

IN THE HIGH COURT OF SINDH AT KARACHI

SUIT NO.562/2014

Plaintiff : Abdul Razzak Khamosh,
through Mr. Muhammad Umar Lakhani
advocate.

Defendants : The Province of Sindh and others,
through Mr. Jam Habibullah, State Counsel,
Mr. Muhammad Vowda, advocate for defendant
No.5.

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For hearing of CMA No.4518/2014 & CMA No.6279/2015

Date of hearing : 24.04.2015.

Date of hearing : 13.05.2015.

ORDER

SALAHUDDIN PANHWAR- J: Through instant application i.e. CMA No.4518 of 2014, the plaintiff prayed that:

“...to grant injunction in favour of the plaintiff restraining the defendants from taking any coercive action against the plaintiff and his rights in the suit property including but not limited to cancellation of allotment of suit property in his favour, dispossession of the plaintiff from the suit property, rejection of the summary dated 10.12.2011 or any other prejudicial action in respect of the suit property”

2. Succinctly, but relevant facts as set out in the plaint are that plaintiff is in business of estate (development and construction) since 22 years. He is in possession of subject matter property i.e. 2.2 acres of land (NaiclassNo.210) Deh Okewari, Karachi (referred to as suit property). Suit property has been recommended for allotment

against issuance of challan of Rs.60 million per acre for residential cum-commercial purpose in his favour by scrutiny committee of the Government of Sindh. It is further case of the plaintiff that he has been served with an illegal, malafide and arbitrary notice dated 27.3.2014 by the defendant No.4 purportedly being under Section 3(1) of the Sindh Public Property (Removal of Encroachment) Ordinance 2010 and Section 32 of the Sindh Land Revenue Act 1967 r/w rule 68-B(1) of Sindh Land Revenue Rules 1968. Impugned notice wrongly has been issued on the alleged pretext that plaintiff is encroaching 03 acres of land in NC No.187/210 in DehOkewari, Gulshan-e-Iqbal, Karachi East. The plaintiff denies allegation at the out-set. He submits that impugned notification is without jurisdiction, legally defective, based on assumptions and a deliberate ignorance of the fact that the plaintiff has been granted allotment and issuance of challan has been recommended in this behalf by the Secretary LU. The relevant summary for issuance of challan is before the Chief Minister of Sindh. The plaintiff is not an encroacher nor do the provisions of the law, under which the impugned notice has been issued to him, apply to the plaintiff. The impugned notice is thus liable to be struck down. In addition, the Chief Minister shall be directed by way of mandatory injunction to sign the summary pending before him regarding issuance of requisite challan. Plaintiff is willing, able and ready to pay the required, recommended amount. Further, the terms of the allotment have been spelt out which will be adhered to in accordance with law. Plaintiff apprehends illegal and coercive action by defendants and apprehending dispossession from suit property and/or refusal/rejection of his summary which is pending with the Chief Minister.

3. In above back ground, the plaintiff sought following relief(s):-

- a) Declare that the plaintiff's allotment and ownership to the suit property i.e 2-2 acres of land situated in NaiclassNo.210 of DehOkewari, Karachi is absolute;
- b) Declare that the impugned notice dated 27.03.2014 is illegal, malafide, without jurisdiction, arbitrary and set aside the same;
- c) Grant a mandatory injunction directing the defendant No.1 to process / sign the summary dated 10.12.2011 in respect of the suit property 2-2 acres of land situated in NaiclassNo.210 of DehOkewari, Karachi and further direct the Defendants to issue challan for payment in favour of the plaintiff;
- d) Grant a permanent injunction restraining the Defendants from taking any coercive action against the plaintiff and his rights in the suit property including but not limited to cancellation of allotment of suit property in his favour, dispossession of the plaintiff from the suit property, rejection of the summary dated 10.12.2011 or any other prejudicial action in respect of the suit property;
- e) Any other relief which this Hon'ble Court deems fit;
- f) Costs of the proceedings.

