

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.D-7101 of 2015

Anwar Ahmed and others

Versus

Pakistan Defence Officers Housing Authority and another

Present:

Mr. Justice Irfan Sadaat Khan and

Mr. Justice Muhammad Faisal Kamal Alam

Date of hearing : 30.08.2017

Date of order : _____

Petitioners

*[Anwar Ahmed and
Others]*

: Represented by Mr. Abdur Rehman,
Advocate.

Respondent No.2

(Clifton Cantonment Board):

Represented by Mr. Abdullah Munshi,
Advocate.

: Nemo for Respondent No.1.

: Mr. Muhammad Shoaib, Assistant
Attorney General.

Case law cited by the Petitioners' counsel.

1. **1999 SCMR Page-2883**
*(Ardeshir Cowasjee and 10 others Versus Karachi Building
Control Authority (KMC) Karachi and 4 others).*
[Costa Livina Case]
2. **PLD 1994 SC Page-512**
*(Abdul Razzak Versus Karachi Building Control Authority and
others) [Abdul Razzak Case]*
3. **1998 MLD Page-1264**
(The State Versus Pir Mazharul Haque and others)
4. **1999 YLR Page-1634**
(Al Jamiaul Arabia Ahasanul Uloom Versus Jamia Masjid)

5. **PLD 2000 Karachi Page-168**
(*Dr. Zahir Ansari Versus Karachi Development Authority*)
6. **2002 MLD Page-1247**
(*Shaheen Public Educational Society Versus Karachi Development Authority 2002*)
7. **PLD 2003 Karachi Page-162**
(*M.A. Hamid Ali Buksh Versus City District Government and others*)
8. **2003 YLR Page-1473**
(*Field Organizers of Weekly Bazar, Karachi Versus Karachi Development Authority*)
9. **2005 YLR Page-2412**
(*Sobho Mal Versus Karachi Development Authority*)
10. **2005 SC Page-361**
(*Haider Ali Rasheed Molji and 9 others Versus Jaffar-e-Tayyar Cooperative Housing Society Ltd through President and 11 others*)
11. **PLD 2006 Karachi 10**
(*Shafiqur Rehman and others Versus Government of Sindh through Chief Secretary and others*)
12. **2004 CLC Page-964**
(*Muhammad Alamgir Amjad and others Versus Multan Development Authority through Director-General and 5 others*)

Case law relied upon by Respondents' counsel.

Other Precedents:

- (1). **PLD 2010 SC Page-483**
(*Justice Khurshid Anwar Bhinder and others Versus Federation of Pakistan and another*) [**Bhinder Case**].
- (2). **2013 SCMR Page-1752**
(*Contempt Proceedings against Chief Secretary, Sindh and others*) [**Contempt Proceedings Case**].

Under discussion:

- (1). The Constitution of the Islamic Republic of Pakistan, 1973.
{**Constitution**}
- (2). Civil Procedure Code, 1908
{**CPC**}
- (3). The Cantonments Act, 1924

ORDER

Muhammad Faisal Kamal Alam, J: Through instant Constitutional Petition, the residents of Defence Officers Housing Authority and particularly of its Phase-II, have put forth their grievances with regard to a Park located in the same vicinity (*Phase-II*) and known as '**South Park**', that same has put to other use also, in violation of law and Regulations, relating to amenities and parks. Petition contains the following prayer clauses:

“That in the facts and circumstances and in the interests of justice this Honourable Court may be pleased to

A. DECLARE

- (i). *That the area known as South Park as denoted on the master plan as developed by the Respondent No.1 and / or the Respondent No.2 for the area known as the Pakistan Defence Officers Housing Authority-Phase-II is an amenity space and cannot be converted to any other use.*
- (ii). *That the actions on the part of the Respondent No.1 and the Respondent No.2 jointly and severally to convert the area known as South Park as denoted on the master plan as developed by the Respondent No.1 and / or the Respondent No.2 for the area known as the Pakistan Defence Officers Housing Authority-Phase-II is illegal and as such void.*

