IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 694 of 2008
Barrett Hodgson Pakistan (Pvt.) Ltd. & another
Versus
Pakistan Refinery Limited & others

A N D

Suit No.1063 of 2008
Pakistan Refinery Limited
Versus
Barrett Hodgson Pakistan (Pvt.) Ltd. & another

BEFORE:

Mr. Muhammad Shafi Siddiqui,J

Date of Hearing:	19.11.2014
Plaintiff:	Through Mr. Zahid F. Ebrahim Advocate along with Mr. Liaquat Hussain Advocate.
Defendant No.1:	Through Mr. Raashid Anwar Advocate.
Defendant No.2:	Through Ms. Farkhanda Mangi, State counsel.
Defendant No.3:	Through Syed Qamarul Hassan, Standing Counsel

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These are two suits involving the construction of a school on a piece of land in Deh Dih Karachi admeasuring 6 acres hereinafter referred to as the said plot. The leading suit is Suit No. 694/2008.

2. Brief facts of the case are that the defendant No.2 for the purpose of establishing a school of international standard on 21.3.2006 has leased out the said plot in favour of the plaintiff. Defendant No.1 is a national refinery called Pakistan Refinery Limited, a private limited company. It is claimed that the plaintiff started work of construction and has invested substantial amount. The dispute appears to have

started when plaintiff on 08.8.2007 wrote a letter to the Executive officer, Korangi Creak pointing out that the defendant No.1 in pursuit of their business discharging waste products in open land which is detrimental to the lives and has created problem in the construction which complaint was sent and the defendant No.1 undertook to take appropriate measures. This was followed by a letter dated 23.4.2008 from defendant No.1 to the plaintiff where the defendant No.1 informed that it being a Key Point 1-A Installation therefore, in terms of Rule 10 of the Civil Defence (Special Powers) Rules, 1951 hereinafter referred to as "the Rules, 1951", no construction can take place within 200 yards of defendant's installation therefore, they were asked to stop installation/ construction immediately hence the instant leading suit is filed. Similarly defendant No.1 has also filed the connected suit against the plaintiff on the ground that it being classified as Key Point Installation, no construction of the nature as has been raised can be allowed. It is the case of the plaintiff that defendant No.1 being public limited company is owned and controlled by oil marketing companies and operates a refinery on a 200 acres plot which is in the same vicinity as that of the subject plot and separated by a 200 feet wide public road.

3. Plaintiffs No.1 & 2 pleaded to have constructed a school of international standard purely on non-profit basis. It appears that the construction started in the year 2004. Plaintiff claims that the defendant's reliance upon Rule 10 of the Rules, 1951 is belated grievance. It is the case of the plaintiff that there are numerous plots adjacent to the defendant No.1's plot such as site for Civil Officers Cooperative Housing Society etc. but none of them have been targeted. It is claimed that the construction was duly approved by the concerned authorities and this letter of 23.4.2008 was nothing but a counter blast of the earlier complaint against the defendant No.1 in terms whereof they were asked to make arrangement for the discharge of their waste products. It is the case of the plaintiff that they have applied for

permission to the Home Department, Government of Sindh on 06.5.2008 as a lay-out and material of the said school was in no way affecting the security of defendant No.1 or persons using facilities of defendant No.1.

4. As against this claim the defendant No.1 filed its written statement and has denied the contents. It is claimed that no cause of action has accrued to the plaintiff for filing this suit. It is claimed that the plaintiffs have come to the Court with unclean hands as they have acquired the land fraudulently claiming before the Sindh Government that they were affiliated with the world's famous school. It is contended that Pakistan Refinery Limited (PRL) is a Key Point 1-A Installation and no construction would be allowed within 200 yards without approval from the Key Point Intelligence Division hereinafter referred to as the KPID. It is claimed that starting point for the measurement of minimum distance of 200 yards should be measured from the fuel tanks. It is claimed that PRL found about such school when international consultants started survey and they refused the PRL Project on the ground that school is constructed next to refinery and the children's life would be at risk. It is claimed that such up gradation is required since the Government is trying to reduce sulphur contents as the same causes serious hazard to the health of general public when fumes are emitted by cars and as such up gradation is inevitable and certain relaxation in the tariff was also promised. Learned Counsel for the defendant No.1 submits that it is not the case of the defendant that no construction should take place within 200 yards, in fact all that is required by the defendant No.1 is that the construction should only take place after its approval by the KPID with regard to its lay-out, material and construction.