4. Against the above application (CMA No.4518/2014), the objections in shape of counter affidavit were filed on behalf of defendant No.5 (after their impleading as defendant No.5) wherein maintainability of the suit was attacked at the very outset while raising preliminary legal obligations i.e:

- i) *plaintiff possess no title document or possession certificate in respect of suit property;*
- ii) *plaintiff is an encroacher*
- iii) *suppressing the fact of pendency of earlier litigation over suit property;*

It was further claimed that defendant no.5 has filed suit No.1334 of 2003 against illegal encroachment and illegal occupation by plaintiff and report of Nazir dated 22.4.2006 in said suit prima facie shows illegal encroachment/occupation of plaintiff; plaintiff is raising construction despite order dated 17.4.2007 passed in suit No.452 of 2007 so contempt application has been filed against plaintiff.

5. The defendant no.2 while filing written statement did not deny recommendation in favour of the plaintiff but claimed the land to be of Government with specific reference to the Suo-Moto Case No.16/2011 whereby honourable Supreme Court restrained the LU from allotting or transferring any government land.

6. Learned counsel for the plaintiff while reiterating his pleadings has argued that there is recommendation of scrutiny committee in favour of the plaintiff and even possession is with the plaintiff hence prima facie case is with plaintiff; since per judgment, reported as PLD 2004 Karachi 269, it was held that if plaintiff encroached any area of defendant no.5, the appropriate proceedings could be filed. Reliance was placed on the case laws, reported as 2010 MLD 1180 (Mst. AqeelaHai vs. Province of Sindh through Secretary Land Utilization Department), 2004 CLC 1029 (ArifMajeed Malik vs. Board of Governors Karachi Grammar School) PLD 1973 SC 236 (Raunaq Ali vs. Chief Settlement Commissioner).

7. On the other hand, learned counsel for the defendant no.5 argued that suit is barred under section 42 and 56(e) & (j) of Specific Relief Act and Section 11 of Sindh Public Property (Removal

of Encroachment) Ordinance, 2010; jurisdiction of this Court is barred under section 23(4) and 25 of Sindh Public Property (Removal of Encroachment) Ordinance, 2010. He placed reliance on case laws, reported as 2014 PLD 264 Karachi (KhurramNaseemuddin vs. Federation of Pakistan through Director General, FIA), 2003 YLR 1478 (Mst. Khursheed Begum vs. KDA), 2004 MLD 1113 (Tariq Mehmood and others vs. the state and others), 2003 PLD Lahore 1 (Mst. AzraIsrar vs. Inspector General of Police, Punjab) 2002 MLD 1379 (Munir Ahmed vs. Province of Sindh), 2000 PLD 66 Quetta (Muhammad Khan vs. Nasibulla), 1989 CLC 1975 (National Pertocarbon (Pvt) Ltd vs. Registrar of Trade Unions), 2003 YLR 1673 (Aurganzeb vs. Suit Southern Gas Company) and 2000 YLR 1161 (Fayazuddin vs. KBCA).

8. Since question of the jurisdiction of this Court is strongly pressed, therefore, it would be in all fairness to decide this issue first because it is the jurisdiction which dresses an interim or interlocutory orders the legal status otherwise same shall be nothing but *corum non-judice*. Therefore, it is always demand of administration of justice to attend the question of jurisdiction *first*. Needless to add here that maintainability of the suit has direct nexus with every interlocutory application, including one falling within meaning and scope of Order 39 of the Civil Procedure Code, and order, passed thereon. I have meticulously examined the material, available on record, which has opened number of facts to be considered on well recognized principles of law. The unfolding thereof is necessary to be examined first. The perusal of the record shows that the plaintiff though has confined the scope of the instant **lis** to

an area of 2.2 acres with a specific claim to save instant **lis** from admittedly earlier pending litigations before court of law. Let me make it clear that it is not whims and wishes of the plaintiff on which a question of jurisdiction shall depend but it shall always be the requirement of law and satisfaction of the judicial conscious of the Court. The documents attached with the plaint, are the documents of the plaintiff himself hence any consequence arising thereof shall fall upon the plaintiff even while deciding an interlocutory application.

