IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Present

Mr. Justice Mian Saqib Nisar
Mr. Justice Ejaz Afzal Khan
Mr. Justice Umar Ata Bandial

CIVIL APPEAL NO. 620 OF 2006

(On appeal from the judgment dated 11.07.2005 passed by High Court of Sindh, Karachi in Const.P.1207 of 2004)

Mansoor Sharif Hamid & others	...	...	Appellants
Versus			
Shafique Rehman & others	...	...	Respondents

For the appellant	:	Mr. Khalid Anwar, Sr. ASC. Mr. Afsar Abidi, ASC.
For respondent No.10	:	Syed Jamil Ahmed, ASC.
Respondent No.3	:	*Ex-parte.*
For remaining respondents:		Nemo.
Date of hearing	:	24.02.2015.

JUDGMENT

UMAR ATA BANDIAL, J.— This appeal by leave of the Court is directed against the judgment of the learned High Court of Sindh, Karachi dated 11.07.2005. The impugned judgment declares the alteration made by the appellant in the layout plan of his private housing settlement, involving the relocation of two plots reserved respectively for a mosque and a clinic at a short distance within the same area, as amounting to conversion of amenity plots contrary to Article 52-A of the Karachi Development Authority Order, 1957 (**"KDA Order"**) and the law laid down by this Court in **Abdul Razzak vs. Karachi Building Control Authority** (PLD 1994 SC 512).

2. The leave granting order dated 20.04.2006 passed in this matter is in the following terms:

> "After hearing the learned counsel for the petitioners as well as the Additional Controller of Karachi Building Control Authority, we grant leave to appeal to consider, *inter alia*, the question whether the plot No. SD-I in KDA Scheme No.3, measuring 12 hundred Square Yards was not an amenity or residential plot and whether the bar contained in Section 52-A (Clauses 2, 3 & 4) of the KDA Ordinance 1958, as amended by KDA (Sindh Amendment) Act, 1994 was attracted to the plot in dispute. Since a short point is involved, let the main appeal be set down for final hearing, on its present record, within a period of 4 months. Meanwhile, status-quo in respect of the property in dispute shall be maintained by all the parties concerned."

3. The private respondents No.1 to 8 before us were petitioners in a constitution petition decided by the learned High Court through the impugned judgment. These respondents have failed to appear or be represented before this Court on any date of hearing. An adjournment application made on behalf of respondent No.7 was allowed on 09.02.2010. However, thereafter, on five dates of hearing, none has entered appearance on her behalf. Although the substituted service of respondents No.1 to 8 by proclamation published on 20.01.2015 in the Daily News and Daily Jang (Karachi Edition) had been effected for hearing on 27.01.2015, however, this Court refrained on that date of hearing to proceed *ex-parte* against them, for the reason that thirty days time mentioned in the publication had not elapsed. Fresh notices were sent again to the respondents for today's hearing. Report of the process-server available on record reveals that some of the respondents refused to accept service; others were served through affixation whilst a few have shifted their addresses. As is apparent from the order sheet, the Court has made repeated efforts to secure the representation of the private

respondents in the present proceedings, but to no avail. Resultantly, this matter has awaited adjudication since 2006. After the lapse of nine years of futile effort to procure representation of the said respondents, the Court is left with no option but to proceed against them *ex-parte*. It is so ordered.

4. The salient facts of the case are that land measuring 11.35 acres belonging to one Mst. Nargis Mistri was acquired by the Karachi Development Authority **("KDA")** sometime prior to 1982. No compensation for such acquisition was paid to its private owner. The acquired land fell within the limits of KDA Gulistan-e-Johar Scheme No.36 (**"KDA Scheme No.36**")**.** By letter dated 18.12.1982 the KDA offered to lease the acquired land back to its original owner, Mst. Nargis Mistri with permission to develop a part of it as an adjunct to KDA Scheme No.36 subject to the following conditions:

> **"i)** The area of 4 acres containing fully grown trees would be maintained by the allottee as a garden.
>
> **ii)** The remaining area of the land measuring 7 acres was permitted for utilization, as per existing town planning rules and regulations, subject to approval by the KDA / Karachi Building Control Authority.
>
> **iii)** The allotment was subject to payment of annual ground rent, full occupancy value & fees and the outer development charges to KDA and concerned municipal authorities.
>
> **iv)** The allottee was made responsible for providing internal development facilities, such as water supply, sewerage system, storm water drainage at her own cost."

