

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD**

**Miscellaneous Appeal No. 31 of 2019**

Date of hearing: 28.10.2019  
Date of decision: 08.11.2019  
Appellant: Muhammad Yameen Qureshi through  
Mr. Riazuddin Qureshi, Advocate.  
Respondent No.9: Arshad through Mr. Shahzaib Abbasi,  
Advocate

**J U D G M E N T**

**ADNAN-UL-KARIM MEMON, J:-** Through this Miscellaneous Appeal, the Appellant is asking for setting aside the Judgment dated 05.09.2019 passed by the learned Presiding Officer, Anti-Encroachment Tribunal, Hyderabad in Suit No.14 of 2018 (Re-Muhammad Arshad v. Province of Sindh & others) filed by Respondent No.9, whereby the learned Judge has decreed the aforesaid suit as prayed by directing Respondents No.2 to 7 to remove the illegal encroachment constructed over the subject plot.

2. Brief facts of the case as per pleadings of the parties are that Respondent No.9 / plaintiff had filed Suit No.14 of 2018 against the Appellant / defendant No.8 for Declaration and Removal of Illegal Encroachment Constructed Over Plot of Madarsa and Removal of Illegal Buffalo Dairy Farm and Permanent Injunction before the learned Anti-Encroachment Tribunal, Hyderabad with the assertion that Plot No.9 admeasuring 102-07 Sq.yds: Plot No.11 admeasuring 150, Sq: Yds: and plot No.13 admeasuring 150, Sq: Yds: survey No.G-2535 Sardar Colony are reserved for Madarsa namely Anwar-ul-Muhammadi which are amenity plots for the interest of Public at large. The Appellant/defendant No.8 has illegally encroached and constructed building over Plot No.9, 11 & 13 G-2535 Sardar Colony, Phuleli for residential purpose, though the aforesaid plots are reserved for Madarsa. The Honorable Supreme Court of Pakistan vide order dated 16.03.2017 passed in Civil Petition No.38 of 2016 directed the Government of Sindh to remove cattle farm from the residential areas of city. The learned trial Court after hearing the parties, decreed the aforesaid suit as prayed and directed the Respondents No.2 to 8 to remove the illegal encroachment

constructed / made over the subject plot vide judgment dated 05.09.2019. The Appellant being aggrieved by and dissatisfied with the aforesaid Judgment preferred the instant Miscellaneous Appeal before this Court on 16.9.2019.

3. Mr. Riazuddin Qureshi learned Counsel for the Appellant has mainly contended that the judgment of trial Court is against the law and facts; that the trial Court without recording evidence of either party passed the impugned judgment, which is not warranted under the law; that the impugned judgment is based upon misreading and non-reading of facts, as such, is liable to be set-aside and matter may be remanded back for recording evidence of both the sides; that learned Anti-Encroachment Tribunal Hyderabad vide judgment dated 05.09.2019 directed the appellant to vacate the amenity plot of Madarsa Anwar Muhammadi; that the impugned order dated 05.09.2019 is against the basic spirit of law thus liable to be set-aside; that the learned trial Court has no jurisdiction to adjudicate the matter under Sindh Public Property (Removal of Encroachment) Act, 2010. In support of his contention he relied upon the report of the City Survey / Mukhtiarkar and argued that the subject plots have been purchased by the private persons through registered sale deed in the year 1977 and such entry was incorporated in the record of rights. Learned counsel heavily relied upon the Section 14(3) of the Act, 2010 and argued that the plots in question are neither used for cattle form nor donkey however, these pertains to the appellant; that no evidence of the parties has been recorded and the impugned order is passed without ascertaining the factual position of the case; that the learned Tribunal failed to appreciate the documents evidence brought on record in favour of the appellant. He lastly prayed for allowing the instant appeal.

4. Conversely, Mr. Shahzaib Abbasi, learned Counsel for the Respondent No.9 has supported the impugned judgment as there is no any error in it and the grounds raised in the instant Appeal are untenable; that the impugned Judgment is passed within the parameters of law; that the instant Appeal is frivolous, misleading as there is absolute correct findings given by the learned trial Court. He lastly prayed for dismissal of the instant Miscellaneous Application.

5. I have heard the parties at considerable length and also reviewed the record available before me.

6. The allegation in the present case against the appellant is conversion of amenity Plot No.9 admeasuring 102-07 Sq.yds: Plot No.11 admeasuring 150, Sq: Yds: and plot No.13 admeasuring 150, Sq: Yds: survey No.G-2535 Sardar Colony, reserved for Madarsa namely Anwar-ul-Muhammadi (Madarsa Plot) to personal use and encroachment thereon. The conversion of an amenity plot is illegal. The encroachment of amenity plot cannot be allowed to sustain under the law. Record reflects that Mukhtiarkar submitted report on 28.11.2018 before the learned Tribunal with regard to the status of Plot No.9/A C.S.No.2535 pat ward `G` Sheet No.126 at Sardar Colony Phuleli Par Hyderabad of 1654 sq.ft in Katchi Abadi Hyderabad to be property of Madarsa Anwar-ul-Muhammadi, which is a public Property and under Section 2(o) of Sindh Public Property (Removal of Encroachment) Act, 2010 "Public Property" is defined, which 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.

