

Order Sheet
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

CP No. D- 847 of 2020

BEFORE

Mr. Justice Abdul Maalik Gaddi
Mr. Justice Adnan-ul-Karim Memon

Date of hearing & decision : 26.08.2020

Petitioners : Khalid Ali Dars and others
through Mr. Rafiq Ahmed Kalwar Advocate

Respondents 1to4 : Province of Sindh and others
through Mr. Allah Bachayo Soomro Additional
Advocate General Sindh

Respondent No.5 : Chairman / Administrator Municipal Committee
Umerkot through Mr. Muhammad Azhar Arain
Advocate

ORDER

ADNAN-UL-KARIM MEMON, J: - Through instant constitutional petition, under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the Petitioners have made the following prayers:

- a. Declare that the Respondents act / actions of recommending and identifying the land of depression course and highway on Kunri-Umerkot road for the purposes of establishment of vegetable / fruit market and taxi stand and subsequent commencement of filling and construction over the said land is malafide, illegal, unlawful, unconstitutional, beyond jurisdiction and thus void ab initio and no legal effect and consequence;
- b. Declare that the Respondent No.5 commencement of work over the land of depression course through his workers and goons under his supervision is illegal, unlawful and falls within the purview of subsection (3) of Section 26-C of the Sindh Irrigation Act, 1879
- c. Declare that the acts / actions of the incumbent Chairman of the Respondent No.5 of usurping the land of the highway and depression course through his official capacity as Chairman is an illegal and malafide manner to benefit his own private land amounts to corrupt practices, abuse of authority and power, conflict of interest and thus falls within the ambit of Section 9 of the National Accountability Ordinance, 1999, in connivance with other official Respondents.
- d. Permanently restrain the Respondents from establishing fruit / vegetable market and taxi stand over the land of depression course Noor wah and highway land on Kunri-Umerkot Road.
- e. Direct the Respondent No.3 to initiate criminal proceedings pursuant to subsection (3) of Section 62-C of the Sindh Irrigation Act, 1879, against the incumbent Chairman of Respondent No.5 namely Khalid Siraj Soomro and his workers and goons who

have illegally encroached and commenced filling and construction over the depression course Noor wah in an illegal and unlawful manner.

- f. Direct the Respondents to remove encroachment from the depression course Noor wah and regularly maintain to make it functional for the purposes of discharge and rain and flood water;

2. The main grievance of the petitioners is that the land available within the natural or carved out land for flow of rain water is not available for permanent allotment to anyone, therefore they are asking for direction to the Respondents to remove encroachment from the depression course off Noor wah and regularly maintain it to make it functional for the aforesaid purpose. Petitioners are also seeking declaration to the effect that identifying the land of depression course and highway on Kunri-Umerkot road for the purposes of establishment of vegetable/fruit market and taxi stand and subsequent commencement of filling and construction over the said land is mala fide, illegal, unlawful, unconstitutional and thus void ab initio and of no legal effect and Consequence.

3. We asked learned counsel to satisfy this Court with regard to maintainability of the captioned petition regarding their locus-standi over the subject land. He admits that the subject land is Government land, but the same has been encroached upon by the private respondent in order to establish vegetable / fruit market and taxi stand. It is contended by him that commencement of work over the subject land of depression course is illegal, unlawful and falls within the purview of subsection (3) of Section 62-C of Sind Irrigation Act, 1879. Learned counsel for the petitioners states that the Government lands are for the welfare of general public; however he pleaded his further case by saying that the petitioners are allottees of Mehran Town and Momal Town, District Umerkot. The subject Housing Society is located adjacent to chandar off Noor-Wah meant for flow of rain water, which is not available for permanent allotment to anyone else including Respondent No.5. He next argued that the action of Respondents is based upon malafide intention and violates the right to dignity as enshrined under Article 14 or the Constitution of Islamic Republic of Pakistan; that Government is adamant to benefit respondent No.5 to protect his private 4.00 acres of land lying adjacent/opposite to the depression course and Kunri-Umerkot Road; that Encroachments over the subject land earmarked for flow of rain water, are infringing the rights of all other citizen; that the constitutional rights of all other citizen in respect of the public properties cannot be taken away by few individuals on account of their greediness; that Courts have never encouraged the actions of

