

# IN THE HIGH COURT OF SINDH AT KARACHI

## Constitutional Petition No.D-703 of 2010

[*Abdul Qadir Versus Province of Sindh and others*]

### Present:

**Mr. Justice Irfan Saadat Khan and**

**Mr. Justice Muhammad Faisal Kamal Alam**

Date of hearing : 19.09.2017

Date of order : 26.09.2017

Petitioner

[*Abdul Qadir*]; : Represented by Mr. Fazal-ur-Rehman,  
Advocate.

Respondent No.1

[*Province of Sindh*]

Respondent No.2

[*Registrar Cooperative  
Societies Sindh*]

: Represented by Mr. Asadullah Lashari,  
State Counsel.

Respondents No.3

[*Saadabad Cooperative*

*Housing Society Limited*]

: Represented by Mr. Akhtiar Hussain  
Soomro, Advocate.

Respondent No.4

[*E.DO. M.P.G. Department  
CDGK*]

Respondents No.7

[*Sohail Ahmed*]

Respondent No.14

[*Muhammad Yunus*]

Respondent No.20

[*Mst. Moiz Fatima*]

: Represented by Mr. Fareed Ahmed,  
Advocate.

: Mr. Muhammad Shahzad, Advocate for  
SBCA.

Nemo for remaining Respondents.

**Case law cited by the Petitioner's counsel.**

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**Case law relied upon by Respondents' counsel.**

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- Law under discussion:**
- (1). The Constitution of the Islamic Republic of Pakistan, 1973.
  - (2). Karachi Development Authority Order, 1957. {*KDA*}
  - (3). Karachi Building and Town Planning Regulations, 2002.
  - (4). Civil Procedure Code, 1908 {*CPC*}
  - (5). Cooperative Societies Act. 1925.

**ORDER**

**Muhammad Faisal Kamal Alam, J:** The subject Petition is filed by a member and resident of Respondent No.3 (*Saadabad Cooperative Housing Society Limited*), inter alia, challenging the action of Respondent Society for diverting the amenity use of allocation area to residential purposes. Following are the prayer clauses: -

*“It is, therefore, most respectfully prayed that this Hon’ble Court may be pleased to declare as follows:*

- 1. The allotment of four residential plots bearing No.261, 262, 263 and 264 on the portion of land reserved for amenity purpose [Mosque & park] as illegal, unlawful and be cancelled.*
- 2. That the Orders and Awards passed by the Registrar and / or Registrar’s Nominee etc. whosoever as illegal, invalid, null and void.*
- 3. That the Respondent No.4, E.D.O., M.P.G., C.D.G.K. be restrained from making any amendment and/or change in the approved layout plan effecting amenity plots, thereby reducing the size of amenity plots.*

4. *To declare that the amenity plots/part thereof cannot be utilized for any other purpose except for they has been approved by competent authority.*
5. *Any other relief this Hon'ble Court deems fit may kindly be granted."*

2. Mr. Fazal-ur-Rehman, the learned counsel representing the Petitioner, has argued by referring to his pleadings that the Managing Committee of Respondent Society unlawfully converted the Plots reserved for Mosque and Park in the original layout plan of the Society into different residential plots and allotted the same to private Respondents. However, in order to cover up their illegality a small Mosque got constructed at a portion of the park land, thus reducing the original area of this park as well. He has specifically mentioned in Paragraph-5 of his Petition that originally 823.33 Square Yards has been shown and reserved for construction of Mosque and an area of 1847.77 Square Yards is allocated for the park. The duly approved layout plan is available in record at Page-15 of the Court file as one of the Annexures with the Petition. Learned counsel further submitted that amenity Plots cannot be converted into residential, which is the illegality committed by the Society that till date has not been rectified either by the Society nor the official Respondents No.1 and 2 (*Province of Sindh and Registrar Cooperative Societies Sindh*) respectively, particularly Respondent No.2, which is a regulating authority for Cooperative Housing Societies. He has leveled serious allegations that former Secretary of the Respondents' Society (*Syed Sabir Ahmed*) who was responsible for creating these residential plots, which were though cancelled by the subsequent Management of Respondents' society, which action was challenged by the allottees of these plots in the shape of Arbitration proceedings before the Respondent No.2, who passed the Awards in favour of the allottees, which were impugned by the Respondents' society in Appeals as provided by the

relevant provision of Cooperative Societies Act, 1925, but, the above Secretary ;managed' to withdraw all those Appeals, resultantly illegal allotments (*as alleged*) became final. Hence, this Constitutional Petition.

3. Learned State Counsel representing Respondents No.1 and 2 (*Province of Sindh and Registrar Cooperative Societies Sindh*) respectively have opposed this Petition, primarily on the ground that once Award attained finality, the same cannot be challenged directly by way of instant Constitutional Petition, but only through the statutory remedy provided under the above mentioned statute and particularly, Sections 64, 64A and 64AA, relating to Appeal and Revision. Per learned State Counsel, non-recourse to adequate and alternate remedy is sufficient ground for dismissal of the instant Constitutional Petition.

