

IN THE HIGH COURT OF SINDH KARACHI

Constitutional Petition No. D – 1883 of 2017

Before:

Mr. Justice Nadeem Akhtar

Mr. Justice Fahim Ahmed Siddiqui

Petitioner : M/S Sultan Mahmood & Co.,
through Mr. Saim Hashmi Advocate.

Respondent No.1 : Cantonment Board Clifton, through
Mr. Sohail H. K. Rana Advocate
a/w Arfeen Zubair Chaudhry, Addl. CEO CBC and
Rao Nadeem Ahmed, Law Officer CBC.

Respondent No.2 : Project Department, Local Government, Government
of Sindh, through Abdur Rahman Shaikh, Project
Manager.

Date of hearing : 28.03.2017.

J U D G M E N T

NADEEM AKHTAR, J. – Through this Constitutional Petition, the petitioner has prayed for a declaration that cancellation letter dated 16.02.2017 issued by respondent No.1 / Cantonment Board Clifton whereby permission granted to the petitioner to occupy the subject playground has been cancelled, be declared as void ; and, the respondents be restrained from taking any coercive action against the petitioner for vacating the subject playground. The main questions involved in this petition are (a) whether Cantonment Board Clifton has any power, authority or jurisdiction to grant permission to change the land use of a playground in its jurisdiction for storing and dumping construction material, machinery, equipment, etc. and for parking of dumpers and heavy vehicles, and to hand over possession of the playground to a third party ; and (b) whether possession of the third party in respect of the playground in pursuance of such permission is legal or not.

2. Relevant facts of the case, as averred in the petition, are that vide agreement dated 26.01.2017, the petitioner was awarded a contract by respondent No.2 / Government of Sindh for ‘Construction of Underpass at Submarine Chowrangi Karachi’ (**‘the project’**). At the request of the petitioner, on 23.01.2017 respondent No.2 sought permission of respondent No.1 / Cantonment Board Clifton (**‘CBC’**) for provision of space for storing construction material, plant, machinery, equipment, etc. for the project. On 16.02.2017

(inadvertently mentioned as 16.02.2016 in paragraph 21 of the petition), respondent No.1 granted permission to take over possession of Muhammadan Playground, Punjab Colony, Khayaban-e-Jami (**'playground'**) on temporary basis for the above purpose subject to the terms and conditions stipulated therein. The petitioner started utilizing the playground with effect from 21.02.2017, and gave a written undertaking dated 28.02.2017 to respondent No.1 that upon completion of the project the playground will be cleared and restored to its original condition. On 22.03.2017, the petitioner received the impugned letter from respondent No.1 whereby permission of temporary possession of the playground was cancelled on the ground that respondent No.1 had been directed by this Court vide order dated 22.03.2017 to ensure that the playground is vacated within three (03) days and thereafter to restore it in original condition. Being aggrieved with the impugned letter of cancellation, the petitioner has filed this petition with the prayer noted above.

3. It may be noted that the aforesaid order dated 22.03.2017 was passed by this Court in Constitutional Petition No.D-1412/2017 filed by Muhammad Aqeel Asim and 2 others against present respondent No.1 / CBC, wherein illegal occupation of and construction on the subject playground was challenged on the ground that the playground is an amenity plot reserved exclusively for sports activities. Photographs were filed in the said petition showing sports activities on the playground in full swing before its illegal occupation and illegal construction thereon. Photographs were are filed in order to show the destruction and encroachment on the playground at the time of filing the aforesaid petition showing number of dumpers and other heavy vehicles parked thereon, construction material and heavy machinery lying thereon and the construction raised thereon. In the aforesaid petition, counsel for CBC and CEO of CBC had stated that the playground will not be allowed to be encroached upon by anyone and construction on the playground whereby it was bifurcated had not been raised by CBC. They had conceded that the contractor had constructed walls on the playground due to which sports activities were not possible. After hearing the parties, the aforesaid petition was allowed in the following terms :

“As a sequel to the above discussion, we are of the considered view that the respondent has no right to allow the destruction of Muhammadan Football Ground situated within the proximation of Punjab Colony, Chandio Village, Gabol Colony and P & T Colony by permitting to use the same for dumping of building and construction material and machinery, erecting bifurcating wall and/or collecting garbage or debris therein. The said playground is meant for the purpose of sports and it cannot be used for any other purpose permanently or temporarily which may hinder the sports activities. We direct the respondent to stop all the unwarranted activities within the said playground and remove all the

construction material, machineries and structure from the said playground and resume its possession within three days. We further direct the respondent to restore Muhammadan Football Ground to its original position and to restore the sports activities as it was continued in the past. The instant petition is allowed in the above terms with no order as to costs."

4. Learned counsel for the petitioner contended that the petitioner is constructing the project which is of public importance and for this purpose proper space was required by the petitioner to store the building material, machinery, equipment, etc. and to park heavy vehicles, and it was the responsibility of respondent No.2 / government to provide the said space to the petitioner. He further contended that possession of the playground was handed over to the petitioner at its request in pursuance of the permission granted by the competent authority / CBC. He also contended that possession of the petitioner is purely temporary and it has no interest whatsoever in or intention of retaining the possession after completion of the project. He stated that the petitioner had submitted a written undertaking to the respondents before taking over possession that the playground will not only be vacated upon completion of the project, but will also be restored to its original condition. Such undertaking was reiterated before us on behalf of the petitioner. It was urged that the petitioner has spent millions of Rupees to mobilize its resources, construction of the project has already commenced and the petitioner is bound under the contract to complete the project within the stipulated period. It was further urged that in case possession of the petitioner in respect of the playground is disturbed or the site for storing construction material and machinery and parking of vehicles is relocated, the petitioner will not be able to complete the project within the stipulated period. It was also urged that in view of the above, the impugned letter issued by respondent No.1 cancelling the permission granted to the petitioner is not justified and is liable to be set aside.