such greedy persons in respect of their encroachment over public land, water bodies and water resources. It is a growing trend across the State that few greedy persons, land grabbers and land mafias are encroaching, the public property, water bodies and water resources and obstructing the development; that Government is bound to act vigilantly and no leniency should be shown in respect of encroachers and the authorities competent are bound to invoke the provisions of the Sind Irrigation Act, 1879. There should be no leniency or misplaced sympathy towards encroachers. The authorities committing lapses, negligence or dereliction of duty by way of any omission or commission, must be taken note of and suitable prosecution and appropriate disciplinary actions should also be initiated against all such officials, who all are responsible for committing an act of negligence or dereliction of duty; that it is the duty of Government to preserve the water bodies and prevent ecological imbalances. Such being the constitutional perspectives and duty of the Government, they are bound to act in respect of all such encroachments. He prayed for direction to the official respondents to remove all encroachment on the subject land. In support of his contentions he heavily relied upon the documents attached with the memo of petition.

4. Preliminary objection has been raised by Mr. Muhammad Azhar Arain learned counsel for contesting Respondent No.5 that the Petitioners were neither aggrieved persons nor had any *locus standi* to invoke the constitutional jurisdiction of this Court, as he has no vested right to call in question the validity of orders passed by the Government functionaries; that instant petition is also liable to be rejected being not maintainable, before this Court on the premise that petitioners have failed to avail remedy as provided under the law.

5. Mr. Allah Bachayo Soomro, learned Additional. A.G, who appears on behalf of respondents 1 to 4, has raised similar objection to the maintainability of writ Petition without filling comments on the ground that in the first place, the petitioners have no *locus standi* to file the petition and secondly, though there is no impugned action, however the action of government functionaries does not violate any of the fundamental rights of the petitioners.

6. We have heard learned Counsel for the parties and perused the material available on record.

7. Foremost, we must decide the objection of learned A.A.G. before considering the contentions raised by Mr. Rafiq Ahmed Kalwar learned Counsel representing the petitioners.

8. The main questions of law arising in the instant matter stand on the maintainability, whether the petitioners have no locus standi to file the petition and secondly, the impugned action for establishment of vegetable/fruit market and taxi stand and subsequent commencement of filling and construction over the subject land meant for flow of rain water, which is not available for permanent allotment to anyone does not violate any of the fundamental rights of the petitioners?

9. In order to examine the locus standi of the Petitioners, it is noted that the petitioners are allottees of Mehran Town and Momal Town, District Umerkot and claiming appropriate proceedings against the Respondents for enforcement of their rights conferred by the constitution.

10. To address the aforesaid proposition, it is *sine qua non* for initiation of proceedings under Article 199 of the Constitution that the Petitioners should have locus standi to institute the proceedings or in other words the Petitioner should be an aggrieved party from the action of Respondents; the Honorable Supreme Court has already settled the issue on the aforesaid proposition, which is the subject matter of the instant petition, in its various pronouncements on the analogy that for a person to have locus standi to initiate a petition for issuance of writ, he must have some right in the matter and he needs not have a right in that strict sense of the term which is provided under Article 170 of the Constitution. With regard to the objection it may be noted that under Article 199(1) (a) the constitutional jurisdiction of this Court can be invoked by an aggrieved person which denotes a person who has suffered a legal grievance, against whom a decision has been pronounced which has wrongfully deprived him or wrongfully refused him something which he was legally entitled to. It is also the requirement that the person invoking constitutional jurisdiction under Article 199 of the Constitution has to establish his legal or fundamental right has been violated resulting in legal loss. The right which is the foundation of an application under Article 199 of the Constitution is a personal and individual right. The legal right may be statutory right or a right recognized by the law. A person can be said to be aggrieved only when he is denied a legal right by someone who has legal duty to perform relating to such right. There must not only be a right but a justifiable right in existence, to give jurisdiction to this Court in the matter. Unless

whatever right personal or otherwise, on which the application is based is established, no order can be issued under Article 199 of the Constitution.