5. It is argued that requisite permission as obtained and relied upon is not in accordance with law. It is claimed that in terms of Ex-6 it is established that the school is within prohibited zone and downgrading is required to category 1-B whereas in response thereto KPID vide letter

dated 07.10.2008 asked the survey team to carry out the inspection and give its recommendations which survey team in terms of Ex-D/22 declined the downgrading of the refinery. It is further contended that the delegation of powers under Rules, 1951 to the Sindh Government is incorrect as such delegation of power does not denude the delegator's powers to act itself and that there was nothing to prevent Federal Government from taking out 1992 directives. It is claimed that since NOC itself provides that recipients must comply with the Rule 10 of 1951 Rules, therefore, it could not be considered to be an NOC as the condition was imposed. It is only requirement of the Federal Government which needs to be complied with. It is claimed that the approval can only be granted by KPID and any other authority in this regard is irrelevant. It is further contended that the said permission of Government of Sindh cannot be considered as valid, it is necessary under Rule 10 of the Rules 1951 that the NOC issuing authority must have examined the building plans, material, etc. and should have concluded that those are adequate for providing protection to the persons using the facilities. Learned Counsel submits that they have not challenged the subject NOC of Government of Sindh in view of pendency of the suit and since the matter is subjudiced therefore, it was not necessary to file a fresh suit. Lastly it is claimed that if the plaintiffs are allowed to continue with their construction and operation of the school then it will be held responsible for any further loss.

6. On the basis of the pleadings two suits were consolidated and Suit No. 694/2008 was considered as a leading suit in terms of the order dated 24.12.2009. Following are the consolidated issues:

1. *Whether the defendant No.1 (Plaintiff in Suit No. 1063 of 2008) is a Key Point Installation 1-A and if so what is the effect?*

2. *Whether the Plaintiffs (Defendants No.1 and 2 in Suit No. 1063 of 2008) are entitled to construct and operate school without the prior permission of the Key Point Intelligence Division, ISI?*

3. *Whether the Plaintiffs (Defendants No.1 and 2 in Suit No. 1063 of 2008) have obtained the requisite permission under Rule 10 of the Civil Defence Special Power Rules and/or the Directive of the Federal Government issued on 30.04.1992?*

4. *What is the effect of the Federal Inspection Team in the Office Memorandum of the Acting Director, Civil Defence, Ministry of Interior dated 13.01.2009 and whether it constitutes a valid permission under Rule 10 and/or the Directive issues thereunder?*

5. *What is the effect the N.O.C granted by the Civil Defence Directorate, Home Department, Government of Sindh dated 24.01.2009 to the (Plaintiff in Suit No. 1063 of 2008) in Suit No.694/2008 and whether it constitutes a valid permission under Rule 10 and/or the Directive issued thereunder?*

6. *Whether the construction and operation of the School by the (Plaintiff in Suit No. 1063 of 2008) will pose a security risk to the persons using the school and/or the Refinery of Defendant No.1(Plaintiff in Suit No.1063 of 2008) and/or the intervening space?*

7. *Whether in the event of a terrorist attack on the Refinery of Defendant No.1(Plaintiff in Suit No.1063 of 2008) because of the inflammable material lying in the oil tanks and/or otherwise there will not be a risk to persons therein or nearby or on the adjoining road?*

8. *Whether the Federal Government has issued directives to the Defendant No.1 (Plaintiff in Suit No.1063 of 2008) to upgrade its refinery for the benefit of the general public?*

9. *What should the decree be?*

7. The parties further agreed not to adduce oral evidence and that both the suits be decided on the basis of documents. The procedure of admission and denial of documents was exercised and documents were exhibited. The crucial issue that goes to the heart of the case is the interpretation and applicability of Rule 10 of the Rules 1951 and directives of 30.04.1992.

