 2006 C L C 110 (*MUHAMMAD RAHIM & OTHERS Vs. KARACHI METROPOLITAN CORPORATION & OTHERS*) are of relevance here. Conversely, the above cited case law relied upon by Respondent No.4 is clearly distinguishable from the present case. The cited decision [1989 SCMR page 570; Abdul Baqi Mehar versus Inspector General of Registration] was a service matter and in that context the Hon'ble Apex Court has made a reference to the above mentioned [and reproduced] Rule 135 of the West Pakistan Registration Rules, 1929. Even the said Rule is not applicable to the facts of instant case, as the illegality of sub-leases in question were/are floating on surface and no further inquiry was required for ascertaining the validity of these sub-leases in question, hence, the afore said Rule 135 does not lend any help to Respondent No.4. Even otherwise, it would be absurd if the said Rule is interpreted in such a manner, which results in perpetuating illegality rather preventing it.

14. In view of aforesaid discussion, it is necessary to issue directions to the concerned authority including Inspector-General of Registration to take

strict action against the concerned Sub-Registrar, who has registered the aforementioned Sub-Leases in question along with other officials connected with such illegal acts and report the matter within four weeks from the date of this order through M.I.T.-II of this Court.

15. In order to prevent further misuse of these Sub-Leases, the Petitioners are directed to deposit the original Sub-Leases in question with the Nazir of this Court within a fortnight, who will cancel the same (Sub-Leases in question). Petitioners, however, will be at liberty to seek any other remedy against those persons whose action, if, has caused any injury or losses to Petitioners.

16. At this juncture, it is also necessary to observe that Respondents No.2 and 3 will consider the request / application for raising construction of third floor on / in the Said Building in accordance with their relevant Building and Town Planning Rules / Regulations and take an independent decision in this regard. However, Petitioners would be at liberty to apply afresh for the allotment or execution of Sub-Lease(s) in respect of that flat / / unit, which physically exists in the Said Building.

17. In the above terms, the instant petition stands disposed of.

JUDGE

JUDGE

Dated: _____