

IN THE HIGH COURT OF SINDH, KARACHI
C.P. No. D-2244 of 2024

Present:
Justice Zafar Ahmed Rajput
Justice Ms. Sana Akram Minhas

Petitioner : Samiullah Khan, through
Mr. Muhammad Atiq Qureshi, Advocate.

Respondents : Government of Sindh, through Secretary Lands,
No. 1, 8 & 9. DIG/SSP Central, and SHO Khawaja Ajmer
Nagri, respectively, through Mr. Pervez Akhtar
Mastoi, Assistant Advocate General (“AAG”).

Respondents : Karachi Development Authority, through its
No. 2 to 7 Director General; Executive Engineer (KDA),
North Nazimabad Division-I; Director of Estate
& Enforcement Department KDA; Additional
Director, Anti-Encroachment Cell, KDA; Senior
Superintendent Police, Anti- Encroachment Force
and DSP & S.H.O., KDA Police, respectively,
through Ms. Nazia Siddiqui, Advocate.

Respondents : Mehran Khan & Zameer Hussain
No. 10 & 11. (Nemo)

Date of hearing : 05.11.2024.
Date of order : 05.11.2024.

ORDER

ZAFAR AHMED RAJPUT, J: - Through the instant Constitutional Petition, the
Petitioner, *inter-alia*, seeks the following relief: -

- a) *To hold and declare that the Petitioner is entitle for the substitute plot in lieu of the plot No. A-39, Sector I-A/1, measuring 240 Sq. yards situated at North Karachi, Karachi.*
- b) *To direct the Respondents No.1 to 9 to remove the encroachment from the petitioner plot within a week time from the order of this Honorable court.*
- c) *To hold and declare the possession on the subject plot of the Respondent No.10 and 11 forceful and illegal and their status as encroacher.*
- d) *To direct the Respondent 10 and 11 to hand over the physical possession of the said plot to the Petitioner.*
- e) *To direct the respondent No.2, 3 and 4 to provide substitute plot in alternative, they failed to remove the encroachment from the said plot.*

2. Briefly stated facts of the case, as disclosed in the memo of Petition, are that the Petitioner is the absolute owner of Plot No. A-36, measuring 240 square yards, situated at Sector 1-A/1, North Karachi (“**subject property**”) by virtue of Allotment Order dated 30.04.2021; that although the subject property was formally allotted to the Petitioner, physical possession thereof was never delivered to him, and it was subsequently revealed that the same was under encroachment and illegal occupation of the Respondents No. 10 & 11; that the Respondents No. 2 to 6 initiated proceedings for removal of the encroachment from the subject property; however, their efforts remained unsuccessful; that the Respondents No. 2 to 4 also lodged an FIR against the Respondents No. 10 & 11; however, they failed to pursue the matter with due diligence and despite initiation of the aforesaid proceedings, they have neither demonstrated any genuine interest in effectively pursuing the case nor taken meaningful steps to secure removal of the encroachment from the subject property, thereby resulting in the continued illegal occupation of the Respondents No. 10 & 11; that owing to such maladministration, the Petitioner continues to be deprived of the lawful use and enjoyment of the subject property; that after a considerable delay, the Petitioner addressed a letter to the Respondent No. 2, requesting the allotment of a substitute plot in lieu of the subject property, but to no avail; that the official respondents are under an obligation to provide or arrange an alternative plot for the Petitioner; however, owing to their failure to do so, he has been constrained to invoke the constitutional jurisdiction of this Court through the instant Petition.

