

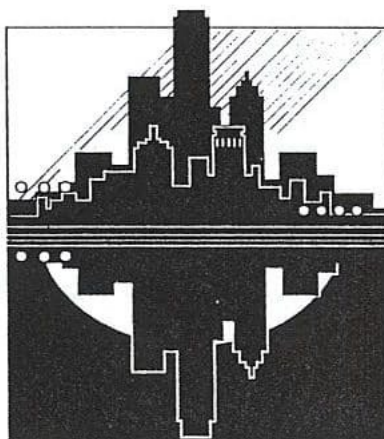
9th October 1999.

SHEHRI

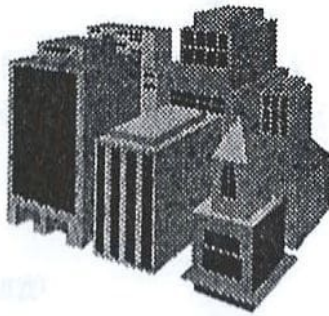
CITIZENS FOR A BETTER ENVIRONMENT

SEMINAR ON

**BUILDING LAWS AND REGULATIONS
AND OTHER RELATED MATTERS**



PAPERS PRESENTED BY:
QAZI FAEZ ISA.



I N D E X

S.No.	Description	Page
01.	Can buildings be constructed in violation of SBCO?	1
02.	List of judgments of the superior courts.	3
03.	Legal principles.	4
04.	What does the Costa Lavina case decide?	16
05.	What does the Glass Towers case decide?	20
06.	Whether buildings can be regularized?	22
07.	Exercise of discretion by officials.	24
08.	Information to be provided to lawyers defending KBCA.	25
09.	A draft of Preliminary Legal Objections.	28
10.	A draft of a written statement/counter affidavit.	30



CAN BUILDINGS BE CONSTRUCTED IN VIOLATION OF SINDH BUILDING CONTROL ORDINANCE, 1979?

- **Preamble of the law:**

Law to "regulate the planning, quality of construction and building control, prices charged and publicity made for disposal of buildings and plots by builders and societies and demolition of dangerous and dilapidated buildings in the province of Sindh."

- **Necessary to have plan approved:**

Section 6(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."

- **If construction without any approved plan or in violation thereof building has to be demolished:**

Section 7-A

"Where the provision of sub-section (1) of Section 6 are violated the building may without prejudice to any other action including sealing of the building or ejection of the occupants be ordered by the Authority or any officer of the Authority authorized in this behalf to be demolished, at the cost of the builder in the case of public buildings and the owner in other cases."

- **If sub-standard or un-approved material used or building not in accordance with the approved plan or specification directions can be issued, construction can be suspended and or building can be demolished:**

Section 11(2)

"If ... the construction of any building is not in accordance with the plan or the specifications approved by the Authority or any material used in the construction is of sub-standard or is not of the quality or type mentioned in the advertisement ... may ... issue any direction ... or ... may require that the construction be suspended ... or that the construction ... be demolished at the cost of the builder."

- 2
/
- No alteration in structures, design and specification can be made unless prior approval obtained:

Section 12(6)

"No builder shall without approval of the Authority, make any alterations in the structures described in the plans, design and specification approved by the Authority."

- Dangerous buildings may be demolished and occupiers can be made to vacate the same:

Section 14

(1) *"If a building ... is likely to collapse, the Authority may, after such enquiry as it deems fit order for carrying out the specific repairs or demolition of the whole or part of the building."*

(2) *"Where the specific repairs are to be carried out ... and if the repairs are not carried out within the specified period, the Authority may, ... proceed to have the building demolished and the cost of demolition shall be recovered from the owner as arrears of land revenue."*

(3) *"Where the whole or a part of the building is to be demolished, the Authority may, by notice, require the occupier or occupiers thereof to vacate the building within the period specified in the notice and if the building has not been vacated within such period, the Authority may, notwithstanding any other law for the time being in force order that occupier or occupiers of the building be ejected, if necessary, by force."*

- Offences can not be compounded in respect of building works:

Section 19 (1-A) Proviso

"no offense relating to building works commenced or carried out in violation of the regulations framed or deemed to be framed under section 21-A, shall be compounded."

LEGAL PRINCIPLES:



A. Building or part thereof erected in contravention of Regulations must be removed and cannot be regularised:

A divisional bench of the Sindh High Court held, (1) on page 534C, that:

"Regulation 16(1) of the Regulations requires the Authority to, inter alia, require any person who has carried out building works contrary to the provisions of the regulations to show cause why such building works or part thereof shall not be removed or altered to comply with the regulations and by regulation 16(2), paras, (a) and (b), the Authority shall require such person, if he fails to show sufficient cause, to demolish the whole building or part thereof or to alter the works so as to bring it in conformity with the Regulations. It, therefore, follows that the Legislature intended that any building or a part thereof erected in contravention of the Regulations must be removed or altered to conform to the Regulations."

The Supreme Court, (2) on page 526 G, has held, that:

"The Authority may compound criminal liability but it cannot regularise a breach of the Regulations which is of the nature which has changed the complexion or character of the structure, which was originally intended to be erected or of the plot. In such cases, it can be said that the Authority has no discretion in fact and law."



B. The necessity for maintaining minimum spaces between buildings and other safety measures:

A divisional bench of the Sindh High Court held, (1) on page 536 D, that:

"The object and the consideration for the rule requiring minimum open spaces to be left in any building are thus, to ensure safe and hygienic conditions of living for the citizen in general. They do not concerned any one individual alone."

The Supreme Court specifically confirmed the aforesaid view, (2) on page 526 E, and also confirmed that:

5.
"The regulations contained in Chapters 7 and 8 relating to drainage and sanitation and fire precautions are similarly intended to ensure healthy and safe living for the public in general."



C. Compounding of offences:

The Supreme Court has held, (2) on page 526 F and G, that:

"We may observe that the discretion given to the Authority under section 19 of the Ordinance or under Regulation No. 16 to compound an offence or discretion given by Regulations Nos. 20 and 25 is subject to the well settled principle of legal jurisprudence that discretion is to be exercised fairly and reasonably and not at the cost or prejudice of third parties.

