

ORDER SHEET  
HIGH COURT OF SINDH, CIRCUIT  
COURT, HYDERABAD

**M.A No.88 of 2021**

*(Iqbal Javed & others versus Province of Sindh & others)*

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DATE	ORDER WITH SIGNATURE OF JUDGE
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**Appellants:** Through Barrister Jawad S. Qureshi

**Respondent-10:** Through Mr. Ahmed Nawaz Chang, Advocate  
Mr. Allah Bachayo Soomro, Addl. A.G

**Date of hearing:** 01.11.2021  
**Date of decision:** 01.11.2021

**O R D E R**

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**ADNAN-UL-KARIM MEMON, J:** This Miscellaneous Appeal has been directed against the judgment dated 10.09.2021 passed by learned Anti-Encroachment Tribunal Hyderabad (Tribunal) in Suit No.11 of 2020 [Re: *Muhammad Rizwan Qureshi versus Province of Sindh & Others*], whereby learned Tribunal has decreed the Suit filed by respondent No.8 with directions to official respondents to remove the illegal construction of four shops and clinic over the public property / municipal road.

2. Facts of the matter, in Birdseye view, are that respondent No.8 herein filed the aforesaid Suit before learned Anti-Encroachment Tribunal Hyderabad, alleging therein that his mother got the lease of the house bearing No.249 admeasuring 111 situated at Unit No.2, Sector-D Latifabad Hyderabad from Taluka Municipal Authority, wherein an area of 31 square yards has illegally been occupied by private respondents. Upon notice, private defendants filed their respective written statements whereby they denied the allegations leveled in the plaint. Official respondents have also filed their comprehensive report, thereafter, as mentioned supra, the learned Tribunal decreed the Suit while declaring the private respondents as “Encroachers” and directed to official respondents to remove the illegal encroachment allegedly made on the public road.

3. In the proceedings before learned Tribunal, the Assistant Commissioner, Latifabad, Hyderabad, and Mukhtiarkar Taluka Latifabad, Hyderabad submitted comprehensive report along with an attested photocopy of letter bearing No. SM/714 of 2018 Hyderabad dated: 06-11-2018, attested photocopy of site plane and attested photocopy of letter No. DDOL/L-440 dated: 26-06-2018. The comprehensive joint report of official respondents is as under:

*“In compliance of the notice/summon of this Honorable Court, it is submitted that the plaintiff/applicant has made plea that the defendants No. 8 to 12 viz. Muhammad Kashif, Muhammad Habib Khan, Muhammad Amir, Jawaid and Sami) are influential persons of locality belongs to the political party and also having relation with criminal type of persons and illegally/unlawfully constructed the shop beside the house of the plaintiff and encroached upon the public property/road*

*After perusal of file/papers, it reveals that mentioned in the report bearing No. 714 dated: 06-11-2018 that as per the sketch/site plan in the eastern side of the 60 feet road, duly attested by the T.M.A Hyderabad and further mentioned that the 5 shops illegally constructed by the above-named defendants.*

*The Photocopy of letter No. DDL/440 dated: 26-06-2018, addressed to the father of plaintiff named Muhammad Umar S/o Muhammad Hafiz of Director Land/HMC Hyderabad produced by the plaintiff the second para is produced as under:-*

*“As per survey report it is found that the area whereupon 4 numbers of shops constructed on area 60 feet road area and the clinic is also encroached upon the area 31 sq. yards. Which are the unauthorized and illegally constructed are to be removed at your/their own risk cost and consequences? It is further submitted that the ownership record of the suit property in question is maintained by the Director Land HMC, Latifabad, Hyderabad. Hence it is requested that the Director Land may be directed to submit the ownership title and approved sketch besides, the Director Anti-Encroachment Cell, Latifabad, Hyderabad may also be directed to visit the site and submit the such report regarding encroachment made by the defendants/respondents No. 8 to 12”.*

4. Mr. Jawad S. 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 directed the official respondents to remove the illegal construction of four shops and clinic over the public property/municipal road, which action could

not be taken without hearing the aggrieved party as provided under Article 10-A of the Constitution; that the impugned judgment is against the basic spirit of law thus liable to be set-aside; that 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 property documents and argued that the subject property has been purchased by the appellant through registered sale deed and such entry was incorporated in the record of rights. Learned counsel heavily relied upon Section 14(3) of the Act, 2010 and argued that the subject property pertains to the appellant; that no evidence of the parties has been recorded and the impugned judgment is passed without ascertaining the factual position of the case; that learned Tribunal failed to appreciate the documentary evidence brought on record in favor of the appellant. He lastly prayed for allowing the instant appeal.

