

**IN THE HIGH COURT OF SINDH AT KARACHI**

**C. P. No. D-8912 of 2017**

**Present:-**

**Mr. Justice Muhammad Junaid Ghaffar.**

**Mr. Justice Yousuf Ali Sayeed.**

**Petitioners:** **Aslam Pervez & others through Mr. Dildar M. S. Shaikh Advocate.**

**Respondents:** **Government of Sindh & others through Ms. Azra Muqem Advocate for KMC. SI Iqbal Ahmed P.S. Ferozabad Karachi.**

- 1) For hearing of CMA No. 18674/2018.**
- 2) For hearing of CMA No. 37269/2017.**
- 3) For hearing of main case.**

**Date of hearing:** **31.12.2018.**

**Date of order:** **31.12.2018.**

**O R D E R**

**Muhammad Junaid Ghaffar, J** Through this Petition the Petitioners have sought the following relief:-

- a) Declaring that the notice No. 0144 dated 22.1.2017 issued by the Respondent No. 4 is illegal unlawful, ab-initio, null and void and not enforceable upon the Petitioners and same is liable to be cancelled.
- b) To cancel the No. 0144 dated 22.12.2017 issued by Respondent No. 4 being illegal and unlawful.
- c) To restrain the Respondents from removing / demolishing the structure / construction raised by the Petitioners over the Plot No. 5/1 admeasuring 240 square yards situated at Scheme 13-A Commercial Area Hill Park Karachi.
- d) Any other relief which this Hon'ble Court grant in the circumstances of the above petition."

2. Learned Counsel for the Petitioners submits that the plot in question bearing No. 5/1, admeasuring 240 square yards, situated at Scheme 13-A, Commercial Area, Hill Park, Karachi, was leased by the

then Karachi Development Authority (“KDA”), on 9.1.1978, against certain consideration and since then the Petitioners are using the property on the basis of the said lease for commercial purposes. He submits that through this Petition, petitioners have impugned notice issued by the Anti-Encroachment Cell, purportedly issued under the garb of certain orders passed by the Hon’ble Supreme Court regarding removal of encroachments on park areas, but in the given facts the same is unlawful and against the spirit of such order. He further submits that though the property in question is within the park area, but such area was earmarked independently for commercial purposes and is not to be accounted for the area reserved for the park.

3. On the other hand, learned Counsel for KMC submits that the impugned notice was issued as per directions of the Hon’ble Supreme Court as apparently the commercial property has been raised on an area which was earmarked for amenity purposes i.e. park; therefore, the allotment and lease is per-se illegal and without lawful authority.

4. We have heard both the learned Counsel and perused the record. This Petition has been fixed before this bench in vacations pursuant to directions of the Hon’ble Supreme Court dated 12.12.2018 passed in Petition No. 9/2010 and other connected matters wherein, Para 5 reads as under:-

“With respect to the cases pending before the courts below (list whereof has been provided by Mr. Waseem Akhtar, Mayor of Karachi) including the learned High Court regarding the amenity plots in which some interim relief has been granted, the Registrar of the Court is directed to fix such matters within ten days from now and we are sanguine that the learned High Court shall decide the cases expeditiously as and when those are fixed. Regardless of the dates fixed, the cases which are pending before the subordinate courts shall be decided within 15 days from today. It maybe pertinent to mention here that if these cases are not disposed of, as has been directed, the files of such cases be requisitioned from the concerned courts and all the matters be listed before this Court for decision and notices be issued to all the plaintiffs

of those cases to appear before this Court on 05.01.2019 . Any violation of the order passed by this Court shall be considered to be disobedience and disregard of the Court's order carrying serious repercussions.”

5. At the very outset, learned Counsel for the Petitioners was confronted as to how the lease in question was granted in favour of the Petitioners, as apparently the land in question is admittedly within the boundary wall of the park in question. To this learned Counsel for the Petitioner requested for a week's time; however, considering the peculiar facts and the exigency in the matter, we deemed it appropriate not to grant any adjournment, as this Bench is only available till 2.1.2019. Nonetheless, even otherwise, while filing a Petition, the Petitioners are required to come before the Court with all such documents which are necessary and on which reliance is to be placed.