We may also point out that there is marked distinction between a criminal liability under section 19 of the Ordinance and a civil liability under the Regulations to rectify irregularity/breaches."



D. Change of land use can only be resorted to after fulfilling statutory preconditions:

The Supreme Court has held, (2) on page 526 G and H, that:

"It is a matter of common knowledge that in the various K.D.A. schemes the plots are categorised as residential plots, flats' sites, commercial plots and industrial plots. We may point out that even under the Order, the KDA is not authorised to change the use of any amenity plot without inviting objections and without obtaining the order of the Government. In this regard, it may be advantageous to reproduce Article 52A of the Order, which reads as follows:

52-A(1) The Authority shall, immediately after any housing scheme is sanctioned by, or altered with approval of, Government, submit to the Commissioner the details including the survey numbers, area and location of each plot reserved for roads, hospitals, schools, colleges, libraries, playgrounds, gardens, parks, community centers, mosques, graveyards or such other purpose

and the Commissioner shall notify such details in the official Gazette.

- (2) The Authority or the Housing Society may at any time prior to utilization of any plot reserved for the purpose mentioned in subsection(1), apply to the Commissioner for conversion of such plot to any other purpose.
- (3) The Commissioner shall, on receipt of an application under sub-section(2), invite objections from the general public through a notice published in one English and one vernacular leading local daily newspaper and the objections, if any, shall be submitted to the Commissioner within 30 days from the date of the publication of the notice.
- (4) the Commissioner shall, after considering the objections received under subsection (3) and hearing such person as he may consider necessary forward his recommendation alongwith the application and other connected papers to Government for orders.

It may be stated that in spite of presence of the above unambiguous Article in the Order the successive Provincial Governments overlooked the above Article and converted amenity plots into commercial or residential plots and thereby denied to the residents of Karachi inter alia parks and play grounds which contributed towards environmental pollution in the city. A tendency has also developed to convert the use of a residential plot into commercial or instead of constructing residential units in the form of bungalows to erect flats."

A Full Bench of the Supreme Court, (10), has recently affirmed the above view and stated, that:

"Clause 4 of Article 40 of the Order (Karachi Development Authority Order, 1957) provides that if any person desires to use any land for any purpose other than that laid down in the Zonal Plan Scheme notified under clause (3), he may apply to the Authority (Karachi Development Authority) for permission to do so and the Authority may order a public hearing and give notice to all persons it deems affected.

On receipt of an application under ... the Commissioner shall invite objections from the general public through a notice published in English and one in vernacular leading daily newspaper and the objections, if any,

shall be submitted to the Commissioner within 30 days from the date of the publication of the notice". Thereafter, the Commissioner is required to "forward his recommendation along with the application and other connected papers to Government for Orders".



E. Structural changes cannot be regularised:

The Supreme Court has held, (2) on page 526 G and I, that:

"The Authority ... cannot regularise a breach of the Regulations which is of the nature which has changed the complexion or character of the structure, which was originally intended to be erected or of the plot. In such cases, it can be said that the Authority has no discretion in fact and law.

The Authority though has allegedly regularised the present construction through its letter dated 12.2.1991 but has not stated any reason for doing so. It has not adverted to the question, whether the irregularities/breaches were of the nature, which could have been regularized. The High Court in the judgement under appeal has highlighted that the breaches of the Regulations were such which are prejudicial to safe and hygienic conditions of living for the citizens and detrimental to health. In this view of the matter, the above regularisation is in violation of the spirit of the Ordinance and the Regulations. The power to regularise contained in the Ordinance and the Regulations is intended and designed to be exercised when irregularity is of the nature which does not change the complexion or character of the original proposed construction nor it adversely affects third parties right/interests."

Recently a Full Bench of the Supreme Court, (10), has specifically approved the aforesaid case and stated that:

"In the case of Abdul Razzak, this Court has held that the power to regularize ... is intended and designed to be exercised when irregularity of the nature which does not change the complexion or character of the original proposed construction nor it adversely affects third parties' rights/interests."

"The power to regularize ... is intended and designed to be exercised when irregularity is of the nature which does not change the complexion or character of the originally proposed construction. The Government or

the Authority under the Ordinance does not enjoy unbridled or unfettered power to compound each and every breach of the Regulations. The Regulations should be applied for the benefit of the public and not for favouring an individual. *Simpliciter the factum*, that on account of tremendous increase in the population in Karachi the situation demands raising of high-rise buildings, will not justify the conversion of residential plots originally intended to be used for building ground-plus-one and allowing the raising of high-rise buildings thereon without providing for required water, electricity, gas, sewerage lines, streets and roads etc."



F. City planning principles which have to be followed:

The Supreme Court, (2) on 528 and 529, cited with approval from the *Goals of modern city planning*, as under:

"(1) The orderly arrangement of parts of the city residential, business, industrial, etc., so that each part could perform its functions with minimum cost and conflict; (2) an efficient system of circulation within the city and to the outside world, using to the maximum advantage all modes of transportation; (3) the development of each part of the city to optimum standards, as of lot size, sunlight and green space in residential areas, and parking and building spacing in business areas; (4) the provision of safe, sanitary and comfortable housing, in a variety of dwelling types to meet the needs of all families; (5) the provision of recreation, schools, and other community services, of a high standard of size location and quality; (6) the provision of adequate and economical water supply, sewerage, utilities and public services."

"In any community, these goals might be supplemented by special goals, such as the preservation of a historical area, or the protection of property values, or the efficient conduct of Government. On occasion, the goals of some powerful special interests might be inconsistent with those of others; e.g. the preservation of slum property values and the provision of adequate housing. Furthermore, the statement of ideal goals required the use of relative terms, such as "adequate" "high standard", etc., which are relative rather than absolute, and change from time to time. Therefore inherent in the concept was the recognition that an ideal is not a fixed objective, but itself will change; that the ideal city can be striven toward, but never achieved."

The Supreme Court in another recent case, (10), has held, that:

"It has also been held that framing of a housing scheme does not mean simpliciter, levelling of land and carving out of plots, but it also involves working out approximate requirement of water, electricity, gas, sewerage lines, streets and roads etc. and if a housing scheme is framed on the assumption that it will have residential units 1+1 but factually the allottees of the plots are allowed to raise multi-storeyed building having flats, the above public utility services will fall short of requirements, with the result that everyone living in the aforesaid scheme will suffer. It has also been held that to reduce the miseries of most of the Karachities, it is imperative on the public functionaries like the Authority to ensure adherence to the Regulations.