5. Conversely, learned AAG has supported the impugned judgment as there is no 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 are correct findings given by the learned trial Court. He lastly prayed for dismissal of the instant Miscellaneous Appeal.

6. I have heard learned counsel for the appellant and learned AAG at considerable length and also reviewed the record available before me.

7. The allegation in the present case against the appellant is the conversion of amenity, reserved for the road to personal use and encroachment thereon. Prima-facie the conversion of an amenity plot and its encroachment is illegal. The encroachment of amenity/road cannot be allowed to sustain under the law. The record reflects that Assistant Commissioner and Mukhtiarkar submitted a report before the learned Tribunal concerning the status of the subject property, 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.

8. To understand the rule position of the case, it is expedient to have a glance at 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 about a dispute that any property is not public property, or that any lease or license in respect of such public property has not been determined, for 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 public property or, that any lease or license in respect of such property has been determined, for 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 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 public property or that any lease or license in respect of such public property has not been determined for this Act. Section 14 (1) provides that Tribunal shall decide any suit or application in such manner and under such procedure as may be prescribed. (2) Any order made by the Tribunal which conclusively determines the rights of the parties about all or any of the matters in controversy shall be final and binding on the parties. (3) The Tribunal shall have the 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.

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

“The Director Anti-Encroachment Cell, HMC Hyderabad also submitted its report mentioning therein that five shops are duly constructed by the private defendants on the municipal road area since last 40 years and also encroached 2 feet belonging to the plaintiff’s house.

“On the other hand, the learned counsels for private defendant No. 08 to 10 remain absent without any intimation, and defendant No. 08 to 10 filed the W/S, which is available on record. The private defendants have filed in their wherein that the suit of the plaintiff is not maintainable and it is hit by various laws. He further stated in their written statement that the defendants are not encroaches but the plaintiff in his personal grudge filed this false suit against the private defendants only to drag them unnecessarily in the litigation. Hence is liable to be dismissed.

Under the foregoing reasons and discussion above, I am of the humble view that the plaintiff has successfully proved his case without a shadow of any doubt and the version of the plaintiff is fully corroborated with the report of the official defendants. Hence, the private defendants are declared as “*Encroachers*” over the municipal road area being public property and the suit of the plaintiff is decreed to the extent of Prayer Clause “A” with no order as to costs. The authorized officer Assistant Commissioner Taluka Latifabad and Mukhtiarkar Revenue, Taluka Latifabad, are hereby directed to remove the eastern side area (60-0 feet) illegal construction of 04 shops made by private defendant No. 08 to 10 and 11, namely (i) Muhammad Habib, (ii) Muhammad Kashif (iii) Muhammad Amir and (iv) Muhammad Sami and clinic are also illegal encroached / illegal constructed made by private defendant No.12 namely Dr. Javaid upon the area 31-0 Sq-yards, un-authorized and illegally construction/encroachment, upon the public property / municipal road area and removed the all illegal encroachment /illegal construction of 04 shops as well as clinic made by the aforesaid private defendants.

Let the copy of this Judgment the sent through the Deputy Commissioner / Ex-officio, Director Anti-Encroachment Cell, District Hyderabad with the issue the specific direction to the Assistant commission / authorized officer U/S 3 Sub-Section 03 of the act ibid, Taluka Latifabad, District Hyderabad and Mukhtiarkar (Revenue) Taluka Latifabad, District Hyderabad, for strict compliance within (15 days) and submit the schedule for drive operation for removal of encroachment from illegal construction of the 04 shops and clinic over the public property / municipal road area, with the intimation to this Tribunal / Court.”

10. In my view the issue of conversion of an amenity/road into personal use had already been discussed and adjudicated by the Honorable Supreme Court in its various judgments and it was held that conversion of an amenity is illegal. The encroachment of amenity cannot be allowed to sustain under the law, which aspect, the official respondents have to look into and restore its position under the law. The encroachment of an amenity/road 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.

11. 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 Honorable Supreme Court in the removal of encroachment of public property cases.

12. In the light of the decision rendered by the Honorable Supreme Court in the recent case of Nasla Tower (CRP No. 55-K of 2021) dated 25.10.2021 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 Honorable Supreme Court passed in the cases of removal of encroachment of amenity /road / public properties from its illegal occupants.

13. In view of the foregoing no case for indulgence of this court is made application. Accordingly this Miscellaneous Appeal is dismissed with no order as to costs.

J U D G E

Sajjad Ali Jessar