3. Learned counsel for the Petitioner has contended that the Petitioner is the lawful allottee of the subject property and allotment in his favour has never been questioned, cancelled, or withdrawn and, therefore, he has a subsisting and enforceable right, title, and interest therein; that the allotment of a plot by a public authority carries with it a corresponding legal obligation to facilitate and deliver its peaceful physical possession to the lawful allottee; that having allotted the subject plot to the Petitioner, the official respondents have failed to deliver its possession, thereby rendering the allotment incapable of being enjoyed for all practical purposes; consequently, the Petitioner has been deprived of the use and enjoyment of the subject property since the date of allotment, though no fault is attributable to him; that the subject property is presently under the illegal and forcible occupation of the Respondents No. 10 & 11, who have neither any lawful title nor any valid document or authority justifying their continued possession thereof; as such, their occupation constitutes an unlawful interference with the Petitioner's proprietary rights and they cannot be permitted to defeat or frustrate the rights lawfully

conferred upon the Petitioner by the competent authority; that although the Respondents No. 2 to 6 initiated proceedings for removal of the encroachment and they also lodged an FIR against the Respondents No. 10 & 11, such measures have not culminated in the effective removal of the encroachment; that mere initiation of proceedings, without taking them to their logical conclusion, does not amount to effective discharge of the official respondents' legal obligations; that the failure of the official respondents to effectively pursue the encroachment-removal proceedings and the criminal case, despite the passage of considerable time, amounts to a failure in the discharge of their public duties; therefore, such inaction has the effect of perpetuating the illegal occupation of the Respondents No. 10 & 11 and is arbitrary, unreasonable, and inconsistent with the obligations of public authorities to act fairly, lawfully, and diligently; that the Petitioner is merely a witness in the criminal proceedings and has no control whatsoever over the investigation, prosecution, or eventual outcome, whereas the responsibility for pursuing the criminal case and taking consequential steps for removal of the encroachment lies with the competent official authorities, and the Petitioner cannot be made to suffer on account of their failure or inaction; that, having waited for a considerable period for the official respondents to secure removal of the encroachment and deliver possession, the Petitioner approached the Respondent No. 2 with a request for allotment of a suitable alternative plot; however, the said request has neither been considered nor responded to by the official respondents; that the allotment of an equivalent alternative plot would constitute an appropriate and just measure for redressal of the Petitioner's grievance, particularly where possession of the allotted plot cannot be secured within a reasonable time; that the Petitioner's continued deprivation of the use and enjoyment of the property lawfully allotted to him, without any fault on his part and as a consequence of the failure of public functionaries to discharge their legal obligations, attracts the provisions of Articles 4, 23 and 24 of the Constitution of the Islamic Republic of Pakistan, 1973 (**"Constitution"**), relating to the right to be dealt with in accordance with law and the protection of property rights.

4. Mr. Khurram Ghayasuddin, Advocate, appointed as Amicus Curiae by this Court vide order dated 28.08.2024, assisted the Court and submitted that the Karachi Development Authority Order, 1957 (**"Order of 1957"**) confers general authority upon the KDA in matters relating to land and urban development; that the KDA's power to remove encroachments is ordinarily exercised in conjunction with the Sindh Public Property (Removal of Encroachment) Act, 2010 (**"Act, of 2010"**), and other applicable laws and regulations, which collectively provide the

legal framework for the management and protection of KDA land and the removal of encroachments therefrom; that the Anti-Encroachment Tribunals are vested with jurisdiction to adjudicate matters relating to encroachments upon public property and may issue appropriate directions to the concerned authorities, including the KDA, for removal thereof; that the Civil Courts may retain jurisdiction in appropriate cases involving encroachment, particularly where the dispute concerns private property, questions of title or ownership, or contractual rights; that this Court, in exercise of its constitutional jurisdiction under Article 199 of the Constitution, may intervene in matters relating to encroachment where the circumstances warrant such intervention, particularly in cases involving public interest, infringement of fundamental rights, or abuse or unlawful exercise of authority by public functionaries.

5. Learned counsel appearing on behalf of KDA as well as learned AAG adopted the stance taken by the learned Amicus Curiae.

6. We have heard learned counsel for the parties as well as learned Amicus Curiae, AAG and also perused the material available on record.

