

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Constitution Petition No.D-5891 of 2016

Date	Order with signature of Judge
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Present

**Mr. Justice Muhammad Ali Mazhar
Mr. Justice Abdul Maalik Gaddi**

Jalil-ur-Rehman & others Petitioners

V E R S U S

Province of Sindh & others Respondents

26.01.2017

Mr. Shaukat Ali Shaikh, advocate for petitioners
Mr. Iqbal M. Khurram, advocate for respondent No.3
Mr. Osama Aftab, advocate for respondent No.4
Mr. Sibtain Mehmood, AAG

Muhammad Ali Mazhar-J. The petitioners have approached this Court for seeking directions against the respondents to adequately compensate them in lieu of their plots as per market value and they may be further restrained not to cause any harassment or taking demolishing action against them.

The brief facts of the case are that the petitioners No.1 and 2 have the leasehold rights. The lease issued by District Officer (Rev), Katchi Abadis, CDGK in favour of the petitioner No.1 for plot No.78, sheet No.2, 136.11 sq.yds., Haji Mureed Goth, Nazimabad, Karachi, is attached at page 13 of the petition, while lease deed of petitioner No.2 issued for plot No.77, sheet No.2, 111.52 sq.yds., Haji Mureed Goth, Nazimabad, Karachi, is attached at page 39.

The leasehold rights by regularizing the unauthorized possession of plots in Katchi Abadis of Karachi were granted for 99 years in the year 2005 to the petitioner No.2 and in 2006 to the petitioner No.1. So far as

the petitioner No.3 is concerned, it is admitted that no leasehold rights were granted to him for the plot in his possession, but the learned counsel referred to page 49 of the file, which is merely refugee identity card issued in the name of Kifayatullah as head of family. When we asked the learned counsel to show the relationship of this Kifayatullah with the petitioner No.3, the learned counsel responded that he purchased the plot from Kifayatullah, but no such title document is available on record.

He further pointed out page 61, which is a copy of sale agreement and argued that the petitioner No.3 has purchased the plot from one Maqsood Anwar, who had purchased the plot No.I-160, Liaquatabad No.4, Karachi, measuring 60 sq.yds. from descendants of Kifayatullah.

Learned counsel argued that the respondents are trying to dispossess the petitioners from their plots on the whims that they have encroached the public property Gujjar Nala Express Project of the respondents. He further argued that if respondents want to evict the petitioners, then they have to take action in accordance with law, but not in a summary way to oust the petitioners from their lawful possession. Alternatively, he argued that if the respondents want to disturb the petitioners from their lawful possession, the proper course is to acquire the property against reasonable amount of compensation under provisions of the Land Acquisition Act.

On the contrary, Mr. Iqbal M. Khurram, learned counsel for respondent No.3 has filed the comments of KMC and argued that vide KMC Resolution 34 dated 05.8.2015 and on the directives of the Chief Minister Sindh/ Minister Local Bodies, the Administrator, KMC chalked out removal of encroachment programme for the alignment of Gujjar Nala

and its beds. Therefore, the operation for removal of encroachment was started against only such encroachment, which is found in the alignment of Gujjar Nala, for which all relevant departments/ agencies are providing assistance in the said removal operation. He further referred to the consent order dated 09.12.2016 passed by the Division Bench of this Court in CP No.D-6286/2016 and some other connected petitions in which the counsel for the petitioners, KMC and learned AAG, by consent agreed that the petitioners will approach to the Tribunal constituted under the Sindh Public Property (Removal of Encroachment) Act, 2010, for the determination as to whether the plots of the petitioners in that case could be declared public property or not.