9. The application, addressed by the plaintiff to Chief Minister, Sindh dated 18.5.2006, being the root is reproduced hereunder:-

“Sub:-REQUEST FOR ALLOTMENT 05-00 ACRES LAND IN DEHOKEWARI ON 99 YEARS LEASE

R/ Sir,

It is submitted that I belong to business family and doing my business in construction field since last 15 years. Presently a project under the name of ‘Moon Garden’ is under process of completion situated in NC No.210 of dehOkewari.

It may be mentioned that in front of my above project a piece of Government Land measuring about 05-00 acres is lying vacant and the same is under our possession. I have been protecting this piece of land since last 8 years from the **professional land grabbers** as well as from Railway Cooperative Housing Society. During detailed Survey recently conducted on the **orders of Honourable High Court**, it had been established that said piece of land is Government land.

The Government of Sindh has now promulgated new policy whereby the ban has been lifted on allotment. Since I am involved in the business of construction with sound financial background and the above piece of land is in front of my Project, it is therefore, your Honour is requested to kindly grant me said area for residential cum commercial purposes on 99 years lease for which I am ready to pay the cost as per law / policy.

Dated:18.5.06

Sd/-Abdul RazzaqKhamosh”

In the above application, the plaintiff *prima facie* admits to have been in possession of government land (occupying) an area of 5.00 acres under a plea of protecting the same from **'professional land grabbers'** and has been protecting since last 08 years (from date of making application). It is not appealable to a prudent mind that how one can occupy the government property/State Land without any authority under a plea to protect it from **'professional land grabbers'**. A **private person**, under any plea, cannot justify occupying government property/State land because the function of a **'good citizen'** comes to an end by reporting the matter to quarter concerned who, *otherwise*, is ultimate authority to ensure protection to government property State land and are accountable for their negligence but such duty of conscious of a **'citizen'** shall, *in any manner*, authorize him to dress himself up as the quarter concern/authority. Further, the application of the plaintiff shows that he continued with such **unauthorized possession** as many as eight years and applied to get his **'unauthorized possession'** legalized by making said application when admittedly the land (5-00 acres) was declared government property/State land in result of survey, conducted under order of this Court (High Court). This is sufficient to show the conduct and attitude of the plaintiff in first occupying/possessing government property or least not of his own (even if it is believed that he was not in knowledge that it was government property) and then attempting to justify the same on finding no other ways. This aspect was always required to be appreciated by all the quarter concerned while processing the application of the plaintiff which, I, regretfully, endorse that was

never appreciated though was floating on surface. If the allotment of government land is made to such persons by the authority concern then it shall allow the **'land grabbers'** to *first* occupy government property/State land on quite innocent plea of protecting it from **'professional land grabbers'** and to innocently apply for allotment thereof.

10. Be as it may, since the plaintiff has admitted pendency of earlier litigations but sought exception while painting that the suit land i.e 2-20 acres to be not involved in such earlier pending litigations. At this juncture, I feel it quite necessary to refer the reply of the plaintiff, submitted in response to the impugned notice which is available as P/2 and reads as:

“SUB: REPLY TO NOTICE BEARING
NO.AC/G.I/E/K/5072014 DATED
27.03.2014

Respected sir,

Please refer to you subject Notice in which an allegation has been made to me that I have encroached a piece of land of 3 Acres in DehOkewari, Gulshan-e-Iqbal, Karachi which is not correct.

The fact is that 2.2 Acres of land in DehOkewari, Gulshan-e-Iqbal, Karachi is in my custody which has been approved by Chief Minister (Copy enclosed).

The following cases for the **above said land** are under process in the Supreme Court and High Court.

- 1) Case No.28 of 2004 (pending in Supreme court)
- 2) Case No.1334/2003 (pending in Sindh High Court)
- 3) Case No.452/2007 (pending in Sindh High Court)

That Board of Revenue, Government of Sindh, Deputy Commissioner (East), Karachi, Assistant City Survey

Officer Karachi (East) and Survey Superintendent Karachi Division, Govt. of Sindh are involved in the above mentioned cases for the said land.

