

ORDER SHEET

IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA

Constitutional Petition No. D – 440 of 2010

1. For orders on office objection.
2. For Katcha Peshi.
3. For orders on M.A. No. 1051/2010.
4. For orders on M.A. No. 3211/2012.

Date of hearing : 03.10.2012.

Mr. Rashid Mustafa Solangi, Advocate for the petitioner.

Mr. Imtiaz Ahmed Soomro, A.A.G. assisted by Mr. Ali Raza Pathan, State Counsel, along with Mr. Abdul Ghafoor Soomro, Executive Engineer, Larkana Drainage Division, Larkana / respondent No.1.

Mr. Muhammad Ashique Dhamraho, Advocate for respondent No.3.

Nadeem Akhtar, J. : This petition has been filed by the petitioner in respect of the drainage Wah / Nala of Larkana City and the open land along with the said Nala left as green belt for plantation of trees.

2. The petitioner has stated in his petition that a land measuring 5.11 acres in Deh Wah Nabi Tapo Bakapur is owned by him and other co-owners, which has been inherited by them from their late father. The petitioner has further stated that he wanted to establish a residential colony / housing township on the said land in the name of his late father, and for such purpose, he applied to the concerned authorities for approval of lay out plan which was duly approved. Thereafter, the petitioner constructed a building / house on the said land as per the approved plan. The petitioner has further stated that as per the approved plan Moen Jo Daro Airport Road is opposite to petitioner's Gul Rind Township Scheme, drainage Wah / Nala is parallel to the said road, and lot of space has been left open between the aforementioned Township and Wah / Nala as a green belt for plantation and aesthetic beauty. It has been further stated by the petitioner that the said Wah / Nala is being used not only by the local inhabitants as a drain, but the same is also being used since long as the main drainage for the entire Larkana City. The said existing drainage Wah / Nala was constructed long time back below the ground level for easy, quick and regular drainage of water in the season of monsoon and floods.

3. It is the case of the petitioner that recently the National Highway Authority started constructing Moen Jo Daro road opposite to petitioner's

Township, and during such exercise, the Project Director of National Highway Authority (respondent No.2) wrote a letter dated 22.02.2010 to the Executive Engineer Irrigation / Drainage, Larkana (respondent No.1), to construct the said drainage Wah / Nala at the outer edge and parallel to the service road. It was also mentioned in the said letter that land mafia will encroach upon the open space between the said Wah / Nala and the service road if the above suggestion was not accepted. The petitioner has pointed out that in the sketch prepared and suggested by the National Highway Authority, 20.40 meters wide dual road and 3.60 meters wide service road have been shown parallel to the existing drainage Wah / Nala and the proposed new Nala, and then petitioner's Township has also been shown. The petitioner has contended that the original lay out plan as well as the sketch / plan proposed by National Highway Authority clearly show that the drainage Wah / Nala is close to the road and a lot of space is left for petitioner's Township to be used as a green belt for plantation of trees in order to provide aesthetic beauty and good and healthy environment.

4. The petitioner has submitted that his brother / one of the co-owners of the land in question moved an application to the Director General Environmental Protection Agency for taking immediate action for prevention of serious diseases spreading due to filthy water drainage. It is the case of the petitioner that in response to the said complaint, a team of Environmental Protection Agency visited the site and made many observations, such as, the treatment plant was not in working condition ; water of the affected drain was highly polluted and contaminated as sewerage, municipal and solid waste was found mixed therein ; and colonies of mosquitos and larvae were observed in the drainage water. After the above inspection and observations, the said team recommended that lining and protective cover should be constructed on the drain immediately in order to avoid pollution and contamination ; that treatment plant of TMA should be in proper working condition ; and that discharge of sewerage water and other dangerous municipal and solid waste in the drain should be stopped immediately.