8. I have heard the learned counsel and with their assistance perused the material available on record and so also the provision of law relied upon by the learned counsel. My findings on the above issues with reasons are as under:-

FINDINGS

Issue No.1	:	*Affirmative*
Issue No.2	:	*Affirmative*
Issue No.3	:	*Answered accordingly*
Issue No.4	:	*Answered accordingly*
Issue No.5	:	*First part/point accordingly, second part/point affirmative*
Issue No.6	:	*Answered accordingly*
Issue No.7	:	*Answered accordingly*
Issue No.8	:	*Answered accordingly*
Issue No.9	:	*Suit No.694/2008 decreed to the extent of prayer "A" only Suit No.1063/2008 dismissed.*

REASONS

Issue No1:

9. With regard to considering Pakistan Refinery Limited as a Key Point Installation, although nothing seriously addressed by both the learned counsel as to its origin and/or how and in what manner it is considered or prescribed to be Key Point Installation 1-A. However, I have perused the record as well as Rules 1951. Rule 12 Sub rule 5 of such rules provides and defines "Key Point" as under:-

> *"Key point means any public utility undertaken or other structure, installation or establishment of such vital importance that if it is destroyed or damaged it may impair the national war effort, and which has been accepted as a key point allotted a number and placed in a category by the Federal Government."*

10. In the light of such definition when the documents exhibited are perused, there are a number of documents which provide that this Installation has been prescribed and allotted a number i.e. 1152-1A Pakistan Refinery Limited Karachi.

11. One of the survey that has been conducted by FIT provides that one fuel tank is very close to the boundary wall of land from where defendant No.1 operates, though it was not functioning at the time of inspection. Similarly the recommendations from category of Key Point Installation 1-A to category of Key Point 1-B, in view of the facts and

circumstances of the case, also emphasized that the defendant No.1 has always been a Key Point Installation 1-A. A letter issued by the Key Point Installation Division also provides that Pakistan Refinery Limited is a Key Point Installation and being numbered 1152-1A since 1965.

12. It is also not the case of the plaintiff that such installation i.e. Pakistan Refinery Limited is not the key point installation however all that has been argued was that the entire 200 acres of land cannot be considered as a Key Point Installation hence the designation of Key Point Installation should not have been an issue. Only point that requires consideration is as to what part of 200 acres be considered as Key-Point Installation 1-A. The plaintiff in these proceedings has not really challenged the defendant No.1 as being designated as a Key Point Installation 1-A, but has emphasized that the measurement of the prescribed and prohibited area should not be made from the boundary wall but should be from the place where in fact such installation is available. I am afraid even that has not been demonstrated or established by plaintiff. As far as the survey report is concerned the plaintiff has not rebutted the same in which it has been established that one of the fuel tanks is available near or adjacent to the boundary wall. The reason that it being considered as a Key Point Installation is certainly on account of its utility and on account of its inflammable category and I am inclined to say that in the absence of any layout plan, Pakistan Refinery Limited, is to be considered in its entirety as Key Point Installation rather than to divide it in piecemeal. However these findings are only on the basis of material available on record.

13. However in my view there has to be some site plan as to where such fuel tanks are to be provided and such plans are required to be considered keeping in view the requirement of rules in terms of Rule 51 and directives and such distance cannot and should not be consumed from adjacent land if at all such distance is the requirement of law/rules. Land of 200 acres is provided to them to consume all kinds of

safety measures including any distance “if” required to be maintained. However, such would not affect the entire area to be considered as Kye Point Installation. It is only for safety measures. The plea should be in such way that it should cater all safety measures within itself rather than putting restrictions on others property and that too by someone who is not the lessor. Thus, it appears that defendant No.1 is in fact a Key Point Installation 1-A however its effects, as being a Key Point Installation 1-A, are summarized in the findings of the following issues. The issue is thus answered in affirmative.