7. To understand the rule position of the case, it is expedient to have a glance on various Sections of the Act, 2010. Section 11(1) provides that no Civil Court shall have jurisdiction to entertain any proceedings, Bar of jurisdiction and abatement of suits, grant any injunction or make any order in relation to a dispute that any property is not a public property, or that any lease or license in respect of such public property has not been determined, for the purpose of this Act, or anything done or intended to be done under this Act. (2) All suits, appeals and applications relating to, encroachment and dispute that any property is not a public property or, that any lease or license in respect of such property has been determined, for the purpose of this Act, shall abate on coming into force of this Act. Provided that a party to such suit, appeal or application may; within seven days of coming into force of this Act, file a suit before a Tribunal in case of a dispute that any property is not a public property or that any lease or license in respect of such public property has not been determined. Section 13 provides that a Tribunal shall have exclusive jurisdiction to adjudicate upon a dispute that any property is not a public property or that any lease or license in respect of such public property has not been determined for the purpose of this Act. Section 14 (1) provides that Tribunal shall decide any suit or application in such manner and in accordance with such procedure as may be prescribed. (2) Any order

made by the Tribunal which conclusively determines the rights of the parties with regard to all or any of the matters in controversy shall be final and binding on the parties. (3) The Tribunal shall have power of a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908). (4) The proceedings before the Tribunal shall be judicial proceedings within the meaning of sections 193 and 228 of Pakistan Penal Code (Act No. XLV of 1860), Section 27 provides an appeal against the order passed by a Special Court shall lie to the High Court of Sindh.

8. I have perused findings of learned Tribunal, which explicitly show the following factual position of the case:-

“From the report of Mukhtiarkar concerned it appears that the defendant No.8 is running cattle farm on the property of madarsa which is a public property. The Honourable Supreme Court of Pakistan through its order dated 16.03.2017 passed in C.P. No. 38 of 2016 has been pleased to direct the Government to remove cattle farm from the residential areas/cities. In another case law reported in PLD 2005 Supreme Court 361, the Honourable Supreme Court of Pakistan has been pleased to observe as under:-

“Admittedly the disputed plot is an amenity plot reserved for Memorial Hall, Madarsa and Imam Bargah. It was frankly conceded by the petitioner in the reply submitted before the High Court that they have raised illegal construction over the amenity plot and constructed residential house, where they are residing. Even petitioner No.1 specifically conceded in the affidavit filed by him before the High Court that an area of 2000 sq.yards survey Nos. 331 was meant for construction of Memorial Hall. During the arguments before the court also learned counsel for petitioner admitted about the illegal construction over the said plot without having any layout plan approved from the authority. In such circumstances learned High Court was right in holding that the said construction being unauthorised over the reserved area be demolished within 2 months.

In view of the above discussion, material available on record and seeking guidance from the above referred laws, I am of the humble view that the defendant No. 8 has encroached upon amenity plot of Madarsa Anwar-ul-Muhammadi and illegally raised construction over it and also running cattle ponds and parks donkey carts over the said amenity plots. In the result I decree the suit of the plaintiff as prayed with no order as to costs. Let the letter be issued to the defendant Nos. 2 to 7 for removal of illegal encroachment and demolished of illegal construction and removal of cattle pond and parking of donkey carts from the plot Nos. 9, 11 and 13 belonging to Madarsa Anwar-ul-Muhammadi within 15 days of this order. There will be no order as to costs.

9. In my view the issue of conversion of an amenity plot into personal use had already been discussed and adjudicated by the 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.

10. Without prejudice to above, at this juncture, I would like to refer the order dated 11.9.2009, passed by the honorable Supreme Court of Pakistan in Suo Moto case No.14 of 2009 wherein it is held that:

No one in authority, whosoever high office such person in authority may be holding, has any power, jurisdiction or discretion to distribute any public property or asset and in these cases extremely valuable lands, on nominal consideration, **which land or asset essentially belong to the People of Pakistan.** It was patently malafide exercise of power. This Court further ordered that the grants of lands to the petitioner specially in the manner, the same was done are **prima facie violative of Article 3 (elimination of exploitation) Article 25 (equality clause) and Article 31 of the Constitution of Islamic Republic of Pakistan which requires the State to endeavour to promote observance of Islamic moral standards and Article 38 of the Constitution which *inter alia* requires the State to secure the well-being of the people by preventing concentration of wealth in the hands of a few to the detriment of general interest.** The grant of lands to the petitioner in these cases were reprehensible acts on the part of the highest executive authority in the province, totally alien to the concepts of Islam.

11. In another case, reported as 2014 SCMR 1611, it was held 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 HaqIndhar v. province of Sindh (2000 SCMR 907 and (ii) Taj Muhammad v. Town Committee (1994 CLC 2214)

*(Underlining has been provided for emphasis).*

12. It is suffice to say that what is prohibited by the Honorable Supreme Court of Pakistan cannot be sought to be permitted by any other Court or authority, whosoever, it may be. Since the relief which is being sought in *all senses* shall amount to permitting what is prohibited/stopped by Honorable Supreme Court which cannot be granted to the appellant because the law is clear that one cannot obtain directly, cannot obtain indirectly. Thus, now I can safely conclude that instant appeal *from all angles* is incompetent and the jurisdiction of this Court is barred by Article 189 of the Constitution even, more particularly the principle enunciated by the Honourable Supreme Court in removal of encroachment of public property cases

13. In the light of decision rendered by the Honorable Supreme Court in the case of Ardeshir Cowasjee vs. Karachi Building Control Authority (1999 SCMR 2883) and order passed by the learned Tribunal in the matter, I am of the considered view that the official respondents are under legal obligation to comply the directives of the Honourable Supreme Court passed in the cases of removal of illegal encroachment of amenity plots / public properties from its occupants.

14. The appeal stands disposed of in the above terms.

**JUDGE**

*\*Fahad Memon\**