5. The petitioner has alleged that respondents 1 and 3, in collusion with one another, are trying to construct a new Nala which is contrary to the approved plan and the proposal given by the National Highway Authority, as the same is being constructed very close to petitioner's house and township without any approval, map or feasibility report. Not only this, the height of the new Nala is about 10 to 12 feet and the same is above the ground level of the township and the entire vicinity which shall

cause serious and dangerous situation for the entire vicinity. It has been further alleged by the petitioner that such illegal actions are being taken by the respondents at the instance of land grabbers and encroachers so that they may encroach upon the space left open for green belt and plantation of trees. The petitioner has asserted that the said purported actions of the respondents are collusive, malafide and illegal.

6. In the above background, the petitioner has prayed *inter alia* that the aforementioned actions of the respondents be declared as illegal and void *ab initio* ; respondents 1 and 3 be directed to stop constructing the illegal and unauthorized new Nala ; respondents 1 and 3 be directed to construct drainage Wah / Nala as per the original and approved plan and as proposed by the National Highway Authority ; respondents 1 and 3 be directed to cover the drainage Wah / Nala passing through Larkana City area ; and TMA / respondent No.3 be directed not to construct new Nala on such open area touching petitioner's township which has been earmarked and has been shown and left open in the original / approved plan as green belt for plantation of trees, and to leave entire such area open / available for the said purpose. The applications listed for orders have been filed by the petitioner for passing of interim orders to the above effect.

7. Mr. Rashid Mustafa Solangi, learned counsel for the petitioner, submitted that respondents 1, 3 and 4 have acted in an extremely irresponsible and arbitrary manner, and that the impugned actions taken by them are malafide which have seriously prejudiced not only the petitioner, but also all the people living in the vicinity in question. He further submitted that the said respondents have not performed their duties and functions in accordance with law and have in fact taken such actions which are not expected from public functionaries. The learned counsel also contended that the petitioner and the people living in the vicinity in question have every right to protect their valuable rights by stopping the said respondents from constructing unauthorized and illegal Nala which, if allowed to be constructed, shall not only be a continuous and serious threat and hazard to their lives and properties, but will also facilitate encroachers / land mafia to illegally occupy the open land earmarked as green belt for plantation of trees. He submitted that aesthetic beauty and environment of the entire vicinity shall be permanently and irrevocably spoiled if the impugned actions are not stopped immediately. In support of his submissions, learned counsel for

the petitioner cited and relied upon the following two single Bench reported cases of Lahore High Court :

A. **2003 CLC 576** :

Muhammad Yousaf V/S Province of the Punjab, through Secretary Local Government and 6 others.

In the above cited case, the site in question, which was located in the vicinity of the city, was being used by Municipal Corporation City District Government for dumping solid waste full of dirty material spreading various diseases resulting into deaths of hundreds of people. The petition was treated as a public interest litigation, and it was held *inter alia* by the learned single Judge that people of the said locality being citizens of the country were entitled to equal protection of law ; that pollution is the form of slow poisoning ; that it was the duty of the City District Government to redress grievance of people ; and that each and every citizen, authority, body and public functionary must discharge its responsibility. We hereby approve the above case as the situation therein was similar to the facts and circumstances of the present case, and also as findings of the learned single judge are based on sound and settled principles of law and natural justice.

B. **PLD 2007 Lahore 403** :

Syed Mansoor Ali Shah and 4 others V/S Government of Punjab, through Housing, Physical and Environmental Planning Department, and 3 others.

In the above noted case, the learned single judge has discussed and followed the case of Ms. Shehla Zia V/S WAPDA reported as **PLD 1994 Supreme Court 693**, wherein the Hon'ble Supreme Court was pleased to hold as under :-

“Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word ‘life’ is very significant as it covers all facts of human existence. The word ‘life’ has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally. For the purposes of the present controversy suffice to say that a person is entitled to protection of law from being exposed to hazards of electromagnetic fields or any other hazards which may be