11. In view of the above and from the facts of the case, it is evident that the Petitioners are not aggrieved of any orders, acts or proceedings done or taken against them by the Respondents, therefore, the Petitioners are not aggrieved person to approach this Court under Article 199 of the Constitution.

12. Apart from above, we have noticed that *prima facie* the subject land is government land, and the Municipal Committee Umerkot is trying to establish vegetable / fruit market and taxi stand, without proper allotment order, on the contrary the subject land is meant for depression course and is not available for permanent allotment to anyone as observed by the learned Division Bench of this Court vide order dated 26.7.2017 passed in C.P No. D- 4651 of 2015. An excerpt of the order is reproduced as under:-

* The instant Petition was disposed of vide order dated 08.11.2016 in terms the statement filed by the official respondents present on that date to the effect that encroachment raised by private parties in Bhadda Land on Deh 369 had been removed and work of drainage of Sim Nala was going on with understanding that the remaining exercise of drainage of Nala and for removal of encroachment would be completed latest by 30.04.2017. Such order has not been complied with which led to filing of the listed application seeking compliance.

The Additional Deputy Commissioner pointed out that some portions of land have been permanently leased out in terms of revenue entries and cannot be resumed unless required by the government under Land Acquisition Act. He further added that the land grant conditions at the relevant time are sufficient to provide room for permanent allotment / lease of the land over the water course / path of natural flow of water and hence presently the same cannot be disturbed except by acquiring the land. The ADC has also referred to Section 62 and 63 of the Bombay Revenue Code, 1879 (prevailing at the time when alleged entries were made to the effect that the Collector was authorized to dispose of the alluvial land. Copy of such provision he has sent in compliance of order dated 26.07.2017 for perusal of this Court.

Mr. Neel Keshav contended that this land cannot be leased out as it is part of land constituting natural flow of water as referred to the above order and seeks compliance thereof and relied upon Sindh Irrigation Act for the resumption of land and removal of encroachments.

We have heard the counsel for Petitioner and the official present.

The natural flow of water should not have been intervened and the natural cycle should remain ideally as natural as possible unless otherwise required for a better cause. The Bhadda land, which in fact represents the historical canal and / or natural or unnatural path of water course, has been interfered at some places as it claimed to have been allotted or leased out to certain individuals and such entries were made revenue khata / register as at some intervals this canal portion-wise was filled with sand and due to sifting it has merged with the ground level and apparently was available as land. Needless to point out that flood or rain water also carries sand and soil as such these canals are required to be maintained frequently.

We have noted that vide notification dated 20.03.2012 Sindh Irrigation (Amendment) Act 2011 (Sindh Act No VII of 2012) was notified. In terms

of such amendment Section 62-C in Sindh Act VII of 1879 is inserted from which it is stipulated that notwithstanding any grant or lease by any authority or any Judgment or Decree of any Court in favour of any person, the land of all the natural or artificial depression course meant for discharge of flood or rain waters shall stand resumed to the government and shall be exclusively used for the said purpose. It furthermore stipulates that any person in possession of such land is required to vacate the land within seven days of the commencing of the above Act.

In our opinion such land available within the natural or carved out land for flow of water, may it be rain water or flood water, is not available for permanent allotment and if had been allotted is liable to be resumed. It may be made available for shorter period or enjoyment but cannot be turned into a permanent right. These temporary possessions could always be resumed under acute circumstances or the circumstances shown in the aforesaid newly inserted section and amendment of Sindh Act VII of 1879

The official respondents have submitted provision of law for the disposal of unoccupied land such as Section 62 and 63 of Bombay Revenue Code, 1879. They submitted that the Collector was empowered to grant alluvial land and hence the occupants' rights are protected. It provides that it shall be lawful for the Collector, subject to rules, to require payment of price for un-alienated land to sell the same by auction and to annex such conditions to the grant as may deem fit.