5. The appellant is the attorney / successor of the original owner. He was issued an allotment-cum-possession letter by the KDA on 18.06.1985 which restates the above mentioned conditions of land use and improvement. Learned counsel for the appellant has contended that as a result of the appellant's compliance with the conditions conveyed by the KDA, a first layout plan of the appellant's settlement, utilizing an area of 7.35 acres was submitted to the KDA. This plan was approved by KDA on

19.08.1985. It envisaged a public park measuring 4 acres encircled by residential, commercial and amenity plots. In the present context, plots for a mosque and a clinic were shown along the south end of the public park. On 09.09.1985, the KDA approved a second layout plan proposed by the appellant. This plan shifted the said amenity plots earmarked for a mosque and a clinic to the northwest of the settlement, adjacent to a plot previously reserved for 'commercial use' in the first layout plan. Soon afterwards, a third layout plan of the said settlement proposed by the appellant was approved by the KDA on 20.06.1987. According to this plan, the location of only the clinic was shifted to the south end of the appellant's settlement upgrading the clinic into a hospital and giving it a larger area. The plot vacated by the clinic on the northwest side of the settlement was again classified as 'commercial' in the third layout plan and designated as plot No.SD-I measuring 1200 Sq. Yards **("disputed plot")**.

6. In their constitution petition filed in year 2004 the private respondents complained before the learned High Court that construction of a high-rise building was commenced unlawfully by the appellant on the erstwhile amenity plot reserved for a clinic. The appellant and the public respondents, in particular KDA and KBCA, had illegally converted that amenity plot into a commercial plot in violation of the conditions laid down in Article 52-A of the KDA Order. The counter affidavit filed in the learned High Court by the Deputy Controller of Buildings, KBCA refers correspondence by the Directorate of Land Management KDA Wing, CDGK reconfirming that the disputed plot is categorized as 'commercial'. Accordingly, commission of illegality in the approval of the appellant's building plan is denied. It is a matter of record that the location to which

the plot for a clinic had been shifted under the appellant's second layout plan dated 09.09.1985 was reserved for commercial use under the first approved plan dated 19.08.1985. However, by considering the second layout plan as being final and binding, the impugned judgment dated 11.07.2005 rejected the subsequent alteration made in the appellant's third layout plan dated 20.06.1987. The finding is based firstly, on the principle laid down in **Abdul Razzak's case** (*supra*) that an amenity plot cannot be converted to commercial use without inviting objections and obtaining the order of the government and secondly, on the prohibition imposed by Article 52-A(2) of the KDA Order. The said prohibition was incorporated in the KDA Order by means of the Karachi Development Authority (Sindh Amendment) Act, 1994. For the sake of convenience, the amending law is reproduced below:

> "WHEREAS it is expedient further to amend the Karachi Development Authority Order, 1957 in the manner hereinafter appearing:
>
> It is hereby enacted as follows:
>
> **1.** **(1)** This Act may be called the Karachi Development Authority (Sindh Amendment) Act, 1994.
>
> **(2)** It shall come into force on and from 2nd May, 1994.
>
> **2.** In the Karachi Development Authority Order, 1957, in Article 52-A for clauses (2), (3) and (4) and Explanation thereunder, the following shall be substituted:--
>
> **"(2)** No amenity plot reserved for the purpose mentioned in clause (1) shall be converted to or utilized for any other purpose."
>
> **3.** The Karachi Development Authority (Sindh Amendment) Ordinance, 1994 is hereby repealed."

