

## IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1744 of 2016

[Hanif Ahmed and another v. Sindh Building Control Authority and others]

Date of hearings : 18.10.2017, 02.11.2017, 07.11.2017 and 11.01.2018.

Date of Decision : 15.02.2018.

Plaintiffs : Hanif Ahmed and Abdul Khaliq Ali, through M/s. Muneer A. Malik and Chaudhry Atif Rafiq, Advocates.

Defendant No.1 : Sindh Building Control Authority, through Mr. Muhammad Usman Tufail, Advocate.

Defendants No.2-8 : Yasir Ahmed and 6 others, through Dr. Muhammad Farogh Naseem, Advocate.

### Case law relied upon by Plaintiffs' counsel

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1. P L D 1975 Karachi Page-464  
[*Abdul Ghafoor Memon v. Mohammad and another*]
2. P L D 1993 Karachi Page-286  
[*Abdul Razique Khan v. The Province of Sindh and 3 others*]
3. P L D 1988 Supreme Court Page-53  
[*Iftikhar Ahmad and others v. President, National Bank of Pakistan and others*]
4. 1970 S C M R Page-105  
[*Chairman, District Concil, Jhelum v. Ali Akbar and 2 others*]
5. P L D 1967 Supreme Court Page-241  
[*Pakistan Tobacco Co. Ltd. V. Karachi Municipal Corporation*]
6. 1992 M L D Page-527  
[*Mst. Feroza Hajiani and another v. Abdul Razzak and another*]
7. 2015 Y L R Page-1303 (Sindh)  
[*Standard Chartered Bank Limited v. Karachi Municipal Corporation and others*]
8. PLD 2002 Karachi Page-405  
[*Muhammad Asif v. Controller of Building, K.B.C.A., Karachi*]

9. 2008 Y L R Page-738  
[*Mrs. Alba D'SA and others v. Mrs. Naheed Pabani and others*]
10. P L D 2007 Supreme Court page-472  
[*Jawad Mir Muhammadi and others v. Haroon Mirza and others*]  
(Jawad Mir's case)

#### **Other Precedents:**

1. 2004 C L C 1029  
[*Arif Majeed Malik and others v. Board of Governors Karachi, Grammer School*]
2. P L D 2003 Karachi page-222  
[*M. Y. Corporation (Private) Ltd. v. Messrs Erum Developers and others*]

- Law under discussion:**
1. Sindh Building Control Ordinance, 1979 ("**Building Law**").
  2. Karachi Building and Town Planning Regulations, 2002 (the "**Regulations 2002**").
  3. Specific Relief Act, 1877 ("**SRA**").
  4. The Sindh Buildings Control (Amendment) Ordinance, 2001 (the "**the Amendment Ordinance, 2001**").
  5. Civil Procedure Code, 1908 ("**CPC**")

### **ORDER**

**Muhammad Faisal Kamal Alam, J:** Present order will dispose of three pending applications. For the sake of reference, the C.M.A Nos.11139 and 11140 of 2016, preferred under Section 94 read with Order XXXIX, Rules 1 and 2 CPC, are referred to as the "**Stay Applications**", whereas, the third C.M.A. No.12767 of 2017 is basically an application for anti-dating the present matter prior to 24.10.2017. Since hearing of the pending applications have been concluded, therefore, third application [C.M.A. No.12767 of 2017] for anti-dating the case has become infructuous, and is accordingly disposed of.

2. The relevant facts for deciding the aforementioned Stay Applications are as follows:

The present suit, as per the pleadings, is filed in the public interest, *inter alia*, against a multi-storied building constructed on a residential plot No.A-9, admeasuring 2500 square yards, situated in Bath Island Quarters, Karachi, by the name 'Royal Elite' (the "**Said Project**"). The claim of the Plaintiffs is that Defendant No.1-Sindh Building Control Authority ("**SBCA**") has committed an illegality while giving approval for the multi-storied building plan [available at page-147, Annexure 'G'] accompanied with approval letter dated 26.09.2014. It is further averred that even sale NOC should not have been given to Defendants No.2 to 8, who are the owners of the land and builders of the Said Project.