7. The principal grievance of the Petitioner is that, although the subject property was allotted to him, it remains under the alleged encroachment and illegal occupation of the Respondents No. 10 & 11, and that the official respondents have failed to remove such encroachment and deliver possession to him. The reliefs sought in prayer clauses (b), (c) and (d), namely, a declaration that the possession of the Respondents No. 10 & 11 is forcible and illegal, a declaration that they are encroachers, and a direction for handing over possession, are, in substance, proceedings for determination and removal of encroachment and recovery of possession. As ably assisted by the learned Amicus Curiae, and as is not disputed by learned counsel for the KDA as well as learned AAG, the Order of 1957, read with the Act of 2010, provides a statutory framework for dealing with encroachments upon public property, and the Anti-Encroachment Tribunals constituted thereunder are vested with jurisdiction to adjudicate such matters and issue appropriate directions to the concerned authorities, including the KDA. The Petitioner, therefore, has an adequate and efficacious alternate remedy before the competent statutory forum, which he has not availed.

8. Moreover, the status of the Respondents No. 10 & 11, the basis and nature of their possession, and the question whether such possession constitutes encroachment in law are essentially questions of fact, requiring determination

upon the basis of evidence. Such disputed factual questions ordinarily cannot be satisfactorily adjudicated in the constitutional jurisdiction of this Court, particularly when a specialized statutory forum is available for their determination. The declarations and consequential directions sought against the private respondents, therefore, cannot appropriately be granted in summary proceedings under Article 199 of the Constitution. It is also the Petitioner's own case that an FIR has been registered against the Respondents No. 10 & 11 and that the criminal proceedings arising therefrom are pending, wherein the Petitioner is stated to be a witness. Any grievance concerning the conduct or progress of those proceedings may be addressed before the competent criminal court in accordance with law; the same cannot be made a basis for this Court to supervise the progress of such proceedings in the present Constitutional Petition.

9. As regards the prayer for allotment of a substitute plot, the Petitioner has not been able to identify any statutory provision, rule, or policy conferring upon him an enforceable right to such allotment merely because possession of the originally allotted plot has not been delivered. The question of allotment of a substitute plot, in the absence of a vested legal right, falls within the domain of the competent authority, to be considered in accordance with the applicable law and policy. It is trite that a writ of mandamus may be issued only where a Petitioner establishes a clear and enforceable legal right and a corresponding legal duty upon the public authority, coupled with a failure or refusal on the part of that authority to discharge such duty. In the present case, the Petitioner's letter addressed to the Respondent No. 2 is stated to have been made after considerable delay, and nothing has been placed on record to show that the request was thereafter pursued or that any order expressly refusing the same was passed. In such circumstances, no direction for allotment of a substitute plot can be issued in the exercise of constitutional jurisdiction.

10. It is well settled that the jurisdiction under Article 199 of the Constitution is extraordinary and discretionary and is not ordinarily invoked where an adequate and efficacious alternate remedy is available before a competent statutory forum, particularly where the relief sought involves adjudication of disputed questions of fact. The exceptional circumstances referred to by the learned Amicus Curiae in matters concerning encroachment, such as cases involving a demonstrable element of public interest, violation of fundamental rights, or abuse of authority by public functionaries, are not shown to exist in the present case. The Petitioner's grievance, insofar as the private respondents are concerned, essentially relates to

possession and alleged encroachment, for which a specific statutory forum and remedy are available. No material has been placed on record demonstrating such abuse of authority or violation of fundamental rights as would warrant bypassing the statutory mechanism.

11. For the foregoing reasons, we find no merit in the instant Petition, which is accordingly dismissed, along with the pending application(s), if any. The Petitioner shall, however, remain at liberty to approach the Anti-Encroachment Tribunal or any other forum of competent jurisdiction for such reliefs as may be available to him in law. He shall also be at liberty to submit a fresh representation to the competent authority seeking allotment of a substitute plot, which representation, if made, shall be considered and decided strictly in accordance with law and the applicable policy.

12. The above are the reasons for our short order dated 05.11.2024.

JUDGE

JUDGE

Athar Zai