

IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

C.P. No.D-2231 of 2014

Present

Mr. Justice Muhammad Iqbal Kalhoro

Mr. Justice Adnan-ul-Karim Memon

Muhammad Dawood Wagan
& others

Petitioners

Vs.

The province of Sindh through
Secretary Local Government
Department, Karachi

Respondents

Date of Hearing: **12.02.2019.**

Date of Announcement: **28.02.2019.**

Mr. Muhammad Arshad S. Pathan, Advocate for the Petitioners.

Mr. Irfan Bughio, advocate for HDA/ Respondents No.2, 3, 6 & 7.

Mr. Jhamat Jethanand, advocate for Respondents No.8 & 9.

Mr. Zaheeruddin Sahito, Advocate for SBCA/ Respondents No.4 & 5.

Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh.

J U D G M E N T

ADNAN-UL-KARIM MEMON-J: - Through the instant petition, the
Petitioners have made the following prayers:-

a) **To issue writ declaring that the revise of lay out plan of Midland Bungalows and Kehkashan Housing Scheme by Hyderabad Development Authority reducing and converting the amenity area of both the Schemes into residential/ commercial plots and denomination/ assignment of Plot Nos.B/38, B/39, A/37 and removal of road area from the lay out plan and its enclosure in the plots are illegal, unlawful, void ab-initio and without lawful authority.**

b) **To declare that the act of conversion of area of amenity plot of both Housing Schemes and its usage by the builders through third person is illegal, unlawful and entire amenity area of both Schemes is liable to be restored to its original position alongwith the road area**

joining Kehkashan Housing Scheme to Midland Bungalows.

c) To direct the official respondents to restore the area of amenities of both Housing Schemes by taking over its possession after demolition, removal of entire construction over the amenity plots road area of Midland Bungalows and Kehkashan Housing Scheme and restore the amenity plot in its original position.

d) To take necessary action against the officials as well as proprietors/ owners of both Schemes for their purposeful, intentional, flagrant violation of law and provisions of Article 9 & 26 of the Constitution and direct the agencies to take appropriate action according to law for purposeful, intentional, illegal and unlawful acts of official respondents who acted collusively.”

2. The case of the petitioners pertains to illegal conversion of amenity plot by way of creation of plots bearing Nos.B-38, 39 & A-37 in Kehkashan Housing Scheme and Midland Bungalows Housing Scheme. Petitioners being aggrieved by and dissatisfied with the aforesaid actions of the Respondents have filed the instant petition with the aforesaid prayers. And the case of the Respondents No.8 & 9 is that the interim order in respect of aforesaid three plots was obtained in C.P No.D-1796/2010, which has been withdrawn by order dated 24.4.2014 passed by this court and said vacation of interim order was assailed before the Hon'ble Supreme Court of Pakistan in CPLA No.222-K/2014 vide order dated 24.7.2014, however, same remained unaffected. The Respondents 2, 3 and 4 have submitted brief history of the case, which is discussed herein below in detail.

3. The Respondents have filed their comments in the Petition.

4. Mr. Muhammad Arshad S. Pathan, learned counsel for the Petitioners has argued that in both aforesaid Schemes there was amenity Plots the said amenity plots were converted into residential/commercial plots; that the fundamental rights of general public enshrined in Article 9 & 26 of the Constitution have been denied; that the revised plan shows the reduction of area of amenity plot on the Eastern side of Midland

Bungalows and the said reduction was even revised in infringement of rights of general public of Midland Bungalows and Kehkashan Housing Scheme; that lay out plan of Kehkashan Housing Scheme shows the area of reserved for amenities on the Western side of the Housing Scheme and the lay out plan of Kehkashan Housing Scheme placed together with the lay out plan of Midland Bungalows, shows area of both Schemes made together; that owner/ proprietor malafidely, illegally had closed the road leading to amenity and on other hand reduced the area and so also introduced commercial plots through revised lay out plan, illegally and unlawfully, which is absolutely unwarranted under law; that construction has been started upon the area of the amenities as the road area has been closed and construction of the residential units has been started illegally, unlawfully; that respondent No.6 Ghulam Shabbir started the construction and the residents of both Housing Scheme approached the HDA but no heed was paid, as the official respondents are in collusion with the proprietors. He lastly prayed for allowing the instant petition.