4. On behalf of Respondents' Society Mr. Ishaque Memon, who is acting as Commissioner to look after the affairs of the said Respondent No.3 has filed his para-wise comments. As per arguments of Mr. Akhtiar Hussain Soomro, the learned counsel representing the Respondent No.3 (*Saadabad Cooperative Housing Society Limited*), the conversion of amenity plots into different residential plots bearing Nos.261 to 265, in Block-5, KDA Scheme-36, Saadabad Cooperative Housing Society, Gulistan-e-Jouhar, Karachi, are admitted in corresponding Paragraph-6 of the Comments of Respondent No.3, however, with further plea that the said plots have been further transferred to other transferees / persons. The stance of Respondent No.3 is that all such illegalities were committed by its erstwhile above named Secretary. It was further contended that Petitioner has invoked the jurisdiction of this Court with unclean hands as he himself is running a Hospital by the name of "*Batool Hospital*" established on the residential Plots No.196, 197 and 198, which belong to family members of the said Petitioner. The Respondents' society has not questioned the

authenticity of the layout plan, which is annexed as one of the annexures with the Petition as well as the crucial fact that the subject area on which newly added residential plots were created, originally has been reserved for Mosque, Park and School respectively as already mentioned in the forgoing paragraphs. In such type of litigation, stance / reply of a concern Co-operative Housing Society, in the present case, Respondent No.3 is of significance.

5. Counter-Affidavit on behalf of the erstwhile City District Government Karachi (*CDGK*) through its concerned MPGO Department, currently Master Plan Department of Sindh Building Control Authority (*SBCA*)-the Respondent No.4 is also on record, wherein, the concerned Master Plan Department has admitted the fact about existence of the three Plots with different measurement as amenity, to be used for the purposes of Mosque, Park and School, respectively, as also pleaded by the Petitioner. It has been further apprised by the said Respondent No.4 that though the layout plan was once revised way back in 1989; which is also appended with the Petition as mentioned above, but in that revised layout plan, the afore-mentioned newly created Plots No.261 to 265 do not exist. It has been further clarified by the said Respondent No.4 that till filing of its reply, no amendment was made in the last layout plan nor any approval was accorded from the Master Plan point of view about creation of afore-mentioned plots in the Respondent Society.

6. Mr. Fareed Ahmed, the learned counsel representing private Respondents who are allottees of the afore-mentioned purported residential plots, controverted the arguments of the Petitioner, but till date, no Counter-Affidavit of the main Petition has been preferred by him. He argued that Petitioner himself is guilty of illegality and using his residential plots for the purposes of running a Hospital. It has been further contended that

private Respondents have not committed any illegality and present Petition merits dismissal.

7. In rebuttal, the Petitioner's counsel placed on record a notice of the Managing Committee meeting dated 02.02.2004, wherein, under Agenda Item No.1, it has been specifically mentioned that newly added six plots have been un-authorizedly carved out from the area specifically reserved for amenity and it was decided to get it approved from the concerned authority, but the same was never done.

8. Submissions heard and record perused.

9. First the Issue of maintainability should be addressed. It is an undisputed position based on the record of present proceeding that the subject dispute was first agitated in the manner provided under the Cooperative Societies Act, 1925. Awards were passed by the Nominee of Respondent No.2 (*Registrar Cooperative Societies Sindh*), which were challenged by the Respondent No.3 (*Saadanaad Cooperative Housing Society Limited*) in different Appeals before the Appellate Forum, as the Awards were against the Respondent No.3, whereby, *inter alia*, allotment of the impugned Plots including *Plot No.261-A* in favour of private Respondents was held to be legal and the stance of present Respondent No.3 (*Society*) that the very allotment of these Plots is illegal, was rejected. Consequently, the cancellation of the afore-mentioned plots in Block-5, which was carved out from an amenity Plot, was held to be illegal and void and the allotment was endorsed in favour of present Respondents No.5, 7 and 8 and / or their purported predecessor-in-interest.

10. It is also a matter of record that the above Appeals were withdrawn by the then Honorary Secretary and instead of passing withdrawal order simpliciter, the Official Respondent No.2 (*Registrar Cooperative Societies*

*Sindh*) **has added a paragraph, by further fortifying the opinion of his nominee who has passed the Award.** Copies of these Awards and the orders for withdrawal are available from Pages-21 to 71.

11. If the contention of Respondents is accepted then the legal and factual consequence that will follow would be that now if fresh Appeal (for the arguments sake), is / are preferred, impugning the above Awards, then the same would be dismissed being hopelessly time barred. This means that the *ex-facie* illegality committed regarding the above two amenity plots relating to the Mosque and the park will continue with impunity. This follows that the wrongdoers would continue to reap benefits from their wrongs, without any hindrance, while genuine members of Respondents' Society who want that relevant Building and Town Planning Regulations with regard to amenity and the statutory provisions with regard to a Housing Society should be implemented, would be left remediless and at the mercy of wrongdoers.