In the light of above fact, you are requested kindly to **stop your any further action for the said land till the case is decide by the Hon'ble Court.**

The above reply (document P/2) of the plaintiff reveals that plaintiff himself admits that land in question was directly (or least indirectly) involved in the above said matters, pending before honourable Supreme Court and High Court. It needs not be mentioned that a matter directly or indirectly subjudice before a court of competent jurisdiction cannot be re-tried before other court/forum as such *lis* shall fall within meaning of '**res sub judice**' or '**resjudicata**'. In either case, the subsequent **lis** is incompetent.

Further, the notice, impugned through instant *lis*, would show that:

“It has been brought to the knowledge of the undersigned that you have been found in possession of State / Government land, the Mukhtiarkar Gulshan-e-Iqbal has reported that you have encroaching the land in N.CNo.,187/210, 03 Acres, DehOkewari, Gulshan-e-Iqbal Karachi East.

Whereas, the competent authority, the Government of Sindh has been authorized the undersigned to require the person directly or indirectly responsible for encroachment to remove such encroachment together with structure raised by him, under Section-2 of Removal of Encroachment Act 2010.

You are hereby required to appear in the office of the undersigned on 29.03.2014 at 12:00 noon alongwith documents if any, failing the legal action will be initiated against you as per law.

(Underlining is provided for emphasis)

11. It is pertinent that the impugned notice was requiring the plaintiff to appear and produce the document, showing/proving

legality of his possession, which demand cannot be termed to be **'illegal'** because every person is always obliged to respond to demand of law or to explain his position, as and when demanded by a competent person. Such act of the person shall bring no harm or prejudice to him/her. The right to complain arises when an authority *prima facie* deviates from law and procedure. A demand to show title or legal authority to occupy/possess a government property cannot give rise to file a suit challenging such notice.

12. Moreover, I would like to examine the plea of the plaintiff with reference to the documents and pleadings of the plaintiff himself alone. The record spells out that though he (plaintiff) claimed (per P/2) that such land (2-2 acres) has been approved by the Chief Minister but from the pleading of the plaintiff it is undisputed that there is only recommendation in favour of the plaintiff. To make the picture more bright, it would be conducive to refer the summary titled as **"Summary for the Chief Minister, Sindh"** which reads as:

Subject: REQUEST FROM MR. ABDUL RAZZAKKHAMOSH FOR ALLOTMENT OF 02-20 ACRES LAND IN DEHOKEWARIKARACHGI ON 99 YEARS LEASE FOR RESIDENTIAL CUM COMMERCIAL PURPOSES.

.....

3. The Scrutiny Committee (under the relevant Statement of Conditions) in its meeting held on 21.10.2011 took the following decision (Annexure-C) which is reproduced as under:-

"Recommended allotment of land admeasuring 02-20 acres from N.CNo.210 of DehOkewari Karachi in favour of Mr. Abdul RazzakKhamosh for Residential-cum-Commercial purposes at 75% of market price of Rs.60.00 Million per acre (Category-"A-1"). Subject to condition that if any litigation found, the applicant will be responsible."

4. The Chief Minister, Sindh may like to consider the recommendations of the Scrutiny Committee at Para-3 above for allotment of 02-20 acres from N.CNo.210 of DehOkewari Karachi in favour of Mr. Abdul RazzakKhamosh for Residential-cum-Commercial purposes on 99 years inter alia with the following conditions that:-
.....”

13. The perusal of the above *prima facie* shows that it was *at the most* a **‘recommendation’** of the Scrutiny Committee. The term **‘recommendation’** cannot be equated to that of **‘approved/sanctioned’** nor a **‘recommendation’** can be used as a trump card to compel the competent authority in endorsing the **‘recommendation’** with a mandatory **‘YES’** without examining the recommendation as reasonable or otherwise. A recommendation could *at the most* earn right of consideration but it shall not be taken as **‘approval / sanction’**.

14. In the well known case of *‘Amanullah Khan and others v. The Federal government of Pakistan through Secretary, Ministry of Finance, Islamabad and others (PLD 1990 SC 1092)* it was held as:-

*‘Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, **producing order in it so that decision will achieve the high quality of justice**. The sever instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalize it and regulate it and regulate it by Rules, or Policy statements or precedents, the Courts*

have to intervene more often, than is necessary, part from the exercise of such power appearing arbitrary and capricious at times.'