5. At the very outset, learned counsel for respondent No.1 / CBC stated that the impugned letter was issued by the said respondent in compliance of the above-quoted order passed on 22.03.2017 by this Court in C.P. No. D-1412/2017, which order has not been challenged by respondent No.1 or by any other party. He conceded that the playground is an amenity plot reserved exclusively for sports activities and the same has never been used for any other purpose. He contended that permission to use the playground was granted to the petitioner on temporary basis at the request of the government only for storing construction material, machinery, equipment, etc. and parking of heavy vehicles. He further contended that the said permission was granted strictly on the terms and conditions stipulated in the respondent No.1's letter dated 16.02.2017, whereby the petitioner was not allowed to raise any type of

construction on the playground. Counsel for respondent No.1, Additional CEO of respondent No.1 and Project Manager present on behalf of respondent No.2 / government submit that the respondents will abide by the order as may be passed by this Court.

6. Before dealing with the case at hand, we would like to discuss the law laid down by the Hon'ble Supreme Court and this Court in relation to conversion 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. Some of such cases are discussed below in brief :

- 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 an unreported order passed on 05.05.2016 by the Hon'ble Supreme Court in C.P. No.152-K of 2014, it was held inter alia that there is no law which permits KMC, DMC, Cantonment Boards or any other agency in Karachi to install billboards or hoardings on a public property ; such an act on the part of permission granting agency is against the civil rights of the citizens which cannot be hampered by erecting billboards or hoardings on civic amenities meant for the use and benefit of public at large ; and, all the authorities concerned were directed to immediately remove all the billboards and hoardings within their jurisdiction within fifteen (15) days, and not to allow installation of billboards and hoardings on any portion of public place / property in Karachi.
- E. Vide order dated 16.02.2017 passed recently in C.P. No.D-6183/2015 (Mazhar Ali Magsi V/S Province of Sindh and others) and vide judgment dated 08.02.2017 delivered in C.P. No.D-1642/2016 (Muhammad Ashraf and another V/S Faisal Cantonment Board and another), 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.

7. It is now well-settled that 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 the amenity / public property without any obstacle is a fundamental right as enshrined in Article 26 read with Article 9 of the Constitution ; liberty and right of a person to have access to amenity / public property or to utilize and enjoy the same cannot be taken away by converting such amenity into a commercial one for the purpose of extending benefit to a third person ; 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 ; amenity / public property cannot be used for any other purpose than for which it was carved out, earmarked or reserved ; even the

government or the authorities concerned have no right to change the use of an amenity / public property ; functionaries and authorities exercising statutory power are bound to discharge their functions 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, is liable to be removed.

8. Coming back to the present case, it is an admitted position that the playground is an amenity plot / public property which was carved out and reserved specifically for sports activities and has always been used by sportsmen and public exclusively for such purpose. In this view of the matter, the principles laid down in the above cited cases would apply with full force to the present case as well. The petitioner has claimed that respondent No.2 / government was obliged to provide land to the petitioner for storing construction material, equipment, machinery, etc. and to park dumpers and heavy vehicles for the project. However, no such condition is stipulated in the contract. It has also been claimed by the petitioner that at its request permission was granted to it by respondent No.1 to occupy and use the playground for the project. Record shows that the purported temporary permission dated 16.02.2017 was granted by respondent No.1 to respondent No.2 / government and not to the petitioner. In any event, such permission could not be granted by respondent No.1. If it is assumed that permission was sought by or on behalf of the petitioner, even then the fact remains that the petitioner was fully aware at the time of entering into the contract that land would be required, and permission for this purpose was sought by the petitioner in respect of a land knowing fully well that it was a playground. Thus, contention of the learned counsel for the petitioner that temporary possession and use of the playground is in the interest of general public as the project is of public importance, is untenable.

9. In the above mentioned C.P. No.D-1412/2017 filed earlier in respect of the playground, it was held inter alia by this Court vide judgment dated 22.03.2017 that the playground situated in a thickly populated area used to provide opportunity for sports and recreational activities, including cricket, football and hockey, to a significant number of population, and such activities were a delight not only for sportsmen, but also for spectators and local residents ; and, there is already a scarcity of open spaces and playgrounds in Karachi and as such depriving children, young men and players from sports activities would amount to snatching away a thrilling delight from their lives. In view of the above and the statements made in the aforesaid petition by the counsel and CEO of CBC as noted earlier, the said petition was allowed by this

Court by directing CBC to remove all the construction material, machinery and structure from the playground and resume its possession within three days, and to restore it for sports activities. It may be noted that the aforesaid judgment dated 22.03.2017 of a Division Bench of this Court, which admittedly is still in the field, is binding on us. Since the impugned letter of cancellation of permission has been issued by respondent No.1 in compliance of the judgment delivered by this Court in C.P. No.D-1412/2017, the same cannot be called in question or interfered with in these proceedings.

10. In view of the above discussion, we hold that the purported permission granted by respondent No.1, whereby possession of the playground was handed over to the petitioner and use of the playground was allowed to be changed for storing construction material, equipment, machinery, etc. and parking dumpers and heavy vehicles, was void ab initio, and the petitioner's possession of the playground pursuant to such void permission was/is illegal. If the petitioner is still in possession of the playground or any part thereof, respondent No.1 / CBC shall immediately take over possession and shall restore the playground forthwith to its original condition failing which its officers shall expose themselves to disciplinary action as held by the Hon'ble Supreme Court in Moulvi Iqbal Haider supra.

Foregoing are the reasons of the short order announced by us on 28.03.2017 whereby this petition and stay application filed by the petitioner were dismissed with no order as to costs.

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