5. Conversely, Mr. Jhamat Jethanand, learned counsel for Respondents No.8 & 9 has raised the question of maintainability of the instant petition and argued that every aspect of the matter was considered by this Court in another CP No. D-1796 of 2010 filed by Mr. Abdul Sattar Memon and others, wherein this Court vide its orders dated 24.04.2014 by modifying the interim order dated 28.12.2010 to the extent that such orders shall not be applicable on the residential plots bearing B-38, B-39 and A-37 accepting that these plots are not amenity plots and were approved in the year 1992 for residential purpose. He next added that the Petitioner No.3 assailed the order dated 24.04.2014 before the honorable Supreme Court of Pakistan in CPLA No. 222-K of 2014 and the same was dismissed on 24.07.2014. He further averred

that the similar relief cannot be claimed by filing subsequent legal proceedings as it would fall within mischief of constructive res-judicata; that the issue of amenity plot has been resolved by earlier round of litigation, therefore this petition is not maintainable.

6. We posted a question to the learned counsel for Respondents No.8 & 9 with regard to site inspection report carried out by the order of this court; he in reply submitted that he has filed certain objections on the report which may be considered; that nothing is done contrary to the law. He lastly prayed for dismissal of the petition.

7. Mr. Irfan Bughio, learned counsel for HDA/ Respondents No.2, 3, 6 & 7 has adopted the arguments of Mr. Jhamat Jethanand.

8. Mr. Zaheeruddin Sahito, learned counsel for SBICA/ Respondents No.4 & 5 has also adopted the arguments of Mr. Jhamat Jethanand

9. We have heard learned counsel for the Petitioner and learned counsel appearing on behalf of the Respondents as well as, perused the material available on record.

10. To commence, we would address the question of the jurisdiction of this Court with regard to maintainability of the petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

11. The allegation in the present case against the respondents is conversion of an amenity plot to commercial/residential use and encroachment thereon, in both the housing schemes as discussed supra.

12. The Honorable Supreme Court in the case of Ardeshir Cowasjee vs. Karachi Building Control Authority (1999 SCMR 2883) has held that the conversion of an amenity plot is illegal. The encroachment of amenity

plot cannot be allowed to sustain under the law. Accordingly, we are of the view that this Petition could be heard and decided on merits by this Court, while exercising its Constitutional jurisdiction.

13. Having decided on the maintainability of the instant Petition, the following factual position has emerged in the present matter:-

i) That in 1982 M/s Indus Housing Enterprises got approval of lay out plan over R.S No's 244, 245 and 246/2 Deh Sari Qasimabad, Hyderabad in the name of Kehkashan Housing Scheme; that in 1984, M/s Indus Housing Enterprises, Sponsors informed that due to non-response of booking, he had sold the piece of land i.e. Revenue Survey No.246/2 Deh Sari Qasimabad, Hyderabad to some other party and requested for approval of revised layout plan of his scheme by dropping these survey numbers. His request was considered and revised plan of Kehkashan Housing Scheme over only R.S No 244 (admeasuring 6.9.acres) was approved on 01.04.1984 by the competent authority; that in the layout plan a plot was reserved for amenity i.e. 8460 sq. ft. was considered on western side of the scheme. And since then no layout plan of Kehkashan Housing Scheme has been revised.

ii) That in the year 1987, M/s. Mst. Memoona, Mst. Shehla, Mst. Tasneem Kauser, Mst. Amna, Mr. Muhammad Ilyass and Mr. Mansoor through attorney Mr. Muhammad Iqbal s/o M. Usman of M/s. Simco Builders & Developers, submitted layout plan in the name of Mid Land Bungalows Housing Scheme over R.S. Nos. 245/1, 245/2 and 246/2, total admeasuring 4 acres $\frac{1}{2}$ ghunta and the same was approved vide permission No. HDA/DDC/MP/PHS-151/1288 dated 04/06/1987 having total amenity area admeasuring 16132.5 sq. ft. After one month of issuance of permission the sponsor requested some corrections in sizes of plots due to architectural mistake. The same was approved as revised plan vide permission No.HDA/DDC/MP/PHS/1618 dated 09/07/1987 having total amenity area admeasuring 14578.25 sq. ft (i.e. within permissible limit); that in this layout plan part of amenity plots was proposed towards eastern side,