Issues No.2, 3 and 4:-

14. Issue No.2 pertains to a very crucial and critical point which in fact would decide the crux of the matter. I have also perused the other two connected issues i.e. Issue No.3 and 4 and it appears to me that these issues somehow one way or the other interlinked with each other. Therefore, I will deal with these three issues simultaneously.

15. In order to understand the scheme of Rules 1951 it is necessary that the Civil Defence Act 1952 should also be perused. The Civil Defence (Special Powers) Rules 1951 were framed under Ordinance VI of 1951 as modified however after repeal of Ordinance 1951 the subject rules were framed/adopted in terms of section 10(2) of the Civil Defence Act, 1952 in the following manner:

> *"Every point, order or rule made under Civil Defence (Special Powers) Ordinance, 1951, and maintained in force under Civil Defence Ordinance 1951, shall if in force immediately before commencement of this Act, and so far as it is not inconsistent with the provisions of this Act, be deemed to have made under the provisions of this Act, and have effect accordingly subject to the provisions of this Act."*

Rule 10 of Civil Defence (Special Powers) Ordinance 1951 provides restrictions as under:-

"10. Security of buildings.- (1) The Federal Government or the Provincial Government may by order, as respects any area specified in the order, provide for securing that, subject to any exemptions for which provision may be made in the order, no building or on building of such class as may be specified in the order, shall be erected, extended or structurally altered except with the permission of that Government and in accordance with such requirements as to layout, materials and construction as that Government may impose being requirements which if is in the opinion of that Government necessary to impose for the purpose of rendering the building more secure or of affording better protection to persons using or resorting to it;

(2) If any person contravenes any of the provisions of an order made under this Rule, he shall be punishable with imprisonment for term which may extend to three years, or with fine, or with both."

16. In order to understand the points more clearly it is necessary that all such definitions of key point and vulnerable points shall also be defined which are reproduced as under:-

"Key Point:

All those installations in public as well as private sector which are considered essential to the normal working of the economy as the destruction of which is likely to cause severe impairment of the National war effort in a period of hostility.

A. CATEGORIES OF AND THREATS TO KEY POINTS

Key Points and vulnerable points

1. ***Key points** are those structures, installations, factories or other establishments which are of vital importance to the country in its readiness and ability to fight a war and in the event of whose destruction or severe damage, the loss would impair the vital national war effort.*
2. *The **Vulnerable Point (VP)** of a key point is the most sensitive part or portion of the installation which, if destroyed or damaged, would either badly affect the functioning of the installation or make it totally unserviceable."*

17. Thus, the above when read together provides that the application of rule 51 within the specified area of the Key Point Installation is for the safety of such installation and as such it is to be seen from the view

point as to what lay-out and material is being used. There is nothing like prohibited area, its only specified area as mentioned n the subject rules.

18. Rule 10 has been framed in such a way that it caters for both safety of installation and/or the building, which is to be raised within the specified area. A closer look of Rule 10 does not prohibit the construction; the emphasize is that the lay-out and material of the building within the specified area to be more secured and in this regard requires permission of the concerned government. In the instant case the defendants have not defined as to how such threats are being imposed on the Key Point Installation by constructing a school since defendant No.1 has not pointed out anything about lay-out and material. Thus, when the bar of raising construction is not an absolute, the construction of school under no stretch of imagination could be a threat and required to be stopped. The subject rules cater for the material and layout and it is nowhere the case of the defendant No.1 that the material and the layout plan are such that provides threat to such Key Point Installation. Thus, where the cause which is a threat on the Key Point Installation is out of lay-out and material this is in fact a cause of action for the defendant No.1 which threat is not at all demonstrated but in fact it only purports to be a dictate and command of the defendant No.1.