It is noted that the three layout plans of the appellant's settlement were approved by the KDA during the period 1985 to 1987. On the other hand, the prohibition in Article 52-A(2) of the KDA Order was enacted in the year 1994. It is therefore apparent that the learned High Court applied the prohibition retrospectively to the appellant's case whereas according to

the language of the statutory amendment such an interpretation is not justified. Be that as it may, the un-amended Article 52-A of the KDA Order was in the field when the different layout plans submitted by the appellant were approved by the KDA. Accordingly, it is the original Article 52-A that applied to the case in hand for ascertaining the limitations, if any, imposed on alterations made in layout plans of a private housing settlement. Article 52-A was incorporated in the KDA Order through amendment made by the Sindh (Amendment of Laws) Ordinance, 1974 which is reproduced below:

> "After Article 52, the following shall be inserted:--
>
> **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, play-grounds, gardens, parks, community centres, 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 sub-section (1) apply to the Commissioner for conversion of such plot to any other purpose.
>
> **(3)** The Commissioner shall, on receipt of an application under subsection (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 persons as he may consider necessary forward his recommendations along with the application and other connected papers to Government for orders."

7. Learned counsel for the appellant has argued that while wrongly giving retrospective enforcement to the prohibition in Article 52-A of the KDA Order, the learned High Court has also ignored certain important facts of the case. On these facts the present case remains outside the ambit of Article 52-A(3) and (4) of the KDA Order which specify the procedure for the conversion of amenity plots to other use. The second

layout plan submitted by the appellant was given final and overriding effect by the learned High Court although it was one of the amending layout plans. The disputed plot in the appellant's third layout plan was located in the same area that was reserved for commercial use in the original/first layout plan. As such the third layout plan reinstated land use in that area.

8. More importantly, it is not alleged or shown by the private respondents No.1 to 8 that in 1987 when the disputed amendment in the layout plan was approved, the infrastructure and facilities of the appellant's settlement had been implemented or that its plots had been announced for sale. It is more likely at that time the settlement was still on the drawing board rather than being occupied by residents. The documents on record show that the private respondent No.2 was the earliest amongst the objectors to get approval of KDA/KBCA dated 12.06.1998 for his house building plan submitted for plot No.B-16, Block 2, KDA Scheme No.36. Indeed, the private respondents No.1 to 8 herein do not claim in their constitution petition that they were either resident in or owners of property in the appellant's settlement or KDA Scheme No.36 when the impugned amendment in the layout plan was approved. Also, the said respondents do not explain why the second layout plan of the appellant's settlement dated 09.09.1985 enjoys primacy or finality because it is neither alleged to be notified in the gazette by the competent authority under Article 52-A(1) of the KDA Order nor to have been represented by the appellant for sale of plots to the public. On what criteria any of the three layout plans or indeed subsequent amendments thereto ought to be treated as final and binding is also not dilated by the learned High Court. The private respondents No.1 to 8 approached the

learned High Court 17 years after the impugned amendment in the third layout plan was approved. It appears that they became aggrieved in 2004 by the construction commenced on the disputed plot by the appellant. Conversion of land usage is claimed by learned counsel to be a convenient but mistaken label given to their grievance by the petitioners before the learned High Court to advance their object of blocking construction of a high-rise building undertaken by the appellant on a commercial plot. The learned High Court statedly accepted that version without verifying the allegation with reference to the facts on record. Therefore, the impugned judgment unfairly judges the disputed layout plan and compliant construction activity, upon standards that apply to conversion of usage of residential or amenity plots that were being specifically used as such.

9. Since we have heard the present case in the absence of the objectors / private respondents therefore, we have considered the matter in issue and the material on record carefully so that no injustice is caused, in particular, to the public interest of the resident community in the neighbouring KDA Scheme No. 36.