6. Perusal of the record as well as the lease in question reflects that it is silent as to how this plot was allotted to the petitioners i.e. whether through any auction, balloting or otherwise. Despite repeated queries, learned Counsel for the petitioner was unable to assist the Court on this issue. It is admittedly a Government Land (irrespective of the fact that even otherwise it was for amenity purposes i.e. park), and could not have been allotted to any individual without following the procedure as provided in law regarding its allotment. The land of KDA could only be allotted through public auction, or through balloting or, for any special purpose which is not the case here. It has been directly leased as could be deciphered from the record for a period of 99 years, whereas, it is admittedly within the amenity area of park. It is settled law that an area which is reserved for amenity i.e. parks, cannot be used for any commercial purposes. We had also confronted the learned Counsel for the Petitioner as to whether the property in question has any access independently from outside the park

to which learned Counsel conceded that there is no separate entrance and it is only accessible after entering the park. We have also seen the photographs placed by the petitioners themselves and it is clearly reflected that the property being claimed is inside the park and there can't be any exception to it. We have also not been assisted in any manner as to how the obstacle(s) of Article(s) 40 and 52-A of the KDA Order, 1957, were circumvented, which require that while considering any change in the zonal or master plan it is mandatory to invite public objections. Lastly, we may observe that it is not a case of any kiosk or a tea stall within the park, which in exceptional circumstances can be permitted by grant of a license; but in this case it is an independent lease for 99 years, which perhaps cannot be granted in respect of land reserved for an amenity like a park.

7. The Hon'ble Supreme Court in the case reported as ***Province of Sindh through Chief Secretary and 8 others v. Syed Kabir Bokhari (2016 SCMR 101)***, had the occasion to deal with somewhat similar facts, wherein, allotment of amenity land was made by KDA for commercial use through auction for 99 years in the year 1976. The allottee had paid full occupancy value of the disputed plot and was also given possession; however, the Hon'ble Supreme Court was pleased to set-aside such allotment and lease and held as under:-

“6. It is not the case of respondent before us that the disputed plots allotted to the respondent were the plots meant for commercial use and such also does not appear to be the position emerging on examining the two master plans as referred above. The master plan shows that the land having cross lines apparently is meant for amenity/land for public use and not a space/land meant for allotment for use in commercial venture. Depiction of two squares in the revised master plan of 1975 is outside the lined area does not appear to be factually correct as has become known from the two reports; one submitted by the Deputy Nazir of High Court of Sindh and the other of Office Incharge of this Court in which the disputed plots are shown to be part and parcel of parking lot of CDGK and not out side it. The land

immediately outside the parking lot is a beach, which become submersible by sea water on high tide.

7. All these factors show that the disputed plots allotted to the respondent were carved out from amenity plot/land for public use and such allotment being admittedly made for commercial use was directly in conflict with the Article 52-A of the KDA Order, 1957 which specifically provided for procedure for seeking of conversion of amenity plot for other use. Admittedly, there is no order whereby use of plot from that of amenity to that of commercial was sanctioned by competent authority in respect of disputed plots.

8. It may further be noted that the allotment of disputed plots was made as back in the year 1976 but despite having possession, the respondent took no steps for raising construction and rather left the disputed plots as they were at the time of allotment and possession that is a bare site. The respondent has given an explanation for not raising the construction that is the officials did not develop the area nor provided the utility. The fact however remains that for almost 29 years respondent remained inactive and did not use the disputed plots for the purpose for which they were allotted. This fact of non-use of disputed plots by the respondent reflects heavily against him and shows that very purpose of allotment of disputed plots was other-wise than use by the respondent as kiosks.”

8. Similarly, in the case reported as ***Ardeshir Cowasjee and 10 others v. Karachi Building Control Authority (KMC), Karachi and 4 others (1999 SCMR 2883)*** in somewhat similar facts in respect of a plot which was carved out within a park area, the Hon’ble Supreme Court has been pleased to hold that an amenity plot cannot be used for any commercial purposes.

9. In the case reported as ***Human Rights Case Nos.4668 of 2006, 1111 of 2007 and 15283-G of 2010 (PLD 2010 SC 759)***, the Hon’ble Supreme Court had the occasion to examine certain allotment of land to a multinational Food Chain (Fast Food) in a public park by the Capital Development Authority. After a detailed examination as well as case law in respect of the controversy the Hon’ble Supreme Court was pleased to cancel such allotment to the Fast Food Company, with further direction to act strictly in accordance with law for future allotment if any.