Once a scheme is framed, no alterations can be made. Alterations in a scheme can be made for the good of the people at large, but not for the benefit of an individual for favouring him at the cost of other people."

In another case a Full Bench of the Supreme Court, (9), held, that:

"However, we would like to add that simpliciter the fact that the conversion of a residential plot on a main road into a commercial plot is warranted on account of the change in the situation would not justify the violation of any provision of any law or building bye-laws or regulations, nor it would warrant grant of permission for a high-rise building having 17/18 floors. The Government, or the Authority concerned is under obligation to decide the question of number of floors keeping in view the extent of availability of utility services like water, electricity, gas, sewerage lines, streets and roads in the locality involved and the permission for construction of a proposed building should be of minimum floors, which may cause minimum inconvenience and discomfort to the residents of the locality."



G. Building codes are for the benefit of the public:

A divisional Bench of the Balochistan High Court, (3) on page 13, held that:

"We appreciate that petitioners have come before the court to invoke Constitutional jurisdiction of this Court as regards the dangerous situation which has arisen due to construction of multi-storeyed buildings in Quetta Town without observing provisions of Building Code, thus putting into peril the lives of inhabitants and passer by. The entire population of Quetta cannot be allowed to be put in danger for the benefit of few builders who are constructing plazas and multi-storeyed buildings as against provisions of Building Code 1937."

The builders challenged this decision before the Supreme Court but the appeal was dismissed.

In another case the Supreme Court, (7) on page 228 C, has held, that:

"Liberal construction should be placed on such regulations/rules and the paramount consideration should be public interest and public good."

In another recent decision of the Supreme Court, (10), it was held, that:

"The paramount object of modern city planning seems to be to ensure maximum comforts for the residents of the city by providing maximum facilities and that a public functionary entrusted with the work to achieve the above objective cannot act in a manner, which may defeat the above objective. It has been further held that deviation from the planned scheme will naturally result in discomfort and inconvenience to others."



H. Earthquakes are a real danger:

A divisional Bench of the Balochistan High Court, (3) on page 14, took judicial notice of the possibility of the occurrence of earthquakes:

"The population of Quetta, if construction of such buildings are allowed, shall be put to the threshold of horrible destruction in case, God forbid, any earthquake of high grade jolts the Town."

The Supreme Court dismissed the appeal filed against this judgment.



I. No discretion available to regularise where building code or regulations have been violated:

A divisional Bench of the High Court of Sindh, (4) on page 286 A, held, that:

"It is the bounded duty of the K.B.C.A. if it is at all to implement its mandate, to ensure that no unauthorised construction, without a duly approved plan, comes up within the area of its jurisdiction. All or any transgressions have to be visited with prompt and effective action on the part of the K.B.C.A. This, as a rule, should be adhered to by the K.B.C.A., in all respects pertaining to all areas covered by its jurisdiction. If any unauthorised constructions are still raised the K.B.C.A., has full powers to have the same demolished. Where an unauthorised structure comes to be occupied, the K. B.C.A. has jurisdiction to forcibly evict the unauthorised occupants. Unauthorised buildings can also be sealed pending further action. All the foregoing are supplemental to one another. Such, inter alia, is the effect of section 6 and 7 of the Sindh Building Control Ordinance, 1979. In short, the K.B.C.A. has to implement the law, which has created it. Nothing short of that would justify its existence."



J. In under construction buildings third party interest can not be created if it would contravene the law:

A divisional Bench of the High Court of Sindh, (5) on page 90 D, held, that:

"A plain reading of the above section shows that when a building is constructed in violation of the provision of section 6, i.e. without the approval of the plan or in deviation of the plant, respondent No.2 has the power to seal the building or eject the occupants of such building and to demolish the same at the cost of the builder. We are inclined to hold that in spite of the above provisions and in spite of the above public notices it was not prima facie proper on the part of the respondent No.1 to have booked any flat/flats in favour of third persons."

In Muhammad Aslam Gatta's case, (8) on page 557, the High Court queried as under:

"What is the legal consequence of delivery of physical possession or execution and registration of sub-lease in violation of section 6(2) of Sindh Building Control Ordinance?"

And then proceeded to state as under:

"Without first obtaining occupancy certificate from the KBCA, for a building which admittedly was constructed in violation of the approved building plan, it will amount to an agreement to defeat the provisions of Sindh Building Control Ordinance, 1979."

In the recent Full Bench decision the Supreme Court, (10), held as under:

"In the present case the proposed building has not been completed but some construction work has been carried out despite protest of the public. Thirdly, the major part of the above portion of the proposed building has been constructed after the filing of the above Constitution Petition and, therefore, the doctrine of "lis pendens" is applicable to the case in hand i.e. that the third party will be bound by the result of the litigation. In this regard reference may be made to the following cases:

- (i) *Karam Elahi versus The Settlement & Rehabilitation Commissioner (Lands), Lahore and 2 others (1976 SCMR 143)*

In which during the pendency of the litigation in respect of evacuee land the same was transferred to another person. Eventually, the transferred land was cancelled and it was held that the petition in that case having purchased the land during pendency of the writ by the respondent was hit by the doctrine of lis pendens and was bound by ultimate outcome of decision.

- (ii) *Messrs Aman Enterprises, Sialkot versus Messrs Rahim Industries Pakistan Ltd., Sialkot and another (PLD 1993 SC 292)*

In the above case, this Court while setting aside the High Court Judgment declining the relief of specific performance on the ground that the suit property was sold to a third party, held that rule of lis pendens was fully applicable to the subsequent vendee as, if he had made inquiries from the establishment to which property in question originally belonged and with whose approval it could have been sold he would have come to know that agreement of sale existed between appellant/first-vendee and the

respondent-vendor and thus the appellant/first-vendee was entitled to a decree for specific performance of the agreement to sale.

The above reports are fully applicable to the present case. The third parties may have cause of action against respondent No.5, but they cannot defeat the right of the public-at-large."