B. RESTRAIN

- (i). *The Respondent No.1 and the Respondent No.2 jointly and severally from converting the area known as South Park as denoted on the master plan as developed by the Respondent No.1 and / or the Respondent No.2 for the area known as the Pakistan Defence Officers Housing Authority-Phase-II into a space for any other use other than that as for a Park.*

C. DIRECT

- (i). *The Respondent No.1 and/or the Respondent No.2 to develop the area known as South Park and as identified in the Master Plan issued by the Respondent No.1 as a Park.*
- (ii). *The Respondent No.1 and / or the Respondent No.2 to remove the Water Purification Plant located within the perimeter of South Park.*
- (iii). *The Respondent No.1 and/or the Respondent No.2 to remove the workshop that is located within the perimeter of the South Park.*

D. GRANT

- (i). *Costs*
- (ii). *Any other relief that this Honourable Court may deem fit in the facts and circumstances of this case.”*

2. The Petitioners have highlighted the violations in the light of various judicial pronouncements, besides, Building Control and Town Planning Regulations, 2011 (DHA).

3. It has been contended by Barrister Abdur Rehman, the learned counsel representing the Petitioners that the following illegalities are continuously being committed at the subject ‘South Park’ _

- (i). respondents No.1 and 2 (*Pakistan Defence Officers Housing Authority and Clifton Cantonment Board*) respectively are using a portion of the Park as Nursery and thus impairing the use and utility of subject Park, which does not remain an amenity for the benefit of residents of the area, including Petitioners;
- (ii). a portion of a Park is also used as a workshop where employees of Respondents carry out construction work for

sign boards and store ancillary parts of the same at the site;

- (iii) another portion of the subject Park is used as commercial purpose as one of the employees of Respondents, who is a caretaker / Chowkidar, has on the roof top of his residential quarter, installed Base Transceiver Station (*BTS*) of a Cellular Company and it is obvious that either the said employee / Chowkidar or the Respondents are accepting handsome monthly income/rental for the said B.T.S.
- (iv) a Water Purification Plant has been installed at another portion of the subject Park. On account of this Plant, there is a constant flow of persons availing this facility and this is not only causing a continues nuisance to the residents of this vicinity, but also adversely affecting their rights of privacy.

4. The Petitioners' learned counsel has relied upon decisions already mentioned in the opening part of this order.

5. Mr. Abdullah Munshi, the learned counsel representing Respondent No.2 has argued on the basis of his detailed Counter-Affidavit and controverted the submissions of Petitioners. The Respondent No.2 has justified its stance of using a portion of 'South Park' as Nursery, because of its fertile soil, which other Parks also developed and maintained by Respondent No.2 (*Clifton Cantonment Board*) does not have. According to the latter (*Respondent No.2*), the plants grown at this Nursery are used in the Annual Flower Shows and it adds up to the beautification of the Park. It is further reiterated that in Clifton and Defence areas, the Respondent No.2 is maintaining 28 beautiful Parks for the benefits of its residents in particular and for the

public in general. It is further controverted that the residential quarter of caretaker of the Park is a necessity as it enables him to watch and ward the 'South Park' round the clock. It has been categorically denied that existence of afore mentioned facilities including, Water Purification Plant is, in any way, diverted the use of 'South Park' into commercial authority, while emphasizing that water is a basic necessity of life, is being provided by Respondent No.2 to the general public free of cost. The learned counsel for Respondent No.2 has concluded his arguments by praying that instant Constitutional Petition merits dismissal, as no violation of any of the fundamental rights of Petitioners has taken place; conversely, Respondent No.2 are fulfilling their fundamental obligations by providing free of cost drinking water to general public, which is also one of the fundamental rights covered under Article 9 of the Constitution.

6. Arguments heard, record perused and case law has been taken into account.

7. In the first Judgment (*Abdul Razzak Case*), the Hon'ble Supreme Court, *inter alia*, has held that a sanctioned development scheme as announced by the concerned authority, cannot be unilaterally altered to the disadvantage of residents of a particular area, unless it is good for the general public and the proposed alteration should not be in favour of few individuals.