In another case, reported as 2005 SCMR 25, it was held that:-

“In his Treatise ‘Discretionary Powers’ which is Legal Study of official Discretion D.J. Galligan has acknowledged that the general principles that discretionary decisions should be made according to rational reasons means; (a) that there be findings of primary facts based on good evidence, and (b) that decisions about the facts be made for reasons which serve purposes of the statute in an intelligible and reasonable manner’. According to the celebrated author, the actions which do not meet these threshold requirements are arbitrary, and may be considered a misuse of power.

(Underlining is provided for emphasis)

Thus, enough to say that the discretion always remains with authority to incline or decline a recommendation even, else the object of vesting discretion in an authority shall lose its **‘purpose’**. The exercise of authority if not standing well with above touch stone then the outcome thereof shall be nothing but ***misfeasance***.

15. Without prejudice to above, at this juncture, I would like to refer the order dated 11.9.2009, passed by the honourable Supreme Court of Pakistan in Suo Moto case No.14 of 2009 wherein it is held that:

No one in authority, whosoever high office such person in authority may be holding, has any power, jurisdiction or discretion to distribute any public property or asset and in these cases extremely valuable lands, on nominal consideration, **which land or asset essentially belong to the People of Pakistan.** It was patently malafide exercise of power. This Court further ordered that the grants of lands to the petitioner specially in the manner, the same was done are **prima facie violative of Article 3 (elimination of exploitation) Article 25 (equality clause) and Article 31 of the Constitution of Islamic Republic of Pakistan which requires the State to**

endeavour to promote observance of Islamic moral standards and Article 38 of the Constitution which interalia requires the State to secure the well being of the people by preventing concentration of wealth in the hands of a few to the detriment of general interest. The grant of lands to the petitioner in these cases were reprehensible acts on the part of the highest executive authority in the province, totally alien to the concepts of Islam.

(Underlining is provided for emphasis)

In another case, reported as 2014 SCMR 1611, it was held with regard to manner of exercise of powers by an authority regardless of its status that:

13. Looking at the powers of the Chief Minister for allotment of public property, here a reference to the case of IqbalHussain v. Province of Sindh through Secretary, housing and Town Planning Karachi and others (2008 SCMR 105) will be useful wherein this court has observed as under:-

“3. We are in complete agreement with the view taken by the Division Bench of the High Court when it says that public functionaries including the Chief Minister can deal with the public property only under a prescribed procedure within the parameters of law under a duly sanctioned scheme and not at their whims. Even if such order was passed by the Chief Minister in favour of the petitioner, authorities concerned would not be bound to follow such illegal and void order of a superior authority. It would rather be in the exigencies of good order of administration and their duty to point out to the high ups that they were acting in excess of their lawful authority and in violation of law and the constitutional mandate. They may be apprised of the legal consequences flowing from such acts. **The compliance of any illegal and arbitrary order is neither binding on the subordinate forums nor valid in the eyes of law.** Reference in this behalf may be made to decision of this Court in (i) Abdul HaqIndhar v. province of Sindh (2000 SCMR 907 and (ii) Taj Muhammad v. Town Committee (1994 CLC 2214) (Underlining has been provided for emphasis).

16. At this juncture, germane to refer a judgment authored by me in CPNo.S-878 of 2014 where following the above dicta, it was concluded that:

- “i) a state land is the property of people of Pakistan;
- ii) the authority is custodian of such rights of people of Pakistan;
- iv) the authority is meant and believed to act to protect such property of people of Pakistan which includes disposal of such property at proper market rate/price;
- iv) an illegal order, regardless of status of person, passing/ issuing it, shall not have binding effect upon subordinate