10. Certain distinguishing features of the present case may be noticed at the outset. These differentiate the controversy herein from cases in which strict injunctive action against high-rise construction has been ordered by this Court. Firstly, the provisions of the layout plan of the appellant's settlement were proposed autonomously in accordance with the KDA Regulations and without being tied to conditions laid down in the master plan of KDA Scheme No.36. Accordingly the said master plan dated 17.12.1995 (available at page-6 of CMA No. 4972 of 2011) shows the appellant's settlement (situated in Survey No.1, measuring 11.35 acres in Deh Safooran, KDA Scheme No.36) as a blank rectangle marked 'Private

Land'. Nevertheless, the appellant's settlement remains in a sense an appendage to the KDA Scheme No.36. Within the small area of 11.35 acres of the appellant's settlement, the development work is permitted and therefore proposed in a circular band measuring 7.35 acres that encircles an existing garden measuring 4 acres. In the said development area, the appellant had discretion to locate specified land use categories, i.e. residential plots, commercial plots, amenity plots according to his choice. Clearly, the location of each land use category is subject to conformity with the land use ratios prescribed in KDA Regulations and the approval of the competent Building Control Authorities. Viewed in that context, the present case concerns legality of not the conversion but the relocation of an amenity plot, namely clinic/hospital within the circular band of development around the central garden of the appellant's settlement. Secondly, the disputed relocation of an amenity plot by the appellant does not eliminate or reduce that amenity area but actually increases its size from 1200 sq yards to 2000 sq yards. Thirdly, the disputed amendment in the appellant's layout plan was made when the settlement was still at the planning and project implementation stage. There is nothing on record to suggest that by 1987 the appellant's second layout plan was imbued with finality because it had been notified under Article 52-A(1) of the KDA Order or that the appellant had represented or advertised it to the public for securing the sale of plots in the settlement. Also, the private respondents have not alleged that by the year 1987, they had become owners or occupiers of plots situate in or neighbouring the appellant's settlement. In that background, it is evident that an amendment in the layout plan, that is neither notified nor executed nor represented to the public, cannot become a basis for asserting third party vested rights.

Indeed, it is more than a decade later that the private respondents claim that they acquired proprietary rights in KDA Scheme No.36 after purchasing land and planning houses in the area.

11. To our minds, the above facts make the present case distinguishable from the existing legal precedents on the subject of conversion of residential or amenity plots for hosting high-rise commercial buildings. The allegation in the present case namely conversion of an amenity plot to commercial use was discussed and adjudicated in **Ardeshir Cowasjee vs. Karachi Building Control Authority** (1999 SCMR 2883). In that case the land reserved for a revolving restaurant in a public park on the Clifton beach was converted into a high-rise building comprising shops, apartments and a revolving restaurant. It was held that the conversion of an amenity plot was illegal because according to KDA's notified Zonal Plan, only a revolving restaurant and not a commercial building was authorized to be constructed in the public park. The said park was already in public use. To alter the category of its land use, the public notice and objection procedure envisaged in Article 52-A(3) of the KDA Order had not been complied. Accordingly, the judgment struck down the conversion and affirmed the rule of strict enforcement Article 52-A(3) of the KDA Order. **Abdul Razak vs. Karachi Building Control Authority** (PLD 1994 SC 512) was endorsed on the point that conversion of an amenity plot to another use without inviting and deciding objections is illegal. On facts that case involved the conversion of a residential plot to commercial high-rise construction in a developed housing scheme having residents. Such conversion was also held to be an abuse of discretion and therefore unlawful. The same view on the law was endorsed but on account of

additional facts to yield a different result in **Javed Mir Muhammadi vs. Haroon Mirza** (PLD 2007 SC 472). Each of the said cases mandates the strict enforcement of the provisions of Article 52-A(3) and (4) of the KDA Order against landowners who converted land usage of their plots, located in schemes that were already in the use and occupation of the public, for construction of high-rise buildings.