K. Buildings should not be permitted to be completed upon submission of *Undertakings*:

The divisional Bench of the Sindh High Court, (6) on page 456 para 15, held, that:

"We would, also not allow the respondent to complete the structures on an undertaking to demolish the same on failure in legal proceedings because that will amount to permitting premium on wrong-doing. Further, we cannot fail to observe that a tendency has, lately, developed in taking the law for granted and in violating it in the expectations that, on passage of time, matters would ease and condonation would be allowed or the adverse parties, over an indefinite period spreading over a number of years, would lose interest and the violations would be allowed the stamp of continuity, if not for anything, but default on the part of all concerned. This is a very sad state of affairs and the entire society appears to have been stricken with it. Law, thus, is observed only in its breach. Therefore, unless strict observance is enforced no respite from the present day situation appears to be in sight."

A Full Bench of the Supreme Court, (9), has held, that:

"The factum that earlier the above Regulation was overlooked or breached would not justify the repetition of the violation of the same."



L. Occupancy Certificate must be obtained before buildings can be occupied:

In Muhammad Aslam Gatta's case, (8) on page 557 para 19 the High Court of Sindh reproduced the issue framed by it:

"Whether a builder is legally competent and authorized to deliver physical possession of a flat to an allottee or purchaser in view of the prohibition appearing in sub-section (2) to section 6 of the Sindh Building Control Ordinance, 1979, without first complying the same?"

And answered the same as under:

"In the instant case, there is a specific prohibition imposed on the builders that no building as mentioned in sub-section (1) to section 6 shall be occupied by any person or shall be allowed by the builders to be occupied by any person or unless on an application of the occupant or owner the Building Control Authority has issued occupancy certificate in a prescribed manner. Therefore, in order to obtain permission to occupy any building or its portion by any occupant or owner the first requirement is that such building should have been constructed strictly in accordance with the approved building plan as provided under section 6(1) of the Ordinance, 1979. The second condition of grant of permission to occupy a building is that an occupant or owner must have obtained occupancy certificate from the Building Control Authority.

In my view this provision was enacted in order to keep check on the illegal and unauthorized construction and to ensure that all the buildings are raised strictly in accordance with section 6(1) of the Ordinance, 1979. It may be due to this reason that under sub-section (4) to section 6, the Building Control Authority was empowered to grant permission after it is satisfied that the building so constructed is consistent with the approved plan. It is, therefore, settled that where a possession of any building or its portion is delivered by a builder to any occupant, even through a written agreement, but without first obtaining occupancy certificate from the KBCA, for a building which admittedly was constructed in violation of the approved building plan, it will amount to an agreement to defeat the provisions of Sindh Building Control Ordinance, 1979."

The Supreme Court of Pakistan, (7) on page 222, has also affirmed this legal position, as under:

"It may also be noticed that sub-section (2) to (4) thereof (Section 6 of SBCO, 1979) deal with the issuance of the occupancy certificate in the manner prescribed, prohibition of the use of the building other than that for which its plan were approved and granting of permission under sub-section (3) for occupation of the building on such conditions and on payment of such fees as it may fix."*



M. If a cut-line is prescribed it must be strictly enforced:

In a recent case the Supreme Court, (9), has held, that:

"KBCA which is the authority competent under the Ordinance to grant approval of a building plan and, therefore, KBCA is under statutory obligation to provide setback or outline or building line of a proposed building as per Regulations while according approval to its plan.

KBCA has the power to provide setback or building line while approving a building plan."



N. Builders who construct illegally or who have not acted in a bona fide manner can not raise pleas of laches (delay) and acquiescence:

The Full Bench of the Supreme Court, (10), has recently held, that:

"However, it managed and maneuvered approval of the plan not through the proper channel but because of the influence of the then Chief Minister. In the above factual background, it is not open to respondent No.5 to raise the plea of laches or acquiescence. The above plea is only available to a respondent who acts bona fide under the belief that what he is doing is legal and proper and the same cannot be invoked in aid by a respondent who knew from the very inception that he was doing was on account of his own manipulation contrary to law."

WHAT DOES THE *COSTA LAVINA* CASE DECIDE ?

Ardeshir Cowasjee and others versus Karachi Building Control Authority
Civil Appeal No.1888 OF 1996

Brief Facts: A building known as "Costa Lavina" was being constructed on Baghe-Ibne Qasim, Clifton, facing Arabian Sea, on a site which was earmarked for a *revolving restaurant* but which was got *converted* for a flat site for a 15 storey building. This conversion of land use was assailed by public spirited citizens who filed a constitutional petition in the High Court. The matter went up in appeal to the Supreme Court and it was decided by a bench comprising five Honourable Judges. The Judgment was authored by the Chief Justice of Pakistan.

Conversion of designated land use can only be done by following the prescribed procedure:

This can only be done by inviting public objections, considering the same, hearing necessary persons and in the light of the same submitting recommendations to the Government. The Supreme Court stated that:

"Clause 4 of Article 40 of the Order (Karachi Development Authority Order, 1957) provides that if any person desires to use any land for any purpose other than that laid down in the Zonal Plan Scheme notified under clause (3), he may apply to the Authority (Karachi Development Authority) for permission to do so and the Authority may order a public hearing and give notice to all persons it deems affected."

"On receipt of an application under ... the Commissioner shall invite objections from the general public through a notice published in English and one in vernacular leading daily newspaper and the objections, if any, shall be submitted to the Commissioner within 30 days from the date of the publication of the notice". Thereafter, the Commissioner is required to "forward his recommendation along with the application and other connected papers to Government for Orders"."

The Supreme Court held that change of land use is prohibited unless the prescribed procedure is followed.

One notes that the public objections for conversion are being placed by the owner which is not in accordance with law and this Judgment of the Supreme Court.

Moreover, it is noted that no "justification", let alone the prescribed "full justification" are provided seeking the conversion. Clause 4-B of Schedule-D of the Karachi Building and Town Regulations Part-II mentions that among the other things which need examination include "the planning of the area, commercial

facilities in the vicinity, road width, traffic flow and other relevant factors". In addition the stipulated concerned authority and the Master Plan Environmental Control Department has to be consulted by the Commissioner before submitting its recommendations. The approval of the concerned authority and the Master Plan Environmental Control are mandatory (Clause 4-A).