3. Mr. Muneer A. Malik, along with Mr. Ch. Atif Rafiq, the learned counsel representing the Plaintiffs, has argued that the approved building plan violates the provisions of the Regulations 2002, as a residential plot designated for construction of a house / bungalow has been converted into a flat site, as the Said Project comprises of ground + ten stories with four flats / units on each level / storey. It is further contended that since the bungalow existing on the plot in question was demolished for raising the Said Project, thus the Defendants No.2 to 8 (**builders**) were required to obtain a Land Development Permit in terms of Regulation 3-3.1.2(b), because such activity of raising the subject project has materially increased the intensity of use of land in question; since admittedly this land development permit has not been obtained, therefore, all the acts of the builders (Defendants No. 2 to 8) are unlawful and entail adverse consequences. It is further argued that construction of the Said Project in the vicinity is bound to cause adverse ecological and environmental

hazards, besides infringing the privacy of neighbourhood and for residents of this area, the Said Project is a nuisance. As per the stance of Plaintiffs' legal team, the confirmation of injunction is necessary, *inter alia*, to forestall innocent buyers from booking or purchasing the flats in the Said Project because once third party interest is created, it may result in legal complications.

4. The above submissions of learned counsel for the Plaintiffs have been controverted by contesting Defendants No. 2 to 8-builders, who are represented by Dr. Muhammad Farogh Naseem. Per learned counsel, the Said Project does not fall within the purview of flats site as mentioned in the aforesaid Regulations because the original use of the land in question has not been changed and, therefore, procedural compliances pertaining to the change of land use as mentioned in the said Regulations are not applicable to the Said Project. A specific plea with regard to delay has been raised, that Plaintiff No.1 being a resident of the same vicinity when witnessing the construction of Said Project, then, if at all he is so interested in public welfare, should have filed the present *lis* long before and not after almost two years from the issuance of approved building plan and when structure stood completed. It has been further argued as well as pleaded in the counter affidavit of the said Defendants (builders) that the latter have utilized allowable ratio of land as provided in the said Regulations and have not committed any illegality. By relying on Regulation 25-9.2.1(a) of the Regulations 2002, it is submitted that for Bath Island Quarters, a plot ratio of 1 : 2 is mentioned. The calculation is given in paragraph-5 of the counter affidavit; that 45,000 Square Feet is an allowable floor area ratio, whereas, the said building plan was approved for 44465-54 Square Feet, that is, within the allowable ratio. It has been further contended that revised completion plan for the Said

Project has also been submitted to Defendant No1-SBCA, but on account of restraining orders in this matter, the same could not be processed further. Learned counsel has placed his reliance on the reported decisions already mentioned in the opening part of this order.

5. Mr. Muhammad Usman Tufail, learned counsel representing Defendant No.1-SBCA, in brief, has stated that codal formalities have been followed while giving different sanctions and approvals from the stage of demolishing permission, sale NOC upto the issuance of the approval of building plan. He has referred to his counter affidavit and argued that the construction of the Said Project is within the parameters of law. However, the SBCA has imposed a penalty on the Defendants (builders) for violating the provisions of excess covered area.

6. Arguments heard and record perused.

7. Since the interlocutory applications are to be decided at this stage, therefore, at this stage only those facts should be considered which are not disputed. Contesting Defendants No.2 to 8 (builders) have purchased the above plot in question from its previous owner-Hashoo Private Limited vide a conveyance deed dated 24.02.2014, available at page-89 as Annexure 'E' with the plaint.

8. Sale NOC of the subject plot issued by lessor-Defendant (KMC) has been appended with the plaint at page-137. The old structure standing at the subject building was pulled down vide a permission dated 01.04.2014 as is evident from the demolition permission issued by Defendant No.1-SBCA and is filed as Annexure 'F' with the plaint. Similarly, issuance of the approved building plan of the subject multi-storied project is not in dispute except that the same violates the afore-referred Building Regulations 2002. Between the demolition

permission and approved building plan, there is a gap of five (05) months. The present *lis* has been filed on 06.08.2016, that is, almost after twenty three (23) months from the approval of building plan. As per the unobjected to Commissioner's Report dated 22.08.2016 (submitted after two weeks from the institution of the present suit); the structure of the building in question comprising basement, ground + ten floors stood completed; two ducts provisions for elevators exist but lifts / elevators were not installed. Thirty nine (39) electricity meters for each unit are reported to be installed on the ground floor so also one gas meter. It has been specifically mentioned in the Report that building in question has been constructed purely for Residential Purpose, but none of the flats have been occupied so far. In the Counter Affidavit, it is pleaded in paragraph-4(A), *inter alia*, that entire project has been sold out to various allottees after issuance of sale NOC by the Official Defendants, even before filing of the present *lis*. The factum of booking of various units in the project by the allottees / third parties, has not been questioned by the Plaintiff in their Affidavit-in-Rejoinder, except the latter's stance is that the allottees have booked these flats at their own risk.