12. The question that arises for determination is whether the facts of the present case attract that rule of strict enforcement of Article 52-A(3) and (4) of the KDA Order laid down in the afore-noted judgments of this Court? The impugned judgment by the learned High Court holds in the affirmative but by retrospectively enforcing the 1994 prohibition incorporated in Article 52-A of the KDA Order in relation to the disputed amendment in the appellant's layout plan made in the year 1987. That is not a valid ground of decision. However, the failure to invite objections to the appellant's disputed third layout plan under Article 52-A(3) of the KDA Order, *prima facie,* discloses a serious default in the appellant's case. The need for such notice and if so, the effect of its non-issuance in the present case has, however, not been discussed by the learned High Court.

13. It stands to reason that there must be some pivotal event in the development stages of a housing scheme that fixes the starting point necessitating the issuance of public notice on a request for conversion of an amenity plot under Article 52-A(3) of the KDA Order. Article 52-A(1) of the KDA Order requires that details of amenity plots in a Scheme must be notified in the official Gazette. The notice under Article 52-A(3) *ibid* would plausibly become necessary after that notification because it makes a representation to the public about the details of amenity plots. There is

no material on record to show that the details of amenity plots in the appellant's settlement were ever notified in the official gazette under Article 52-A(1) of the KDA Order. However, considering that the official act of said notification of amenity plots had been delayed or prevented by some cause, valuable public and proprietary rights cannot be allowed to be defeated by an act of omission by the concerned functionary. It is in that context that the distinguishing factual features of this case already noted above assume importance. If the erstwhile layout plan had been represented to the public for sale of plots or for any other reason, or that the amenity plot in dispute had been laid out and was being used by the public, then the members of the public may claim a right to defend and protect the same. However, in the present case, neither of the said events are even alleged to have taken place prior to the disputed third layout plan of the appellant's settlement. Add to this, the other features of this case, namely, the appellant's freedom and discretion to locate amenity plots, the early stage of amendment of the layout plan of the settlement during its implementation, the relocation rather than conversion of an amenity plot at the said embryonic stage of development of the settlement and the non-existence of any private or public rights at that time in the layout of the settlement. These aspects of the matter militate the control of Article 52-A of the KDA Order over the appellant's third layout plan.

14. Under Article 40 of the KDA Order, Zonal Plans of urban areas must be notified in the Gazette. These demarcate land reserved for specified purposes like residential, commercial, industrial, recreational use, etc. Change in the use of land reserved for one purpose in the Zonal Plan to another must be preceded by public notice and hearing of

objections by the KDA. Since Zonal Plans deal with large areas of land, hence it is neither alleged nor apparent from the record that any Zonal Plan delineating the appellant's settlement was ever issued. Therefore, it appears that neither Article 52-A nor Article 40 of the KDA Order requiring public notice, hearing and determination of objections prior to allowing change of land use in a housing scheme applies to the present case. The premature enforcement of the said statutory safeguards under the KDA Order would thwart and arrest the object of the law, namely, land development through planned housing schemes that serve the interest of the public.

15. For testing the validity of KDA's approval of the appellant's third layout plan under the KDA Order and regulations, the material date is 20.06.1987. If the said action by KDA complies the legal requirements as on 20.06.1987 then adherence of that amended layout plan to KDA building and construction regulations current in the year 2003 is not relevant because as noted above no third party interest could be adversely affected by those changes made in the layout plan. Secondly, it is not contested that the relocation of the disputed amenity plot, namely, clinic/hospital from one commercial area to another within the settlement scheme fully complied the KDA regulations prescribing land usage ratios reserved for commercial areas and also for amenity plots in the appellant's settlement. Hence, no objection on this score has been taken against the validity of KDA's approval dated 20.06.1987. We therefore consider that non-compliance of the disputed layout plan with the KDA and KBCA regulations has not been made out on the present record. Accordingly, on

its merits the approval of the appellant's third layout plan is lawful and effective.