12. Objective of law is to ensure an orderly behaviour in a society and if on one hand a wrongful act is left unchecked on the basis of certain technicalities and on the other hand a victim of wrongful act is left to run from pillar to post, then in due course of time, an orderly system of a society would be diminished and will be replaced by a disorderly and intolerant behaviour as well as lawlessness. Therefore, in view of the above discussion and undisputed facts, the statutory remedy of Appeal and Revision, as provided in the Cooperative Societies Act, has **become illusory, but, not on account** of some slackness or negligence on the part of the Petitioner or other *bona fide* members of Respondents' Society, but wholly due to mala fide act of its previous Secretary, the Managing Committee and those who were at the helm of affairs of the Respondents' Society at that relevant time, who with dishonest and calculated motive,

withdraw the aforementioned Appeals against the interest of the Respondents' Society itself and those members who believe in the rule of law.

13. In fact, the act of withdrawing the Appeals against the impugned Awards was an attempt to frustrate the provisions of law in order to continue the illegalities and fraudulent acts of some individuals who were controlling the affairs of Respondent's Society at that relevant time, therefore, the alternate remedy provided in the aforementioned statute has not only become illusory, but in the given peculiar circumstances, is neither an adequate nor the efficacious remedy, non-availing of which can be fatal to the present Petitioner. Even otherwise, it is not a mandatory rule that if a person has not exhausted an alternate remedy, then no matter how genuine his case and grave his grievance is, should be barred from invoking the writ jurisdiction. Consequently, we are of the view that the present Constitutional Petition is maintainable.

14. Adverting to the main Issue, it is an undisputed position that the aforementioned amenity plot reserved for the Mosque has been converted into purported residential Plots, but without any due process of law, whereas, the playground area is reduced and in its portion a Mosque is built. Legal position is quite clear from the statutory point of view as well as through various judicial pronouncements.

15. Under Section 52-A of the Karachi Development Order, 1957, as amended from time to time and the Regulations 19-2.2 of the Karachi Building and Town Planning Regulations, 2002, an amenity plot cannot be diverted to any other use and a playground cannot even get converted for any other amenity or for any other use. Similarly, under Regulation 18-4.1, there is a bar to convert or use an amenity Plot for any other purpose.

16. It is an admitted position that the newly created plots (aforementioned) are not even mentioned in the approved revised plan of Respondents' Society, which means that these plots *per se* were illegally carved out/created with the sole purpose to benefit few individuals and particularly, the above named Secretary and those who were at the helm of the affairs of Respondents' Society at that relevant time. In this view of the matter, it is quite apparent that different Awards passed by the Nominee of Respondent No.3, in violation of the express provisions of law as well as judicial precedents relating to the amenity plots, by completely ignoring (deliberately) the above mentioned undisputed factual aspect, suffer from material irregularity and thus having no legal effect whatsoever.

17. It is not out of place to mention that earlier a connected Constitutional Petition No. D-2314 of 2014, which was filed by some other Petitioners, but with regard to same Saadabad Cooperative Housing Society Limited, agitating that the plot reserved for School is being converted and allotted to Okhai Memon Jamaat for establishment of their Community Hall, was subsequently disposed of by the order dated 09.08.2017, on the undertaking given by said entity (Okhai Memon Jamaat) that the amenity status of the School plot shall not be disturbed. Hence, even more, the present Petition is to be dealt with accordingly, when already there is an order in the field about the other adjacent amenity plot earmarked for construction of School.

18. When it is established that the afore referred Plots were illegally carved out / created from / in an amenity Plot reserved for a Mosque, then this illegality is incurable in view of prevailing legal position as also discussed hereinabove. The action of Respondent No.3 in changing amenity nature and use of reserved plots is void *ab initio*. Consequently, very

allotment in favour of private Respondents has no sanctity in the eyes of law and it is also settled principle that transferor cannot transfer a better title than what he himself possesses, therefore, if the title of the private Respondents being purported allottees of the above subject Plots is defective then further transfers of these plots do not improve the legal status of these allottees / private Respondents vis-à-vis the respective newly created purported Plots No.261 to 265 or any other Plot(s) created / allocated in a land exclusively earmarked / reserved for amenity purpose(s).

19. It is also necessary to observe here that it is also a well-established principle that who seeks equity must also do equity. Petitioner has not refuted the claim that latter (Petitioner) is also running the above named Hospital built at the residential plots. No doubt a hospital is a service to the community, but it must be operated in accordance with law. Petitioner should forthwith take steps for taking requisite approvals from the concerned government functionaries, including, Respondent No.4 (SBCA) for the said hospital and the concerned authorities in this behalf including the Respondent SBCA will consider the request of Petitioner strictly within parameters of law and relevant Building and Town Planning Regulations and pass the orders accordingly and expeditiously.

20. The upshot of the above is that present Constitutional Petition is accepted to the extent mentioned above. Respondents are directed to restore the original amenity status of the afore referred plots.

**JUDGE**

**JUDGE**

Dated 26.09.2017

M.Javid.P.A.