*due to installation and construction of any grid station, any factory, power station or such like installations. **Under the common law a person whose right of easement, property or health is adversely affected by any act of omission or commission of a third person in the neighbour-hood or at a far-off place, he is entitled to seek an injunction and also claim damages, but the Constitutional rights are higher than the legal rights conferred by law be it municipal law or the common law. Such a danger as depicted, the possibility of which cannot be excluded, is bound to affect a large number of people who may suffer from it unknowingly because of lack of awareness, information and education and also because such sufferance is silent and fatal and most of the people who would be residing near, under or at a dangerous distance of the grid station or such installation do not know that they are facing any risk or are likely to suffer by such risk. Therefore, Article 184 can be invoked because a large number of citizens throughout the country cannot make such representation and may not like to make it due to ignorance, poverty and disability. Only some conscientious citizens aware of their rights and the possibility of danger come forward and this has happened so in the present case.*** (Emphasis added)

The aforementioned case before the Hon'ble Supreme Court was in respect of construction and installation of a grid station in a residential area due to which local residents of that area were being affected. In the present case, public at large is being affected because water of the drainage Wah / Nala is highly polluted and contaminated as sewerage, municipal and solid waste and colonies of mosquitos and larvae have been found therein. Therefore in our humble opinion, the above authority of the Hon'ble Apex Court is fully applicable to the present case and we are bound to follow the same in view of the important principles laid down therein regarding safeguard of life, liberty, and dignity of every citizen in accordance with law and the Constitution, entitlement and enjoyment of basic amenities, facilities, healthy environment, etc. by every citizen, and sufferings of people due to silent, hazardous and fatal pollution. Moreover like Article 184, Article 199 of the Constitution can be invoked in such cases.

8. Learned counsel for the petitioner also relied upon a letter dated 23.05.2012 addressed by the Assistant Executive Engineer, Naudero Drainage Sub Division, Larkana, to the S.H.O., Dari, Larkana, wherein it was stated that unknown persons have illegally occupied Government property situated at 2R Sub Drain of Larkana South System near

Allahabad Muhalla Air Port Road, and have constructed shops thereon. Through the said letter, the S.H.O. was advised to lodge an F.I.R. against the encroachers. The learned counsel submitted that though encroachment on the Government land parallel to the Wah / Nala has been admitted by respondent No.1, but no effective measures have been taken for its removal.

9. In response to this petition, respondent No.1 / Executive Engineer, Larkana Drainage Division, Larkana, filed his comments along with a 'Self Contained Note'. In paragraph 9 of his comments, respondent No.1 has categorically admitted *“That left over space between sim Nala & road is the R.O.W. of 2R sub drain which is Government property & kept for trees plantation which will provide good environmental condition for the people of Larkana”*. Similarly in his Self Contained Note, respondent No.1 has admitted about the pollution by stating that population of Larkana City has increased ; people have constructed their houses around the drain and they discharge their sewerage and septic water into the drain ; the drain is also being used by buffalos causing further contamination in the drain and damage to its banks ; and people have approached his department for constructing a retaining wall on the sides of the drain.

10. During the course of hearing, respondent No.1 / Executive Engineer, Larkana Drainage Division, Larkana, was present in person. In view of his above admissions, he was confronted as to why immediate and effective measures have not been taken so far for removal of encroachments from the land admittedly reserved for plantation of trees, and for stopping the admitted pollution in the drain water and around its vicinity. The respondent No.1 submitted that his department has been facing strong resistance from encroachers, but he as well as his entire department has every intention to take all necessary actions without further delay. Regarding pollution in the drain water and the risk of accidents and diseases because of the open drain, he submitted that his department shall ensure that the entire drain shall be covered with concrete slabs for which approval will be required from the Government. He submitted an undertaking dated 03.10.2012 before us duly signed by him whereby he undertook to (1) submit a proposal to the Government of Sindh / respondent No.4 for *“construction of slab cover over the retaining wall along 2R Sub Drain of Larkana South System @ RD-8+700 to 13+00”*, and (2) *“Action should be made through law enforcement agencies for removal of the illegal & un-authorized construction of shops & gates on the Government property along 2R Sub Drain of Larkana South System”*.