Private parties can approach the court for enforcing building laws:

The appeal was filed by the private parties. The question arose whether they had *locus standi* (standing) to file the appeal? The Supreme Court held:

"In our view, because of the location of the Park as highlighted hereinabove even a resident of a distant area like Layari Quarters could have filed the above Constitution Petition. In this regard, reference may be made to para 15 of the Judgment in the case of Mst. Sardar Begum Farouqui and 6 others Vs. Rashid Khatoon and 2 others (1990 C.L.C. 83 relevant at page 91) rendered by a Division Bench of the High Court of Sindh to which one of us (Ajmal Mian, CJ) was a party and the author of the Judgment, which reads as follows:

Apparently the instant case falls within the category of public litigation as the public-at-large is interested to ensure that the constructions are not raised in violation of the building bye-laws and the Ordinance by misusing a status quo Order of a Court. The intervention by this Court will discourage the aforesaid illegal practice obtaining in Karachi."

If any persons is deprived from using any amenity plot (in this case a park) it could be construed to be deprivation of a Constitution Fundamental Right:

"In our view, the appellants have the right to use the Park with all amenities as was envisaged under the approved KDA Scheme No.5. The use of the Park involves enjoyment of life which is covered by the word 'life' employed in Article 9 of the Constitution as interpreted by this Court in the above-quoted extract from the Judgment in the case of Ms. Shehla Zia Versus WAPDA (PLD 1994 Supreme Court 693). The appellants, therefore, have the right to ensure that the official respondents do not grant approval of plan in respect of the Plot which may be violative of the provision of the Order and the Regulations and which may impinge on their right of enjoyment of life."

Legal pleas, by way of defence, can not be raised by one who has not acted honestly:

"However, it managed and maneuvered approval of the plan not through the proper channel but because of the influence of the then Chief Minister. In the above factual background, it is not open to respondent No.5 to raise the plea of

laches or acquiescence. The above plea is only available to a respondent who acts bona fide under the belief that what he is doing is legal and proper and the same cannot be invoked in aid by a respondent who knew from the very inception that he was doing was on account of his own manipulation contrary to law."

Third party rights can not be created if the law is being broken:

"In the present case the proposed building has not been completed but some construction work has been carried out despite protest of the public. Thirdly, the major part of the above portion of the proposed building has been constructed after the filing of the above Constitution Petition and, therefore, the doctrine of "lis pendens" is applicable to the case in hand i.e. that the third party will be bound by the result of the litigation. In this regard reference may be made to the following cases:

- (i) *Karam Elahi versus The Settlement & Rehabilitation Commissioner (Lands)* (1976 SCMR 143)

In which during the pendency of the litigation in respect of evacuee land the same was transferred to another person. Eventually, the transferred land was cancelled and it was held that the petition in that case having purchased the land during pendency of the writ by the respondent was hit by the doctrine of lis pendens and was bound by ultimate outcome of decision.

- (ii) *Aman Enterprises versus Rahim Industries Pakistan Ltd* (PLD 1993 SC 292)

In the above case, this Court while setting aside the High Court Judgment declining the relief of specific performance on the ground that the suit property was sold to a third party, held that rule of lis pendens was fully applicable to the subsequent vendee as, if he had made inquiries from the establishment to which property in question originally belonged and with whose approval it could have been sold he would have come to know that agreement of sale existed between appellant/first-vendee and the respondent-vendor and thus the appellant/first-vendee was entitled to a decree for specific performance of the agreement to sale.

The above reports are fully applicable to the present case. The third parties may have cause of action against respondent No.5, but they cannot defeat the right of the public-at-large."

Regularisation cannot be done contrary to the Regulations:

"In the case of Abdul Razzak, this Court has held that the power to regularize ... is intended and designed to be exercised when irregularity of the nature which does not change the complexion or character of the original proposed construction nor it adversely affects third parties' rights/interests. It has been

further held that the paramount object of modern city planning seems to be to ensure maximum comforts for the residents of the city by providing maximum facilities and that a public functionary entrusted with the work to achieve the above objective cannot act in a manner, which may defeat the above objective. It has been further held that deviation from the planned scheme will naturally result in discomfort and inconvenience to others. It has also been held that framing of a housing scheme does not mean simpliciter, levelling of land and carving out of plots, but it also involves working out approximate requirement of water, electricity, gas, sewerage lines, streets and roads etc. and if a housing scheme is framed on the assumption that it will have residential units 1+1 but factually the allottees of the plots are allowed to raise multi-storeyed building having flats, the above public utility services will fall short of requirements, with the result that everyone living in the aforesaid scheme will suffer. It has also been held that to reduce the miseries of most of the Karachities, it is imperative on the public functionaries like the Authority to ensure adherence to the Regulations."

A housing or other scheme cannot be altered:

"Once a scheme is framed, no alterations can be made. Alterations in a scheme can be made for the good of the people at large, but not for the benefit of an individual for favouring him at the cost of other people.

The power to regularize ... is intended and designed to be exercised when irregularity is of the nature which does not change the complexion or character of the originally proposed construction. The Government or the Authority under the Ordinance does not enjoy unbridled or unfettered power to compound each and every breach of the Regulations. The Regulations should be applied for the benefit of the public and not for favouring an individual. Simpliciter the factum, that on account of tremendous increase in the population in Karachi the situation demands raising of high-rise buildings, will not justify the conversion of residential plots originally intended to be used for building ground-plus-one and allowing the raising of high-rise buildings thereon without providing for required water, electricity, gas, sewerage lines, streets and roads etc."

Multiline Associates case overruled to the following extent:

"We, therefore, hold that the Judgment in the case of Multiline Associates versus Ardsher Cowasjee and others (PLD 1995 SC 423) (supra) to the extent of inconsistency to the Judgment in the case of Abdul Razak versus Karachi Building Control Authority and others (PLD 1994 SC 512) (supra) does not reflect the correct legal position and thus the same is overruled to that extent."

WHAT DOES THE *GLASS TOWERS* CASE DECIDE?