9. As per the pleading of official Defendants, so also mentioned in the Counter Affidavit (paragraph-6) of private / contesting Defendants (builders) that since building stood completed, therefore, revised completion plan up to ten floors was submitted before Defendant No.1-SBCA for its onward scrutiny and necessary action and in this regard, the private Defendants also paid fee of Rs.1.9 Million (Rs.19,94,544/-) besides making payment of Rs.8.6 Million towards composition fees. Defendant No.1-SBCA in its Counter Affidavit has not disputed this position of submission of revised building plan, though further adding

that penalty (as mentioned in the foregoing paragraphs) has been imposed upon the private Defendants No.2 to 8 (builders). In their Written Statement, Defendant No.1-SBCA has mentioned that the present covered area of the subject project since falls within the purview of permissible limit as mentioned in subsection 1-C of Section 19 of the Building Law, therefore, the present excess covered area of the project is regularizable. This particular aspect has been questioned by the Plaintiffs in paragraph-6 of their Rejoinder by stating that Regulation 3-2.20 – 3-2.21, dealing with the regularization of buildings, were subsequently challenged in C. P. No. D-408 of 2012 and till date has remained suspended.

10. Primarily, two preliminary objections have been raised by the private Defendants / builders with regard to maintainability of the present suit; *first* one is about legal character of Plaintiffs as envisaged in Section 42 of the Specific Relief Act, 1877; *second* one is that delay in filing present proceeding of the nature, disentitles the Plaintiff from any injunctive relief.

11. It is not necessary to discuss all the case law relied upon by the counsel for the private Defendants (builders) to answer the above questions. As far as the first question is concerned about the legal character of the Plaintiff under Section 42, for bringing this type of proceeding; through various judicial pronouncements and particularly Judgment of learned Division Bench of this Court given in Karachi Grammar School's case (*supra*), *inter alia*, the scope and applicability of Section 42 has been significantly narrowed down. Plaintiffs through present proceeding, primarily are seeking relief that official Defendants should perform their functions within the statutory limits, because violation thereof is bound to result in violating the rights of easement

and other amenities of the neighbourhood. Therefore, I am of the view that present suit is maintainable.

12. The second question is answered after a discussion in the following paragraphs.

13. In my considered view three following reported decisions (*ibid*) are relevant to answer this question\_

- i) P L D 1975 page-464;
- ii) 2015 Y L R page-1303; and
- iii) P L D 2007 Supreme Court page-472.

14. The first case also relates to an injunctive relief sought against construction of a building. This Court dismissed the revision application of the Petitioner (of the reported case), which was filed against the orders of Courts below, as they all refused the injunctive relief to the Petitioner, on the ground that the Petitioner initiated the proceeding against Respondent after passage of six (06) months from the date of commencement of construction by Respondent, about which the Petitioner was aggrieved of. It has been held that essence of an interim relief is that action for redressal of grievance should be brought without unnecessary delay. In this perspective, it has been further ruled that since delay was unexplainable and the building reached an advance stage of construction, thus, his right to claim interim relief stood fortified. This rule has been reiterated in the subsequent case of M. Y. Corporation (*ibid*), which is a decision of the learned Division Bench of this Court. The present *lis* is filed when the entire structure of the said Project/building stood completed and there is substance in the arguments of private Defendants (builders) that delay in filing present proceeding by the Plaintiffs is not a *bona fide* one. The rule of refusal of injunction as mentioned in the afore referred case law is applicable to the facts of

the present case. Plaintiffs side though has attempted to explain this delay of more than a year in filing the present proceeding, as already discussed in detail in the preceding paragraphs, but, not convincingly; consequently, this has disintitiled the Plaintiffs from an injunctive relief at this stage.

15. The main contention of Plaintiffs' side about change of use of subject plot from residential to a flat site has been considered. Per learned counsel for the Plaintiffs, a multi-storied building cannot be constructed on the subject plot by changing the status and use of present building from residential to a flat site, which, *inter alia*, will bound to cause an adverse impact on the basic amenities of the neighbourhood and would be a continuous nuisance. Obviously, these contentions have been controverted by the legal team of the private Defendants (builders). The first question that whether construction of a purely residential unit on a plot in question would amount to change of use; this question has been answered by two separate Judgments handed down by the learned Division Bench of this Court. The first one is an unreported decision given in *Farrokh K. Captain and others v. Karachi Building Control Authority and others [C. P. No.D-549 of 1997]*, which has been mentioned and considered in second subsequent case of Standard Chartered Bank Ltd. (*ibid*). The gist of these decisions is that construction of multi-storied building comprising of only residential units is not a violation of the aforementioned Regulations 2002, relating to the change of land use; Chapter 18 in general and Regulation 18-4.2 of Regulations 2002 in particular.