8. Similarly, in *Costa Livina Case (supra)*, the Hon'ble Apex Court has further reiterated the importance of parks and playgrounds and their inherent amenity nature. Taking into account a chain of reported decisions, the concept of 'life' as envisaged in Article 9 of the Constitution has been expounded to include, leading a proper, comfortable and clean life. The Hon'ble Apex Court through this *Costa*

Livina decision disallowed that a portion of ‘*Bagh-e-Ibne-Qasim*’ to be used for raising a multistoried commercial-cum-residential complex, save a Revolving Restaurant which was already there in the original plan, that too for the benefits for the visitors of the said ‘*Bagh-e-Ibne-Qasim*’.

9. By now it is an established principle that designated amenity areas/plots, in particular, parks and playgrounds cannot be put to any other use. One of the main purposes for maintaining parks is to provide a healthy recreation in a relatively clean environment to the residents of nearby vicinity.

10. If crux of the *dicta* laid down in the afore cited decision is applied to the undisputed facts of present case, then it is not difficult to hold that a portion of the Park, which is being used as a Nursery and installation of BTS on the roof top of one of the rooms (at the Park), are purely commercial activities and thus violates the basic amenity nature and use of subject ‘South Park’ and is a continuous illegality and wrong, that should be remedied forthwith by Respondents. In this regard, the reported decisions mentioned in the opening part of this order, viz. ***Bhinder*** and ***Contempt Proceeding Cases*** are relevant to the extent that rule of prior hearing or ‘*Audi alteram partem*’ is not of universal application, particularly where the impugned action is uncontrovertible and an admitted fact and despite a prior hearing, the result could and would not have been any different. Consequently, the Respondent No.2 will stop using the designated portion of the Park for Nursery and shall also dismantle the Base Transceiver Station (*BTS*) forthwith.

11. As per the site inspection Report of Nazir of this Court there is one office room, two rooms, a bathroom and a kitchen for the use of caretaker and his family members; besides, one small room which is

used primarily as a store. It is also specifically pleaded in the Counter-Affidavit of Respondent No.2 that there are three other public Parks within a radius of half a kilometer of the same vicinity, which fact has not been disputed by Petitioners. Location of Water Purification Plant apparently is such that it has a separate entrance, as also shown in the Photographs appended with the Memo of Petition itself. If the above undisputed facts have to be weighed with a harsh reality of acute shortage of water and particularly drinking water in Karachi City, then Water Purification Plant installed at the subject Park to facilitate public at large and that too free of cost, is also a public service. It is otherwise a statutory obligation of Respondent No.2 (*Clifton Cantonment Board*) as envisaged in the Cantonments Act, 1924, particularly, Sections 217 to 225 thereof. It is also an undeniable fact that persons from low income group residing in nearby areas are the end users and beneficiaries of this Water Purification Plant and hence this facility neither violates the concept of amenity, nor changes/converts the use of subject Park as an amenity to some other use.

In view of above discussion, it can be safely held that a clean drinking water is not only a basic necessity of life, but also a part of healthy and clean life and thus is a fundamental right of a citizen covered under Article 9 of the Constitution.

12. Similarly, existence of residential accommodation for a caretaker and his family, in its present form as mentioned above, has not violated any of the laws and regulations pertaining to amenity uses; for the reason, the reported decisions relied upon by the Petitioners' side relate to that situation where concerned Government functionaries had allotted a portion of park and playground for residential purposes to different persons, which admittedly is not the present case. A caretaker of the park

is an employee of Respondent No.2 and is merely a licensee in respect of the residential quarter located at the subject Park and the said caretaker cannot be termed as an allottee nor he has any other entitlement to the said residential quarter. This arrangement would facilitate Respondent No.2 in a round the clock vigilance of the 'South Park'. However, it is clarified that no further addition will be made to the existing structure of caretaker residential quarter.

13. In the above terms, the present Constitutional Petition is partly allowed and listed Civil Miscellaneous Application stands disposed of.

JUDGE

JUDGE

Dated 12.09.2017.
M.Javaid.P.A.