M/s Excell Builders & others Versus Ardeshir Cowasjee & others

CIVIL APPEAL NO.756 OF 1998

Ardeshir Cowasjee and others Versus Government of Sindh and others

CIVIL APPEAL NO.757 OF 1998

Brief facts: On the Clifton Road in Karachi a building known as the *Glass Towers* was being constructed in violation of building laws. One such violation was the fact that it was being built beyond the stipulated cut-line. The cut-line is a line shown on the map of the plot beyond which no construction can take place. The object of marking the maps in this manner is to retain the possibility of widening major roads. The Karachi Building and Town Planning Regulations state that: *The purpose of the road widening of major roads is to relieve traffic congestion on the existing roads, promote traffic safety on streets, convenience of pedestrians, general convenience and welfare of residential, commercial, industrial developments and to widen the roads in order to cater for the increased vehicular traffic.*

The Supreme Court directed that the portion of the *Glass Towers* building which was constructed beyond the cut-line should be demolished, despite the fact that the builders during the pendency of the litigation had completed the building.

The judgment in this was delivered by the Supreme Court together with the judgment in the *Costa Lavina* case. The main legal principles are laid down in the *Costa Lavina* case which is referred to in this judgment. However, this case is nonetheless important and lays down certain important legal principles. The most important of which is that the stipulated cut-line must be strictly enforced.

KBCA's statutory duty and the building line (cut-line):

"KBCA which is the authority competent under the Ordinance to grant approval of a building plan and, therefore, KBCA is under statutory obligation to provide setback or outline or building line of a proposed building as per Regulations while according approval to its plan."

"KBCA has the power to provide setback or building line while approving a building plan."

Building Regulations cannot be violated even though not enforced earlier:

"The factum that earlier the above Regulation was overlooked or breached would not justify the repetition of the violation of the same."

Despite conversion of designated land use, from residential to commercial, certain important factors have to be taken account of:

"The fact that the conversion of a residential plot on a main road into a commercial plot is warranted on account of the change in the situation would not justify the violation of any provision of any law or building bye-laws or regulations, nor it would warrant grant of permission for a high-rise building having 17/18 floors. The Government, or the Authority concerned is under obligation to decide the question of number of floors keeping in view the extent of availability of utility services like water, electricity, gas, sewerage lines, streets and roads in the locality involved and the permission for construction of a proposed building should be of minimum floors, which may cause minimum inconvenience and discomfort to the residents of the locality."

Accordingly, even in respect of commercial plots building plans have to be approved after due consideration of:

- adequate availability of water
- adequate availability of electricity
- adequate availability of gas
- adequate availability of sewerage lines
- adequate streets and roads in the locality involved
- keeping in view the locality the number of floors that should be permitted to be raised should be prescribed
- the proposed building should cause minimum inconvenience and discomfort to the residents of the locality



WHETHER BUILDINGS CAN BE REGULARISED?

- Section 21-A sets out the matters in respect whereof regulations may be made. This Section makes no mention of *regularizing* any construction.
- No regulations under the Sindh Building Control Ordinance, 1979 have been made till date. However, Section 21-A(3) of the Ordinance stipulates that:

"The Karachi Building and Town Planning Regulations, 1979, in the case of the Authority of Karachi and the bye-laws of the council concerned in other cases, duly published shall until the regulations are framed under this section, be deemed to be the regulations."

- The entire Ordinance makes no mention of *regularization* of any violation of the approved building plan or permits that any building may be built in contravention of the law.
- The Ordinance specifically states, that, the Regulations to the extent that the same are *"inconsistent with the provision of this Ordinance"* cannot be given effect.

Accordingly, it is questionable whether there is any power vesting in the Authority to *regularize* any building.

- In any event no building can be *regularized* in contravention of the Regulations. Usually this is sought to be done under Regulation 16(2)(c), however, the same makes no mention of *regularization*. The relevant part of which reads as under:

"compound the offence after realization of composition fee on the merits of the case."

The Supreme Court in the case of Abdul Razzak Versus KBCA (PLD 1994 SC 512), held, that: *"There is marked distinction between a criminal liability under Section 19 of the Ordinance and a civil liability under the Regulations to rectify irregularity/breaches. The Authority may compound criminal liability but it can not regularize a breach of the Regulations which is of the nature which has changed the complexion or character of the structure, which was originally intended to be erected or of the plot. In such cases, it can be said that the Authority has no discretion in fact and law."*

- Therefore, it is clear that so called *regularization* can not be done pursuant to Regulation 16(2)(c). The Supreme Court in Abdul Razzak's case, which was recently approved in the COSTA LAVINA case, pointed out the distinction between criminal and civil liability. It must be borne in mind that buildings do not commit crimes but only those building them. Crimes committed by individuals can be compounded (not *regularized*). However, buildings have to conform to the building plans and Regulations.
- The Supreme Court further held that **structural changes** can not be regularized. If any structural change is sought to be made the **prior** approval (before the construction is raised or before the approved plan is proposed to be deviated from) of the Authority has to be obtained.



EXERCISE OF DISCRETION BY OFFICIALS:

Some officials wrongly believe that the exercise of power by them under any law is in their unquestionable discretion. The superior courts of Pakistan have always deprecated such an interpretation. However, for the removal of all doubts in this regard a recent insertion has been made in the law. This was done by inserting Section 24-A to the General Clauses Act, which governs all laws.

Section 24-A General Clauses Act, 1897.

Exercise of Power under enactments.—

- (1) *Where, by or under any enactment, a power to make any order or give any direction is conferred on any authority, office or person such power shall be exercised reasonably, fairly, justly and for the advancement of the purpose of the enactment.*
- (2) *The authority, office or person making any order or issuing any direction under the powers conferred by or under any enactment shall, so far as necessary or appropriate, give reasons for making the order or, as the case may be, for issuing the direction.*
- (3) *Where any order made or any direction given in exercise of the powers conferred by or under an enactment affects any person prejudicially such person may require the authority, office, or person making the order or giving the direction to furnish the reasons for the order or, as the case may be, the direction and such authority, office or person shall, furnish the reasons to such person.*

INFORMATION TO BE PROVIDED TO LAWYERS

KBCA officials can help their lawyers by providing complete information to them as soon as is possible. This information shall include the following. However, if any particular information is not readily available, whatever information is available should be immediately provided to the lawyers.