Learned counsel for KMC submits that this petition may be disposed off in terms of the aforesaid consent order while the learned counsel for petitioners argued that some relevant facts and case law were not discussed in the consent order. He further argued that in the case in hand at-least petitioners No.1 and 2 have leasehold rights in their favour conferred upon them by issuing registered indenture of lease, so in this regard, he referred to the order reported in 2016 CLC Note-2 authored by one of the learned members of same Bench which passed the consent order held that, keeping in view, Section 39 of the Specific Relief Act, registered documents could not be cancelled without intervention of the civil court. He further referred to the judgment of Hon'ble Supreme Court in the case of Amir Jamal & others vs. Malik Zahoor-ul-Haq & others reported in 2011 SCMR 1023, in which it was held that the registered documents could be cancelled on the ground of fraud or otherwise, only by civil court. While dilating upon the niceties of Article 199 of the

Constitution of Pakistan, the Apex Court further held in the same Judgment that jurisdiction under Article 199 of Constitution would extend to questions devoid of factual controversy.

Under Section 3 of the Sindh Public Property (Removal of Encroachment) Act, 2010, government or any authority or officer authorized by government in this behalf may require a person responsible for encroachment to remove such encroachment together with the structure, if any, raised by him on public property. While in the explanation attached to this Section, it is further provided that lessee or licensee, who after the expiry of period of lease or on determination of such lease or license continues to retain unlawfully possession of any public property shall for the purpose of this Section be deemed to be responsible for encroachment. While the procedure for eviction and punishment for encroachment is provided under Sections 5 and 8. Section 11 deals with the bar of jurisdiction and abetment of suits in relation to a dispute that any property is not a public property or that any lease or license in respect of such public property has not been determined for the purposes of this Act. So far as the pending suits before the promulgation of this Act are concerned, it is further provided in Sub-Section (2), all such suits, appeals and applications relating to encroachment and dispute that any property is not a public property or that any lease or license has not been determined shall abet. However, a right has been conferred to all such parties to file a suit before Tribunal for dealing with such disputes.

To a question raised by this Court to the learned counsel for KMC that admittedly the lease was executed in favour of the petitioners No.1 and 2 for the period of 99 years, which is very much in force and not

determined by the lessor. On this point, learned counsel for KMC submits that all such leases were cancelled in one stroke by means of resolution No.34 dated 05.8.2015, but neither any copy of such resolution is available on record nor the counsel for KMC stated that on the strength of this resolution any show cause notice was ever issued to any such lessee before taking any alleged action for cancellation.

Learned counsel for KMC further stated that even for removing the encroachment from public property Gujjar Nala, no individual notice was ever issued but a public notice for general public information was published in the newspaper. However, he has not produced any copy of public notice along with the copy of comments.

Be that as it may, on the one hand, the petitioners No.1 and 2 produced the copy of their leases, but on the other hand KMC has raised a dispute in the counter-affidavit that the petitioners have encroached upon public property and the said land is required for alignment of Gujjar Nala. On the face of it, the dispute presently before us needs evidence and it is well settled that the factual controversy cannot be decided in the writ jurisdiction. Before issuing any notice to the petitioners for removing the encroachment by the respondents, we are at-least not inclined to direct the petitioners to approach the Tribunal, because if the respondents are aggrieved by the encroachment and they want to align Gujjar Nala, it is their responsibility to issue a show cause notice to the lessees to explain as to why they should not be removed from the public property. Basically in this case the crucial element which requires the decision or determination as to whether the petitioners are occupying the public property or they were issued valid leases but this question cannot be

decided without proper evidence and for this purpose, the constitution petition is not a proper remedy. So far as the question for the payment of compensation is concerned again this can be done according to law if the property is acquired under the provisions of Land Acquisition Act.

As a result of above discussion, the KMC is at liberty to take action strictly in accordance with law after issuing proper notice to the petitioners. Till such time, the issue as to whether the petitioners No.1 and 2 have encroached upon the public property and their registered leases are liable to be cancelled is determined, no adverse action shall be taken against the petitioners by the respondents. So far as the petitioner No.3 is concerned nothing has been placed on record to show his valid title, however, if he wants to challenge the action against him, he may seek appropriate remedy in accordance with law. The petition is disposed off in the above terms along with pending applications.

JUDGE

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