Similarly, Section 63 for the grant of alluvial land also provides that when it appears to Collector that alluvial land belongs to the government after considering the interest of public revenue, the same be disposed of after offering to the occupants of the bank or shore on which such alluvial land has formed.

The alluvial land is the one where the stream flows down. Similarly the bank and / or shore does not under any stretch of imagination means the land beneath the flow of water. The subject land where the occupants claimed to have been in possession forms the exact area where the water stream / canal flows during rainy or monsoon season. It has been carved out historically to save the remaining land so that the water from top to bottom may flow in a stream without destroying the majority of the land during rainy or monsoon season. This land, which is subject matter of this Petition, does not vest with the collector for its disposal in terms of the provisions as relied upon by the official respondents.

The natural flow of water, if intervened, or obstructed, may interfere other precious adjacent lands and the water may spill over to those lands which may include agricultural land or villages and hence at the cost of the aforesaid allotments of land on the path of water, the adjacent agricultural land or village cannot be ruined. The land is thus liable to be resumed forthwith and be handed over to the contractor to carry out the required job in terms of the contract.

In view of the above for all intent and purposes the compliance be made in terms of order whereby this Petition was disposed of. Even otherwise, the Petition has already been disposed of and Respondents never raised such questions before it. It is pertinent to note that not only Addl A.G. was present at the time of passing of said order but concerned officials from the revenue department were also present. No one had stated anything at that time which they have agitated now. Let the compliance report be filed within one week from today.

13. Prima-facie the subject land is public property and meant for discharge of flood or rain water as defined under Section 2(o) of Sindh Public Property (Removal of Encroachment) Act, 2010. The Public Property means a building, land, place or premises vesting, in or under the management or control of Government, local Council, autonomous body or registered cooperative society or such other authority. In this regard

Section 62-C (1) of the Sindh Irrigation Act, 1879, is clear in its terms and provides as under:

"Notwithstanding any grant or lease by any authority or any judgment or decree of any court in favor of any person, the land of all the natural or artificial depression courses meant for discharge of flood or rain waters shall stand resumed to Government and shall be exclusively used for such purpose"

14. We have perused the application dated 23.6.2020 moved by Respondent No.5 to worthy Chief Minister, Sindh for allotment of subject land noting of Chief Minister, Sindh which explicitly shows the following factual position of the case:

"that Municipal Committee, Umarkot having its population about 1,50,000 souls and its headquarter is situated at Umarkot City.

That there is one fruit / vegetable market which does exist within central part of city which is creating bigger hurdles for smooth flow of traffic due to non-availability of dedicated taxi stand.

Along this, the city has no any specific area reserved for Taxi stand and all vehicles are standing on various main roads and chowks of Umarkot city that is creating hassle for commuters and Municipal administration to keep the area clean and smooth.

It is therefore requested to your honour that concerned authorities may be directed to allot around 4.00 acres government at suitable place for the establishment of vegetable / fruit market and taxi stand outside the city within limitation of Municipal administration.

Please Process early
Sd/-
Chief Minister, Sindh

15. We have seen the Report dated 22.7.2020 of Mukhtiarkar (Revenue) Umerkot, which explicitly shows that a piece of land of Noor Wah was identified for establishment of Fruit / Vegetable Mandi and Taxi Stand for Umerkot City. An excerpt of the report is as under:

"..... a team of Senior Tapedars was constituted to identify the suitable piece of government land for required purpose. As the team in consultation with the applicant Mr. Khalid Siraj Soomro Chairman Municipal Committee Umerkot has identified a piece of non-functional closed Noor Wah passing with Kunri-Umerkot road in deh Lashri near Government Circuit House Umerkot has been identified for subject purposes. Furthermore, team has reported the private market value of said land is 1200 rupees per square feet.