- 1. Plot Address _____
- 2. Name of Owner/Attorney _____
- 3. NIC No. of Owner/Attorney _____
- 4. Residential Address of Owner _____
(not same as plot address)
- 5. KBCA Plan Approval No. _____ dated _____ (Attach copy)
 - a) No. of floors approved _____
 - b) Percentage/fraction of plot that may be covered _____
 - c) Compulsory open spaces: _____ ft in front, _____ ft at rear, _____ ft at sides
 - d) Cutline setback for road widening _____ ft.
 - e) Type of plot category: Residential/Multi-storey flats/Commercial shops + offices/Flats + Commercial (other) _____
- 6. Present position of building and plot:
 - a) No. of floors constructed (give details).
 - b) Percentage (approximate) of plot area constructed upon _____
 - c) Is there excess area covered by the builder? Yes/No How much? _____
 - d) Compulsory open spaces left _____ ft. in front _____ ft. at rear _____ ft. at sides.

- e) Cutline setback provided: _____ feet
- f) Is building or its balconies projecting on public road? Yes/No
By how much? _____ ft.
- g) Is the approved plan (column layouts, architectural layouts, etc.) being followed? Yes/No
- h) Is there a lift-well shaft? Yes/No How many shafts?
- i) Has a safety fencing been installed between the plot and the public road/footpath? Yes/No
- j) Are utilities/meters connected? Yes/No
KESC _____ Nos meter (type= _____)
KWSB Water _____ Sewerage _____
SSGCL _____ Nos meters _____
PTCL _____ Nos telephone connections _____
Are there any illegal/kunda connections? Yes/No
- k) What is the stage of finishing of various parts and floors of the building?
7. Has the approved plan been canceled/withdrawn? Yes/No (Attach copy of notice)
8. Has Notice under Section 7-A of SBCO'79 been served by KBCA on builder/owner? Yes/No (Attach copy of notice).
9. a) Supervising Licenced Architect _____ (Licence No. _____)
b) Supervising Engineer _____ (Licence No. _____)
Have their KBCA licences been suspended? Yes/No

10. Has the "Plinth Verification Certificate" been provided by owner/architect? Yes/No (Attach copy).
11. Has the KBCA received advance notices from builder of pouring of concrete? Yes/No.
12. Has any (partial) Completion/Occupancy Certificate been issued? Yes/No (Attach copy).
13. a) Has the building been sealed? Yes/No (Attach copy of sealing notice).
b) Has builder violated seal? Yes/No
c) Has FIR been filed for violation of seal? Yes/No (Attach copy).
14. Have criminal prosecution proceedings been initiated?
FIR No. _____ dated _____
Court of _____ Case No. _____ dated _____
Against _____
Present status of case _____

15. Have any demolition actions been taken by KBCA? Yes/No (Give details).
16. Are there any other Suits or other cases including disposed off cases, relating to the plot? Yes/No (Give details).

28

Generally KBCA seeks time when it is served, with the result that status quo orders can be passed. Under cover of status quo some unscrupulous builders continue with construction. To avoid this from happening, on the very first date these Objections could be filed, to the extent that the same are applicable.

(Case No. _____)

(Name of Parties)

PRELIMINARY LEGAL OBJECTIONS

It is respectfully submitted that the Defendant, the Karachi Building Control Authority ("KBCA"), was served on _____ and seeks time to file a detailed Counter Affidavit to the stay application, however, at the very outset the following Legal Objections are being submitted:

- A. The Suit is not maintainable as it seeks to restrain the KBCA from performing its statutory duty. It is submitted that if the Plaintiff is allowed to continue with the construction there will be serious violations of the provisions of the Sindh Building Control Ordinance, 1979 ("the Ordinance").
- B. That on the one hand the Plaintiff wishes to stay the action that may be taken by KBCA but at the same time wishes to continue unabated with the construction. The object of the Plaintiff appears to be to create third party interest, which will involve multiplicity of legal proceedings and further to frustrate the lawful action of KBCA.
- C. That the suit is not maintainable for want of a statutory notice under Section 20-A of the Ordinance.

27
D. That the suit is otherwise not maintainable since the Plaintiff has not exhausted the remedy as provided under Section 16 of the Ordinance.

E. That Section 20 of the Ordinance stipulates that no suit can be filed against KBCA in respect of "anything done or intended to be done in good faith under this Ordinance". It is submitted that KBCA is proceeding in accordance with law and in good faith and as such the suit is not maintainable.

F. That the suit is not maintainable as the statutory Notice as stated in Section 80 of the CPC has not been served upon KBCA.

G. That this Hon'ble Court does not have pecuniary jurisdiction in the matter. It is submitted that the value of subject matter of this suit is considerably in excess of the maximum pecuniary jurisdiction of this Hon'ble Court as is borne out by the plaint itself. *[This objection to be taken if the suit is filed in the lower Court]*

H. That this suit is not maintainable as the requisite Court Fee of Rs.15,000/- has not been paid. *[This objection to be only taken after ascertaining this fact]*

Karachi

Dated: _____

ADVOCATE FOR THE DEFENDANT

SUIT FILED BY
BUILDER TO RESTRAIN
KBCA FROM DEMOLITION

[PROFORMA]

WRITTEN STATEMENT / COUNTER AFFIDAVIT

PRELIMINARY LEGAL OBJECTIONS

[See separate attachment and incorporate as appropriate]

That without prejudice to the aforesaid Preliminary Legal Objections, a para wise reply to the contents of the Plaint is submitted as under:

[Each and every paragraph should be precisely replied. General denials should not be made. Each allegations of fact should be specifically replied to]

[Draw the attention of the Court to the contravention of the approved plan, if any]

Example:

That the contents of para ____ as stated are incorrect and are denied. It is submitted that the Plaintiff was granted approval for *Ground* + ____ *Floors* as per the building plans submitted by the owners. The allowable area in respect of the Plot as endorsed on the said building plan was ____ square feet, whilst the builders/owner had sought to construct on ____ square feet thereof. The said approval was subject to various conditions which included:

Plinth verification certificate to be obtained from KBCA after completion of plinths.