16. Indeed the essence of the law enunciated on the subject is also the same. The rule has been reiterated consistently by this Court in **Abdul Razzak's** case (1994; *ibid)* and **Javed Mir Muhammadi's** case (2007; *ibid*) both relating to conversion of residential plots in developed areas of a housing scheme to commercial use on the one hand and in **Ardeshir Cowasjee's** case (1999; *ibid*) concerning conversion of a portion of an amenity plot to commercial use as a high-rise building on the other hand. It is ruled that the law restricting conversion of land usage in housing schemes is not to be applied rigidly and pedantically but is meant to protect the public interest and public convenience. Reference is made to the apt observations made in this behalf in the **Ardeshir Cowasjee's** case:

> "20. The perusal of the abovequoted extracts from the above judgments indicates that in the case of Abdul Razak, this Court has held that the power to regularize contained in the Ordinance and the Regulations 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, leveling of land and carving out of plots, but is 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 buildings 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 Karachiites, it is imperative on the public functionaries like the Authority to ensure adherence to the Regulations. However, it has also been clarified that it may not be understood that 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 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 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." ***(emphasis provided)***

The provision and preservation of suitable infrastructure in the target area of a development scheme as a public interest requirement of the law is particularly evident from the above quoted observations in **Ardeshir Cowasjee's** case. The infrastructural facilities of a housing scheme or society like electricity, water, gas, roads, sewerage, etc. can be overburdened dramatically when land reserved for residential purposes is converted to commercial use. Equally, public interest suffers through deprivation when amenity plots are converted to other use. The irregular and unlawful conversion of plot usage creates undue congestion and load on the infrastructure and facilities of a housing scheme which puts the entire community to injury and loss. To prevent such congestion is the primary consideration of this Court in ordering the strict enforcement of building and land usage laws.

17. However, in a case where the relocation (as against elimination or curtailment) of an amenity plot in a scheme takes place prior to or during the stage of implementation of its infrastructural provisions or before representation to or use by the public, the changes

made in the layout plan should not injure public interest. This is because the proposed changes can anticipate and cater any increased requirements resulting from the relocation by making adjustments in the design and planning of the infrastructural provisions of the scheme. Without such adjustment there cannot be any merit to approvals granted by the KDA because an amended scheme without adequate infrastructure and facilities would forebode injury to and deprivation of convenience and comfort of the residents in such scheme. This aspect of the matter in such cases demands vigilance, attention and certification of the approving authorities namely KDA & KBCA rather than injunctive actions by members of the public based upon false presumptions of irregular conversion of land usage by a proponent of a private housing settlement.

18. Accordingly, the upshot of the foregoing discussion is that Article 52-A of the KDA Order has been overstretched by the impugned judgment to apply in this case wherein the requisite ingredients for judicial intervention on that account are lacking. This is however, without prejudice to the enforcement of Articles 40 & 52-A of the KDA Order by residents/owners from the public against amendments made after the notification of the appellant's layout plan or the acquisition of proprietary interest by the objecting members of the public in any plot neighbouring the disputed commercial plot or any changes made to an amenity plot after amendment of Article 52-A in 1994. Also the respondent KDA and KBCA are directed to ensure that the appellant's disputed third layout plan and allied specifications faithfully comply the terms of the allotment letter dated 18.06.1985 and also make provision for adequate

infrastructural facilities that sustain the erection of the proposed high-rise building on the said plot.

19. For the foregoing reasons, this appeal is allowed and impugned judgment dated 11.07.2005, passed by the learned High Court of Sindh in Constitution Petition No. 1207 of 2004 is set aside. No order as to costs.

J.

J.

Islamabad, **J.**
24.02.2015.
*Irshad Hussain /**

APPROVED FOR REPORTING.