10. In the case reported as ***In re: Suo Motu Case No.10 of 2009 (2010 SCMR 885)***, the Hon'ble Supreme Court while dealing with construction of a mega Store in the name of Makro Habib on a plot reserved for playground has been pleased to observe that;

49. The submission on behalf of AWT based on legal title, is founded on private law concepts of right to property but ignores completely, the notion of public ownership of the land, stemming from the Constitution. It also overlooks the fiduciary nature of the responsibilities of the Government and its functionaries while dealing with valuable assets such as playground. Land which is privately owned can be dealt with by the owner in any manner he chooses. The owner may, therefore, legitimately decided to grant a lease of the most valuable land owned by him, in consideration of a 'peppercorn rent'. Or, he may even decide to make an outright gift of the same on the basis of the unfettered title vested in him. However, where land is owned publicly, that is, by the people of Pakistan, legal title may vest in the Government, but such title, and the exercise of powers based thereon, are to be exercised in the public interest, in accordance with the Constitution and the laws framed thereunder.

11. In the case reported as ***SHEHRI-CBE v Lahore Development Authority (PLD 2012 Lahore 362)***, a full bench of the learned Lahore High Court, has been pleased to restrain construction of a shopping mall on a land reserved for park / playground. The relevant finding of the learned full Bench is as under;

10. The aforesaid makes it clear and obvious that in any development scheme at its inception if a particular area is designated as a park/playground, and upon such representation, the properties in the vicinity are acquired by inhabitants, a vested right is created in their favor and the public at large in respect of such park/playground. This right in fact is a necessary appendage to the right to life as enshrined in Article 9 of the Constitution and right of leisure as referred to in Article 39 of the Constitution. Thus in the original plan of the respondents to convert the Doongi Ground to any other use would have offended against the rights of the petitioners. However, the original scheme has since been abandoned. It is now the case of the respondents that unfortunately large sum of public money has been expended on the project, and even if such expenditure is illegal or unauthorized or ill advised, every effort should be made to utilize the construction already erected for some useful public purpose. And it is in the above context, a proposal has been submitted to this Court on behalf of respondents in terms whereof, the respondents have expressed their intention to retain the underground parking lot to provide parking facilities to the adjacent commercial areas around MM Alain Road. It is also the declared intention of the respondents to complete the construction raised above ground into public library, gymnasium and bowling alleys. In this behalf the learned counsel for the respondents has relied upon judgment of the Supreme Court reported as PLD 2010 SC 759 supra.

11. This Court is and has always been sensitive to the fact that public money should not be wasted. And the sensitivity of this Court in this behalf cannot be overemphasized. However, we cannot allow the respondents to present this Court with a fait accompli at the expense of or to the prejudice of the rights of the petitioners or public at large. In the instant case as has been mentioned in C.M. No.1006 of 2010 about 70% of the expenditure has been sunk into the basement for the creation of parking lot. We are informed that the entire parking lot is totally underground and will have a green grass top, can thus be utilized as a park/playground. In modern urban centers construction of parking lots under public parks is not unknown, and such a course of action is often necessitated by paucity of space. Thus, the existence of the underground car parking lot does not entirely destroy the essential feature of the site as a park/playground. In the circumstances we are persuaded to allow the respondents to complete and utilize the underground car parking as long as it remain entirely the underground and has a green grass top thereby 70% of the expenditure already incurred will be put to some use. Whether the car parking lot will be used by citizens of Lahore is entirely up to them. However, we hope that the respondents will not permit the same to become a haven for drug addicts and vagrants.

12. In view of hereinabove facts and circumstances of this case, since apparently the property in question is within the park area and as per the dicta laid down by the Hon'ble Supreme Court as above, an area earmarked and reserved for an amenity like park, cannot be used for commercial purposes, whereas, no satisfactory response has been given as to grant of lease in respect of the plot in question, therefore, notwithstanding the lease in question as contended, the Petitioners have failed to make out any case for indulgence and therefore, by means of a short order on 31.12.2018, instant Petition was dismissed with pending applications and these are the reasons for the same.

**J U D G E**

**J U D G E**