Thus, a multi-storied project duly approved by the Regulator of the Buildings viz. Sindh Building Control Authority, after completing the codal formalities, which does not have Offices and / or shops and any

other commercial usage, then such residential project, if otherwise fulfils relevant provisions of Regulations 2002, is not impermissible on a residential plot. In this regard the decision of Standard Chartered Bank Ltd., in which the present Defendant-KMC was a lessor, as in the present suit, latter's (KMC) plea that only a residential bungalow can be constructed on the subject property (of the reported case) was repelled in the light of the afore-referred decision given in Farokh K. Captain's case.

16. About the apprehension and stance of the Plaintiff regarding the adverse environmental impact and town planning of the entire area, firstly, is a triable Issue and at this stage cannot be decided, and, secondly, to an extent already stands answered by the Honourable Supreme Court in the afore-referred Jawad Mir's case. The decision was handed down by a bench comprising of the Five Honourable Judges. In this decision, the impugned judgment of this Court has been upheld, wherein petition (of the reported case) was dismissed while recognizing and giving legal effect to the rights of allottees / persons, who purchased various units in the multi-storied project. It would be advantageous to reproduce the relevant paragraphs of the decision herein under\_

*“25. As regards the deprivation of the rights to light, fresh air and clean environment, it is noted that infringement of such rights can be established only by producing satisfactory evidence and not merely on the statements in the pleadings of the affected party. There is no material on record to prove the allegation of the appellants relating to deprivation or violation of the above easementary rights by construction of the alleged illegal floors. It is their unfounded apprehension based on subjective and abstract consideration. The hardships, inconvenience, or discomfort likely to result by the building in question must be more than "mere delicacy of fastidiousness and more than producing sensitive personal discomfort or annoyance. Such annoyance or discomfort or*

*inconvenience must be such which the law considers as substantial or material". The appellants have failed to prove infringement of their rights of privacy, light, fresh air and pollution free environment as there is no material to substantiate their infringement.*

*26. So far as the question of adverse affect due to extra burden on the utilities is concerned it is suffice to say that the respondent No.3/concerned Authorities are duty bound to provide adequate relief by providing necessary infrastructure for increasing water supply, electricity, gas and laying down sewerage lines of bigger dimensions to meet the demand of extra burden and they can be activated to perform their duties. This appears to be appropriate and viable solution rather than if demolition of alleged unauthorized/illegal floor which have been regularized in accordance with law."*

17. I have examined the record of C. P. No. D – 408 of 2011, [*Fidai Cooperative Housing Society Limited and others v. Sindh Building Control Authority and others*], but same pertains to the aforementioned Regulations 3-2.20 and 3-3.2 and it does not relate to subsection 1-C of Section 19 of the Amendment Ordinance 2001, whereunder, according to Defendant No.1, revised building plan of Defendants (builders) is under consideration. Therefore, in my considered view, the above provision and subsection 1-C is in the field.

18. About the concern of the Plaintiff that the private Defendants (builders) have not sought a requisite permission for land development as required in terms of Regulations 3-3; though this contention has been controverted by the Defendants, but at the same time it can be resolved by giving directions to Defendant No.1-SBCA to examine this aspect of the case that whether for construction of multi-storied project should Defendants (builders) require a land development permission under the above provision. This must be decided within three weeks from today

and if the answer is in affirmative, then Defendant No.1-SBCA shall ensure compliance on the part of private Defendants No.2 to 8 (builders). Even for the arguments' sake, if this provision was applicable and not complied with by the private Defendants (builders), then in such an event only they (Defendants-Builders), were to face the adverse consequences, if any, because the Regulations 2002 itself does not provide/entail any coercive action against the constructed building itself. This aspect is not seriously disputed by the learned counsel for the Plaintiffs. Secondly, the question of validity of revised building plan is to be decided after a proper trial and an Issue in this regard at the proper stage may be framed, which means that the issuance of revised building plan and other permissions is subject to the final outcome of this proceeding.

19. Thus, the second question is answered accordingly; subject to the above observations and directions, the injunctive relief in the present circumstances cannot be extended to the Plaintiffs and their Stay Applications are dismissed. Consequently, ad-interim order(s) operating till date stands discharged / vacated.

**Judge**

**Karachi dated: 15.02.2018.**

*Riaz, P.S/\**