19. It may also be pertinent to note that it is not a case which is to be seen within the parameter of Rule 10. It is very important at this point of time that defendant No.1 all along the period of construction were quiet and only on account of the complaint of the plaintiff, which was with regard to the discharge of hazardous waste, that the defendant No.1 has come up with this novel idea of restraining the plaintiff from such construction without defining that such layout and material in fact is a threat in the maintaining of such Key Point Installation.

20. In order to decide these issues, two documents are very crucial to determine the controversy involved in the suit i.e. a letter of 30.04.1992 and the NOC issued by the Government of Sindh, Home Department, Civil Defence Directorate (Ex. P/3 and P/9). The letter relied upon by learned counsel for the defendant dated 30.04.1992 provides that the provincial governments were requested to issue necessary directions to all the concerned departments to ensure implementation of the law. The No Objection Certificate provides approval subject to strict observance of Rule 10 of Civil Defence (Special Powers) Rules 1951 as to the extent of secured material and non-combustible, non-toxic items. Thus Rule 10 does not prohibit construction of building and so also no letter relied upon/exhibited by the defendants restrict construction of any building within the specified area; all that has been emphasized was the use of material and lay-out.

21. It is pertinent to point out here that it is nowhere the case of the defendants that the material, as was used by the plaintiff, was posing threat to the security and maintenance of the Key Point Installation. The defendants in their connected suit bearing No.1063 of 2008 have also prayed that the construction of school building on the said plot is illegal and unlawful, which I am afraid is not the mandate of either Rule 10 of 1951 or Act itself. I would leave the viries of Rule 10 of 1951 to be determined in some other case as to whether Rule 10 of Rules 1951 is within the domain and orbit of 1952 Act as the counsels have not argued on this aspect.

22. Rule 10 of Rule 1951 is an enabling provision for the concerned government. Such rule provides that either federal government or the provincial government, as the case may be, may by an order in respect of an area specified therein provide for securing that no building or building of such class, as may be specified in the order, shall be erected, extended or structurally altered except with the permission of that government as to lay out, material and construction. Thus, the words

"*area specified*" does not and cannot be extended to restrain any adjacent land owner from raising construction in accordance with law. The word "area specified" in Rule 10 means the key-point such as 1-A etc. It is this area which is to be specified in the order to secure such area; either it may be point installation 1-A or 1-B, the concerned government may it be federal or provincial provide for securing such area that no building of such class as may be specified in the order referred above be erected without permission of that government unless that government gives permission with regard to its layout material and construction. Firstly the government has not specified in any order regarding class of building to be built in the specified area and rightly so as it cannot be prohibited under Rule 10 of Rules 51. Thus Rule 10 enables the concerned government to impose restrictions as to layout, material and construction as the concerned government may deem fit and appropriate but as far as the decision of the Ministry of Interior dated 30.04.1992 is concerned, it exceeds to limits of Rule 10 and provide that no structure shall be permitted to be constructed within the distances as mentioned in the said letter unless it is cleared by the Key Point Intelligence Division. Thus, such permission with regard to layout materials and construction vest with the provincial government in the present case and not with the Key Point Intelligence Division as mentioned in letter dated 30.04.1992 which apparently is beyond the scope of Rule 10.

23. It may further be pointed out that when the land in question belongs to Government of Sindh and not Federal Government, any restriction with regard to the land in question which is owned by the provincial government could only be imposed by the owner/lessor i.e. Government of Sindh, therefore, such Rule 10 is also to be seen from such perspective. Hence, in my view there is no violation of directives of the Federal Government dated 30.04.1992 which itself exceeds to limits prescribed by Rule 10 of Rules 51 and any inspection with regard to the

upgradation/degradation of the Refinery would not create any impact on the construction. Thus, issue No.2 to 4 are answered accordingly.