16. In view of the above factual position of the case, the land of all the natural or artificial depression courses meant for discharge of flood or rain water cannot be used for any other purpose and encroachment thereon cannot be sustained in view of Section 62-C (1) of the Sindh Irrigation Act, 1879 for which the competent authority of the government of Sindh has to

look into the matter and take appropriate action in the light of legal position enumerated hereinabove.

17. In our view the issue of conversion of an amenity plot into personal use had already been discussed and adjudicated by Honorable Supreme Court in the case of *Ardeshir Cowasjee vs. Karachi Building Control Authority* (1999 SCMR 2883). It was held that conversion of an amenity plot is illegal. The encroachment of amenity plot cannot be allowed to sustain under the law, which aspect, the official respondents have to look into and restore its position in accordance with law. The encroachment of an amenity plot to another use is treated as an abuse of discretion and therefore is unlawful for the simple reason that the paramount object of modern city planning is 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 object cannot act in a manner, which may defeat the above objective and deviation from the planned scheme will naturally result in discomfort and inconvenience to others.

18. Without prejudice to above, at this juncture, we would like to refer the case of *Province of Punjab through Secretary Revenue and others v. District Bar Association Khanewal and others* (2014 SCMR 1611), wherein it was held by the Honorable Supreme Court with regard to manner of exercise of powers by an authority regardless of its status that:

"13. Looking at the powers of the Chief Minister for allotment of public property, here a reference to the case of *Iqbal Hussain v. Province of Sindh through Secretary, housing and Town Planning Karachi and others* (2008 SCMR 105) will be useful wherein this court has observed as under -

"3. We are in complete agreement with the view taken by the Division Bench of the High Court when it says that public functionaries including the Chief Minister can deal with the public property only under a prescribed procedure within the parameters of law under a duly sanctioned scheme and not at their whims. Even if such order was passed by the Chief Minister in favour of the petitioner, authorities concerned would not be bound to follow such illegal and void order of a superior authority. It would rather be in the exigencies of good order of administration and their duty to point out to the high ups that they were acting in excess of their lawful authority and in violation of law and the constitutional mandate. They may be apprised of the legal consequences flowing from such acts. The compliance of any illegal and arbitrary order is neither binding on the subordinate forums nor valid in the eyes of law. Reference in this behalf may be made to decision of this Court in (i) *Abdul Haq Indhar v. Province of Sindh* (2000 SCMR 907 and (ii) *Taj Muhammad v. Town Committee* (1994 CLC 2214)"

19. It is suffice to say that what is prohibited by Honorable Supreme Court of Pakistan cannot be sought to be permitted by any other Court or authority, whosoever, it may be, hence in the light of the decision rendered by Honorable Supreme Court in the case of Ardeshir Cowasjee vs. Karachi Building Control Authority (1999 SCMR 2883) and the order passed by learned Division Bench of this court as discussed in the preceding paragraph, we are of the considered view that the competent authority of official respondents is under legal obligation to look into the matter and comply with the directives of Honorable Supreme Court passed in the cases of removal of encroachment of amenity plots / public properties from its occupants.

20. In view of forgoing discussion, the instant petition stands dismissed in the above terms along with pending application(s) with no order as to costs.

21. These are the reasons of our short order dated 26.08.2020, whereby we have dismissed the instant petition.



JUDGE



JUDGE

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

C.P. No.D- 847 of 2020

DATE

ORDER WITH SIGNATURE OF JUDGE(S)

1. For orders on office objection.
2. For hearing of M.A-3971 of 2020 (Stay application).
3. For hearing of main case.

26.08.2020

Mr. Rafiq Ahmed Kalwar, Advocate for the Petitioners.

Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh
alongwith Muhammad Salam Samyo Mukhtiarkar (R) Umerkot
(respondent No.4).

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Mr. Muhammad Azhar Arain Advocate files Vakalatnama on behalf of
respondent No.5, which is taken on record.

Heard arguments of the parties and perused the record. For the reasons
to be recorded later on, instant petition is dismissed alongwith pending
application(s).

JUDGE

JUDGE