(Condition ____ of the Approval Letter)

The builders/owner have till date not obtained the said plinth verification certificate. In this regard Regulation 18 of the Karachi Building and Town Planning Regulations 1979 (hereinafter referred to as the "Regulations") has been violated. Condition 21 of the Approval further stipulated that:

"Any construction at site against approved building plans will be demolished as per SBCO-79 and amended upto date."

[Mention any undertaking submitted by the Plaintiff]

Example: The Plaintiff submitted an undertaking which inter alia stated as under:

"That we shall carry out the construction strictly according to the approved plan, failing which we are liable for prosecution.

That our building plan is liable for cancellation if against approved plan."

The undertakings are attached herewith and marked as ____.

[Draw attention to important terms of the approval letter]

That the Defendant's approval letter dated _____ specifically stated that the same was granted:

"Subject to the conditions that if any violations if found during and there construction shall be demolished."

Another condition contained in the said letter stated that:

"Plinth verification certificate to be provided by the Owner/Lic. Architect, failing which approval plan shall be treated as cancelled with immediate effect."

The Plaintiff has raised construction in contravention of the building plans approved by the Defendant and has not submitted the requisite plinth verification certificate. Accordingly, the said building plans are deemed to be cancelled and the Defendant can proceed to demolish the construction to the extent that the same violates the approved building plan.

[If the Plaintiff alleges creation of third party rights, state:]

It is submitted that allottees are required to enter into a standard written agreement with the builder/developer before booking in any project as per the prescribed KBCA Agreement Form. The Public Notice informing the potential allottees of this requirement published in Daily Dawn of _____ has also been attached herewith and marked as Annexure _____.

[If Plaintiff contends that carrying out construction in accordance with plan, and, if this is not correct, specifically deal with it]

Example:

That the contents of para _____ are incorrect and are denied and the Plaintiff is put to strict proof thereof. It is specifically denied that the Plaintiff was carrying construction strictly in accordance with the approved plan. It is further specifically denied that the Defendant unlawfully, unconstitutionally, illegally and in a malafide manner issued notice dated _____. It is submitted that when the Defendant came to know of the illegalities being committed by the Plaintiff in respect of the construction the Defendant took immediate notice of the same and warned the Plaintiff to desist from doing the same and rectify its mistake. The Defendant issued a notice (s) dated _____ to the Plaintiff and pointed out the violations being committed by it and the Plaintiff's failure to comply with certain necessary conditions. The Plaintiff, however, failed/neglected/refused to comply with any of the directions of the Defendant and continued to violate its approved building plan. It is submitted that finally left with no option the Defendant was

constrained to issue a notice to seal the subject building vide its letter dated _____ under Section 19 of the Sindh Building Control Ordinance 1979 (hereinafter referred to as the "SBCO").

[If the Plaintiff claims that the contraventions are regularizable, state]

It is submitted that the construction works being carried out by the Plaintiff were not just in violation of the approved building plans but also contrary to the provisions of the Regulations. It is submitted that the Defendant is not competent to regularise construction which is contrary to the provisions of the Regulations. It is further submitted that under Regulation No 24 (Part I) of the Regulations, any builder/developer seeking to regularise a building which is not in conformity with the sanctioned plan is required to submit a form seeking regularisation thereof, provided the same is in accordance with the Regulations. The prescribed Form No 7 is to be accompanied with an Architect's Certificate certifying that the construction is consistent with the provisions of the Regulations. Accordingly, the Defendant has no authority to allow the regularisation of any building which is contrary to the provisions of the Regulations. It is further submitted that no such certificate or form has ever been submitted by the Plaintiff to the Defendant. In any event the Government of Sindh had vide a notification dated 10.07.1998 banned the regularisations of any such deviations.

It is further submitted that only such plans can be regularised which are not beyond the limits prescribed in the Regulations. For instance a builder submits his plans for raising construction at a ratio of 1:3, whilst the Regulations permitted a building ratio of 1:4. In such cases the builders can have the building plans subsequently approved which raise construction upto the maximum prescribed limit of 1:4. It is submitted that if such ratios are violated it results in more persons occupying or using a piece of land and the same would adversely impact upon the availability/provision of utilities.

The Defendant is not legally empowered to regularise plans which are in violation of the law and/or the Regulations. It is submitted that under Regulation 20(2) the Defendant has the authority to order cessation of work or order demolition in case the building works being carried on are not brought into conformity with the approved building plans and the Regulations. Further under Regulation 21, the Defendant can also order that such part of the building as contravenes the Regulations should be pulled down.

[If structural changes made, provide details, and state]

That the Plaintiff cannot alter the structure of the building. Under Section 12(6) of the SBCO, no builder can without the approval of the Defendant make any alterations in the structures described in the plans approved by the Defendant. It is submitted that the Plaintiff has raised construction in complete derogation and in violation of the Regulations of the approved plans.

That the Plaintiff has changed the positions of the columns of the building and also the structure. The Plaintiff has also changed the structure of the floors. The corners are not chamfered as required. The plot ratio has been exceeded manifold. *[Provide details]*.

The Plaintiff has illegally constructed upon _____ square feet. This in addition to being completely illegal will also give rise to a number of severe problems. The unauthorised construction will impose great burdens in terms of extra population, requirement of extra parking spaces, requirement of extra utilities including water, electricity and disposal of garbage. This shall also have an adverse impact on the environment and the existing infrastructure.

[If demolition was ordered by KBCA provide details, and state]

It is submitted that the Defendant was constrained to undertake the task of demolition after ample opportunity had been given to the Plaintiff to take remedial measures, as the Plaintiff had failed to comply with the directions issued by the Defendant in due compliance of the Regulations. The Plaintiff, however, decided to take the law into his own hands and illegally prevent a statutory body from performing its duties.

[If it is a multi-storyed building which is being illegally built, state]

The Defendant has no way of establishing whether the construction being raised is "safe and sound" since the reports/tests accompanying the building plans submitted to the Defendant, and which plans were approved, bear no resemblance to the structure that has been raised in its stead. The safety and soundness of a building is not arbitrarily determined but the same is based upon the nature of the soil, the load, the structure and other factors. Karachi is situated in an earthquake zone and as such it is essential to ensure that buildings are raised in accordance with approved plans, failing which untold destruction and loss of life may follow if an earthquake were to strike Karachi.