The above proposition of law, permits me to say that the ‘**authority**’ is competent to create and generate ‘**revenue**’ through different mode(s), including disposal of the ‘**State land**’, so provided by the Law but such competence and jurisdiction should never be used nor should be allowed to be exercised in an arbitrary manner but must be shown to have been exercise bonafidely in its true sense, keeping the “*public interest*’ at its place which is nothing but *supreme to all other interests*. A disposal of the State land shall not equate the term ‘**public interest**’ unless a mechanism is resorted to create a competition so as to generate maximum ‘**revenue**’ which, undoubtedly is expected from every owner (in case of State land the citizens of Pakistan are always believed to be acquiring such ‘**status**’). The power of the disposal of the government land should remains with competent authority but subject to a mechanism ensuring guarantee to ‘*public interest*’ and same should not be allowed to be preyed only on joining of hands by two.

In same judgment, it was held that “***the process of allotment of the government land(s) should not start by making an application but should start from wide publication as is mentioned in the para-2 of condition-3 for grant of State Land for non-agricultural purpose***”.

17. At this moment, before proceeding further, it would be significant to refer the operative and relevant portions of the

judgment of Honourable Supreme Court of Pakistan, recorded in Suo-Moto case No.16 of 2011 which has been referred by the defendant no.2 to claim the land in question to be government land.

The same reads as:

'7. Under these circumstances, we hereby, until further orders restrain the Government / Revenue Department from mutation, allotment, transfer and or conversion of any state land and or keeping any transaction or entry in the record of the rights in this regard in revenue record of Sindh or till the entire revenue record in Sindh is reconstructed. The conversion of lease for 30 years or of any term upto 99 years shall also be stopped immediately as by this mode the state land is being sold out **at a throwaway price without participation of public at large**, which the law does not permit. Any further conversion or mutation of state land in the record of rights from today onwards would be deemed nullity and would expose the Deputy Commissioner / DCO of the relevant districts / Dehs besides others to contempt proceedings'.

(Underlining has been provided for emphasis).

Bare perusal of above, it is clear that in said judgment the **'participation of public at large'** was insisted in processing any matter for disposal of the Government property/State land, so held in above referred judgment passed in C.P. No.S-878/2014 in following terms:-

“Thus, the requirement of **'open auction'** should have been in all case(s) of disposal of government / State Land, else the directive(s) of Honourable Supreme Court, issued in above referred case(s) and Articles of the Constitution(s), dealing with rights of people and equal treatment shall fail.”

It is a matter of record that participation of the **'public at large'** was never involved in the matter which could be with no other ways but inviting the public through **'wide publication'**. Thus, the plaintiff cannot claim any exception to the above directive(s) of honourable Supreme Court of Pakistan, so insisted in the above referred

judgments only by sticking strongly with recommendation of the Scrutiny Committee, particularly when the mere '**recommendation**' as already discussed, cannot acquire anything else but a right of consideration.

18. In addition to above, since in the above referred judgment the honourable Supreme Court '**ordered for immediate stopping of any conversion of lease for 30 years or of any term upto 99 years**' hence in existence of such specific direction of the Honourable Supreme Court of Pakistan the present plaintiff cannot seek the relief(s), prayed for through instant suit in view of the Article 189 of the Constitution which reads as :-

"189. Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan'

It is suffice to say that what is prohibited by the honourable Supreme Court of Pakistan cannot be sought to be permitted by any other Court or authority, whosoever, may it may be. Since the relief of getting approval of the summary for land in question in *all senses* shall amount to permitting what is prohibited/stopped by the Honourable Supreme Court which cannot be granted to the plaintiff because the law is clear that what one cannot obtained directly he cannot obtained the same indirectly. Thus, now I can safely conclude that instant plaint *from all angles* is incompetent and the jurisdiction of this Court is barred by Article 189 of the Constitution even.

19. In result of above conclusion, I am left with no option but to reject the plaint without any further discussion on interlocutory

application(s), including the CMA No. 6279/2015 which, in consequent to rejection of plaint, stood dismissed automatically.

20. Needless to add while parting that quarter concerned shall be at liberty to proceed into matter but strictly in accordance with law.

Office shall transmit facsimile copy of instant order to Senior Member, Board of Revenue, and Chief Secretary Province of Sindh for compliance.

Imran/PA

J U D G E