11. After perusing the above written undertaking submitted by the respondent No.1 before this Court, learned counsel for the petitioner submitted that the petitioner will not press the remaining prayers and would be satisfied if his prayers (b) and (c) are granted by directing respondents 1 and 3 to construct covers over the open drain / Wah / Nala running through Larkana City area, not to construct the drain / Wah / Nala on the land / area touching petitioner's Township land which is earmarked as green belt for plantation of trees, and to leave the entire said land / area open.

12. Before parting with this matter, we would like to make some observations and highlight some important aspects. Public functionaries and all such departments and organizations which are legally bound to perform their functions and duties for the safety, wellbeing and betterment of general public must perform their functions and duties with prudence, vigilance and full responsibility. Proper policies, schemes and plans should be made by them with the assistance of concerned and qualified professionals keeping in view all possible types of dangers, disasters, destructions, hazards, crises, atrocities, catastrophes and pollution, in advance rather than waking up at the last minute or after occurrence of major damage or after loss of precious human lives. Sensible, considerate and effective policy making would mean consideration of welfare and safety of human beings and environment first, and then planning and execution of such policy accordingly. If policies / plans are designed in such manner, possible dangers can be avoided substantially and precious human lives can be saved to a great extent. The said departments and functionaries must follow the old saying "prevention is better than cure". In our humble opinion, the issue raised in the present case involves welfare, hygiene and safety not only of the people of the vicinity in question, but of all the people of Larkana City as the drain / Wah / Nala passes through the city. Accordingly in case of any pollution, infection, disease or contamination in the drain / Wah / Nala, every person of Larkana City is likely to get exposed to such threat, which is like slow poisoning as held in Muhammad Yousaf's case *ibid* which case has been approved by us. Similarly the open drain, unless covered by slabs, is also a continuous threat to every person of Larkana City area. Plantation of trees on the green belt will be beneficial for every person as it will improve the overall environment of the entire city. The people of Larkana City and all other cities of our country, like any other civilized city of the 21st century, certainly deserve a better, safe and healthy environment. In view of the

facts and circumstances of this case, we are constrained to treat this matter as public interest litigation. It is unfortunate that the respondents did not discharge their functions and duties in the manner in which they were required to although very recent examples of heavy rains and floods were before them. It is a settled principle of law that justice should not only be done, but it should be seen to have been done. In our opinion, similarly duties should not only be discharged, but they should be seen to have been discharged. If the respondents had taken timely and well planned steps through proper plans and schemes to avoid pollution and to prevent illegal encroachments, the situation of Larkana City would have been completely different today.

13. Foregoing are the detailed reasons of the short Order passed on 03.10.2012 whereby this petition was disposed of by us in the following manner :-

“ Heard learned counsel for the parties and Mr. Abdul Ghafoor Soomro, Executive Engineer, Larkana Drainage Division, Larkana / respondent No.1, who has filed an undertaking before this Court that he will approach and move the proposal to the Government of Sindh, for construction of slap cover over the retaining wall along 2R Sub Drain of Larkana South System @ RD-8+700 to 13+00 ; and action would be made through law enforcing agencies for removal of illegal and unauthorized construction of shops and gates on the Government property along 2R Sub Drain of Larkana South System. He further undertakes that he shall complete the exercise mentioned in the undertaking within fifteen days from today.

Alongwith the comments filed by respondent No.1, a site plan of 2R Sub Drain of Larkana South System @ RD-8+700 to 13+00 marked in green color, has been annexed. The respondent No.1 in his undertaking undertakes to remove encroachment from the green portion of the site plan, as it is reserved for plantation. The respondent No.1 is directed to immediately approach S.S.P Larkana, in order to remove illegal and unauthorized encroachments from the aforementioned area. The S.S.P, Larkana, is directed to take action in accordance with law for the removal of the encroachment from the area pointed out by the respondent No.1. This exercise to be completed within two weeks' time from today. After completion of exercise stated above, the respondent No.1 and the S.S.P, Larkana, are directed to submit their compliance report in this Court through Additional Registrar of this Court.”

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