

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

Constitutional Petition No. D – 1639 of 2016

Before :
Mr. Justice Nadeem Akhtar
Mr. Justice Adnan-ul-Karim Memon

Petitioner : Nemo for the petitioner.

Respondents : Through Mr. Allah Bachayo Soomro, Additional A.G. Sindh along with Rasheed Ahmed Zardari Deputy Commissioner Tando Allahyar.

Date of hearing
& decision. : 18.12.2019.

ORDER

ADNAN-UL-KARIM MEMON, J.– Through this petition, the petitioner has sought declaration to the effect that use of a public park viz. ‘Shah Abdul Latif Municipal Garden Tando Allahyar’(**the subject park**) for commercial purposes or renting out its portions to tenants is illegal.

2. This Court vide order dated 24.11.2016 directed the Deputy Commissioner Tando Allahyar to ensure removal of encroachments within fifteen days from the subject park situated opposite to the court building. On 21.12.2016, the said Deputy Commissioner appeared before this Court and made a statement that encroachments had been removed, but this statement was seriously disputed by the petitioner. In order to ensure that all encroachments from the subject public park are removed, learned District and Sessions Judge Tando Allahyar was directed to depute a Magistrate to proceed under Section 133 Cr.P.C for removal of encroachments from the subject park.

3. On 9.2.2017 learned Magistrate-II Tando Allahyar submitted his report dated 23.01.2017 according to which office of Public Health Engineering, a library, a mosque, a female dispensary / maternity home, a press club, a health club, office of garden supervisor, a municipal transport workshop, a municipal overhead tank and some quarters and shops were found existing on the land reserved for the subject park. Thereafter, in compliance of order dated 04.12.2019 Deputy Commissioner Tando Allahyar submitted the latest report dated 10.12.2019 stating that a press club, public health engineering office, a mosque, a library and an overhead tank are still existing inside the subject park, and all other encroachments had been removed therefrom. The said Deputy Commissioner has stated in his above report that the above were developed for

public purposes which neither disturb the visitors of the subject park nor can be declared as encroachment in any manner. Before discussing the merits of the present case, it may be observed that the said Deputy Commissioner had no authority or jurisdiction to decide whether the above can be declared as encroachment or not as such jurisdiction vests only with this Court especially when the matter is subjudice.

4. We have heard learned A.A.G. Sindh and Deputy Commissioner Tando Allahyar at considerable length and have also reviewed the record available before us. The above mentioned reports submitted by learned Magistrate-II Tando Allahyar and Deputy Commissioner Tando Allahyar clearly show that the land in question, which is the subject matter of the instant petition and on which encroachment has been alleged, is a public property reserved for a park belonging to the Municipal Committee Tando Allahyar ; and, the same has been encroached upon to the extent and in the manner stated in the said reports. The precise allegations in the present petition are of conversion of an amenity plot reserved for the subject park to commercial purposes and encroachment thereon and letting out the said illegally converted / encroached portions of the subject park on rent. In this context, it is well-settled that conversion of an amenity plot into commercial and/or for any other purpose is illegal and encroachment thereon cannot be allowed under any circumstances. This view is fortified by the following authorities of the Hon'ble Supreme Court and cases decided by learned Division Benches of this Court, laying down the principles regarding illegal conversion and use of amenity plots / public properties for other purposes, rights of the public in respect of amenity plots / public properties and duties of the authorities concerned for maintaining the status of amenity plots / public properties :

- A. In *Ardeshir Cowasjee and 10 others V/S Karachi Building Control Authority (KMC), Karachi and 4 others*, **1999 SCMR 2883**, the Hon'ble Supreme Court was pleased to hold, inter alia, that citizens were entitled to use the park with all amenities as use of park involving enjoyment of life was covered by the word "life" employed in Article 9 of the Constitution, and citizens had the right to ensure that the officials do not grant approval of a plan in respect of the plot which might impinge on their right of enjoyment of life or is in violation of law ; and, the unauthorized structure from the amenity plot / park was liable to be removed as the same could not be used for any other purposes than for which it was carved out.