Issue No.5

24. This issue deals with the NOC given by the Civil Defence Director, Home Department, Government of Sindh, dated 24.01.2009. It appears that the Federal Government has delegated its power to the province under section 9 of the Civil Defence (Special Powers) Ordinance 1951 through notification No.5-1-50/CDI. Although the matter should come to an end after such delegation of powers however counsel for the defendants submitted that the principal could still for all time to come agitate and take stand despite exercise of such powers after it being delegated to provincial government. I may say that such powers appears to have been delegated under the law and acted upon and it cannot be said that the Civil Defence Directorate (Province of Sindh) had no authority to examine the issue. It is also not pointed out that while exercising such powers Rule 10 or any law in this regard was violated. Hence, in my view under the powers delegated as referred above it forms a valid NOC which of course was considered in pursuance of Rule 10 of Rules 1951. Hence the first part of the issue is decided accordingly and second part in affirmative.

Issue No.6

25. This issue deals with the construction and operation of the school as commenced by the plaintiff. It deals with alleged risk to the persons using the school and/or refinery of defendant No.1. It is pertinent to point out that a number of societies are in existence in the adjoining locality but for the purposes of deciding this issue, it is very relevant that Rule 10 of 1951 Rules should be minutely observed as it prescribes for the lay-out and material but not the construction itself.

26. As explained above that it is not the case of the defendants that the use of layout material or construction will pose a security risk to the

person. In fact what they have prayed is that there should be no school at all which is beyond the mandate of law. It appears that the defendants are asking for something extra than what is prescribed and guaranteed by law. Of course when such permission was granted by the Government of Sindh, Home Department, Civil Defence Directorate, they would have every right to inspect the premises for strict observance of Rule 10 however the construction of school itself will not pose security risk to the person using school or the refinery of defendant No.1. If all such kind of constructions are allowed to be objected in the manner as demonstrated by defendant then no construction of any nature could be raised in the vicinity of refinery which would in fact be a curtailment of fundamental right as far as use and utility of a property as guaranteed under Article 23 of the Constitution is concerned. It is for defendant No.1 to decide from where they are operating. The issue is answered accordingly.

Issue No.7

27. This issue deals with an imaginary incidents of terrorist attack on refinery of the defendant No.1. It is the case of the defendants and is argued that in case of terrorist attack on the refinery it will be a risk for the persons therein and on the adjoining road. It seems to be a very funny proposition that the defendants in order to secure the adjacent land owner are more adamant to put an embargo on their land rather to provide security and safety for their own refinery. Their plot/boundary abuts on main road, so, should they be imposing some kind of restriction for the travellers? In fact in my opinion such parameter or restriction of 200 yards or thereabout or of any nature is to be provided by all such Key Point Installations; no matter where there are, as such restriction could not be imposed to the adjoining land owners who have every right to utilize and construct there property in accordance with law subject to the conditions laid down and prescribed by the land owner/lessor i.e. the provincial governments and/or federal government as the case may

be. No doubt such terrorist attack on the refinery will create a risk to persons working in the refinery as well as the adjoining road but then such terrorist attacks have no boundaries and no restrictions, therefore, for some imaginary thoughts that there might be some terrorist attack the restrictions as to construction to the adjoining land owners cannot be imposed. Hence in my view the issue is not really the one which could supersede the law. If law permits, such construction cannot be stopped. Hence it is answered accordingly.

Issue No.8

28. In view of reasoning and findings on above issues any directive of the Federal Government to upgrade its refinery be it for general public or otherwise would not be a cause to restrict the usage and rights of adjacent owners. However, as against the wordings of issue framed, such up gradation also meant for personal gain as the government has promised relaxation/discount in the tariff rate. The issue is thus answered accordingly.

Issue No.9

29. In view of the above, Suit No.694 of 2008 is decreed to the extent of prayer "A" whereas the plaintiff could not prove the claim of damages hence the prayer "B" is declined while Suit No.1063 of 2008 is dismissed with no orders as to costs.

Dated: **Judge**