- B. In *Moulvi Iqbal Haider V/S Capital Development Authority and others*, **PLD 2006 SC 394**, it was held, inter alia, by the Hon'ble Supreme Court that public park earmarked in a housing scheme created a right amongst the public and that right included their right of entry in the park without any obstacle being fundamental right as enshrined in Article 26 read with Article 9 of the Constitution ; liberty of a person to have access or utilize a right available to him cannot be taken away by converting such facility into a commercial one for the purpose of extending benefit to a third person ; and, functionaries and authorities exercising statutory power were bound to discharge their functions strictly in accordance with law otherwise the action contrary to law would not be sustainable and such Authority shall expose itself to disciplinary action.
- C. In an unreported order passed on 12.03.2012 by the Hon'ble Supreme Court in Civil Petition No.80-K of 2011 (Sikandar & Company V/S Muhammad Rauf Qadri Junaidi and others), it was held, inter alia, that greenbelt / amenity was meant to be used by the residents of the area as a breathing space and not for construction purposes, auction whereof was a farce and sham attempt to rob the greenbelt / amenity plot from citizens of Karachi, which by no means is permissible by law ; and, the said plot being public property meant only for public amenity purposes cannot be converted into building and commercial site.
- D. In *Muhammad Ashraf and another V/S Faisal Cantonment Board and another*, **2017 YLR 2091** and Constitutional Petition No.D-6183/2015 (*Mazhar Ali Maqsi V/S Province of Sindh and others*), this Court has held that a public property meant for the use and enjoyment of general public cannot be leased to any private or third party nor can any type of third party interest be created therein ; and, the government, the relevant municipal authority and all their functionaries are duty-bound to keep the public property free from all types of encroachments and claims.
5. In view of the foregoing, the well-established legal position that has emerged is, use of an amenity / public property by the public for enjoyment of life is covered by the word "life" employed in Article 9 of the Constitution ; such right to enter into and use of the amenity / public property without any obstacle is a fundamental right as enshrined in Article 26 read with Article 9 of the Constitution ; amenity / public property cannot be used for any purpose other than for which it was carved out, earmarked or reserved ; liberty and right of a person to have free

access to amenity / public property or to utilize and enjoy the same cannot be taken away by converting such amenity into a commercial one and/or for any other purpose for extending benefit to a third person ; an amenity / public property meant for the use and enjoyment of general public cannot be leased to any private or third party nor can any type of third party interest be created therein ; any violation in respect of rights relating to the access, use or enjoyment of amenity / public property or change in the use thereof, whether temporary or permanent, by any individual, Government, functionary or agency is illegal ; even the Government or Municipal authorities have no right to change the use of an amenity / public property ; the Government, the relevant municipal authority and all their functionaries are duty-bound to keep the amenity / public property free from all types of encroachments and claims ; such functionaries and authorities exercising statutory powers are duty-bound to discharge their functions and duties strictly in accordance with law otherwise any action by them contrary to law would not be sustainable and such authority shall expose itself to disciplinary action ; and, if any unauthorized construction or encroachment is made on any amenity / public property, the same, being illegal, has to be removed.

6. The principles laid down in the above cited cases would apply with full force to the present case as it appears that the Government and Municipal Committee concerned have encouraged encroachments on the subject park by allowing certain class of people to establish a press club, by constructing public health and other offices / workshop / maternity home / quarters, and by letting out portions of the subject park. As noted above, the Deputy Commissioner Tando Allahyar has submitted the latest report dated 10.12.2019 according to which a press club, public health engineering office, a mosque, a library and an overhead tank are still existing inside the subject park, and all other encroachments have been removed therefrom. According to his above report, the library is used only by the visitors of the subject park, particularly the youth and elderly people, and the overhead water tank is used to store the water required to maintain the subject park. It may be observed that in these days when the trend and habit of reading and exercising have declined to an alarming extent, the combination of library and park at one place is unique, useful and healthy as both these facilities not only complement each other, but each of them also act as an incentive for the other. It goes without saying that the subject park cannot survive without water and the requisite quantity of water cannot be stored in the absence of the overhead tank. However, establishing public health office under the said

overhead tank inside the subject park has no justification. Regarding the mosque, comprising only an area of 1,235 sq. ft. as per the earlier report dated 07.02.2018 submitted by the above Deputy Commissioner, needless to say the same is meant for offering prayers by the visitors of the subject park.

7. In view of the law laid down by the Hon'ble Supreme Court, we are of the clear view that a press club cannot be deemed to be an amenity / public property by any stretch of imagination as it is used as a platform by politicians, political parties, unions, workers, associations, agitators and/or other individuals and entities to raise their voice and to record their protest / demands / statements generally for their own benefit. In fact, such activities because of the press club are detrimental to the peaceful and relaxing environment of the subject park. Moreover, if it is assumed for the sake of argument that a press club is an amenity / public property, even then it cannot be allowed on a land reserved and earmarked for the use of general public for another amenity like a park or playground. Therefore, the permission, if any, for establishing and constructing the press club, public health and other offices, workshop, maternity home and quarters on the land of the subject public park, was void abinitio. Accordingly, all remaining encroachments on the subject park are liable to be removed forthwith. The Deputy Commissioner Tando Allahyar, present at the time of hearing, had undertaken to remove the remaining encroachments from the subject park within three months.

8. The above are the reasons of the short order announced by us on 18.12.2019, whereby the present petition was allowed with direction to respondent No.2 / Deputy Commissioner Tando Allahyar to remove the remaining encroachments viz. Press Club and Public Health Engineering Office from the subject park within three (03) months from the date of the said order, and to submit compliance report to the Additional Registrar of this Court within fifteen (15) days thereafter. Issue notice to the Chief Secretary, Government of Sindh, to ensure compliance of this order in letter and spirit and to submit his separate compliance report to the Additional Registrar of this Court within the period stipulated above.

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