adjacent to Kehkashan Housing and some part towards western side of the Mid Land Bungalows housing scheme. The overall area of these amenity plots was 14578.25 sq. ft. and area reserved for lane and road's amenity was 59219.25 sq. ft. Thus total area becomes 73797.5 sq. ft. That during 1991, One Mst. Tasneem Kousar (one of the shareholder of the land) intimated that she had purchased the entire share of the land of Mid Land Housing Scheme from other partners and got mutation in the record of rights in her favour in Deh Form-VII vide entry No.72 dated 25.03.1991. She also requested for approval of the same layout plan in her name by disallowing commercial plots in addition to approved residential plots of Category A (150 sq. yds), Category B (135 sq. yds), Category C (120 sq. yds). Her proposal was considered in her favour and revised plan was approved vide permission No.HDA/PH/PHS/151/2080 dated 2/12/1991. That in January 1992, she again submitted revised proposal with request to allow only Category A (240 sq. yds) and Category B (120 sq. yds) as up to 1992 the housing scheme have a great slum due to disturbance of ethnic riots and the small sizes plots have no demand in this area. Therefore, she proposed residential plots of only A and B category by deleting C category. Her request was considered and layout plant of Mid Land Bungalows was approved vide permission No. HDA/P&DC/PHS-151/196 dated 01/02/1992, and the same is still intact. However, regarding amenity of Mid Land Bungalows Housing Scheme towards eastern side adjacent to Kehkashan housing scheme and residential plot Nos. 37, 38 and 39 are on the boundary of Kehkashan Housing Scheme within its limit as verified by the Settlement Survey and Land Record Department Sindh, Hyderabad vide letter No.GD/Mohtasib/854 dated 26.05.2010, which were made in the complaint under investigation by the Provincial Ombudsman.

14. This court vide order dated 12.2.2015, appointed Additional Registrar of this Court to inspect the site and submit report, and in compliance thereof he has submitted his report.

15. We have scrutinized the compliance report submitted by Additional Registrar of this Court, which explicitly show the following factual position of the case.

i) That the amenity area including road and lane were reserved 03-acres for Kehkashan Housing Scheme and two portions of amenity plots were reserved for Midland Bungalows and 1st small portion is situated besides the amenity plot of Kehkashan Housing Scheme and their roads and streets are linked with each other. However, 2nd big portion of amenity plot reserved for Midland Bungalows is situated on the backside just between plot No.57 & 15 and both portions of Midland Bungalows having an area of 16132.50 sq.ft; which are exclusively amenity plots.

ii) That the amenity plots reserved for Kehkashan Housing Scheme and 1st small portion of reserved amenity plot for Midland Bungalows and that there is only one open plot situated at the western side of *Makki Masjid*, admeasuring about 1200 sq. ft. However, the mosque was measured about 2400 sq. ft. The Director (planning & Development Control), H.D.A. informed that as per above said layout plan, the mosque had been constructed over the part of amenity plots of both the above said schemes.

iii) To ascertain the remaining part of amenity plots of the said schemes, towards Bungalow No.C-18 related to one Mr. Aslam Ansari situated in Kehkashan Housing Scheme, where it was found that he had occupied the road of 20' x 46'.8" adjacent to his bungalow and blocked it with an iron gate and enjoying the physical possession, accordingly. It was also found that the said blocked road ended at the back side wall of the Bungalow No.38 & 39 related to the respondent No.8.

iv) The Bungalow No.38 was under R.C.C. construction of ground plus+1 story. While the other one is constructed completely. The respondent No.8 informed that he is the owner of the both bungalows i.e. Nos.38 and 39. The Petitioner No.1 informed that the above said two bungalows had been constructed over the reserved amenity plots of Kehkashan Housing Scheme and on some portion of amenity plot of Midland Bungalows. The both bungalows were measured and found about 2800 sq.ft.

v) That 2nd big portion of the amenity plot reserved for the Midland Bungalows, situated between plot No.57 and 15, as per layout plan, issued in the year, 1988, where no amenity plot was found in existence and the said amenity plot was completely occupied by the encroachers, mostly by the inhabitants residing in the bungalows of Midland Scheme. Accordingly, no any amenity plot found there. Besides

it, the streets were found closed by raising bricks wall by the inhabitants of the area.

vi) That the Director (P & DC) H.D.A. Hyderabad informed that layout plan has been revised 4/5 times regarding Midland Bungalows and once regarding Kehkashan Housing Scheme, whereby the reserved amenity areas have been reduced little bit.

vii) That H.D.A. officers, concerned officers of Building Control Authority as well as Officers of Anti-Encroachment Cell, have not been performing their duties properly. Even, the H.D.A. officers / officials did not fully co-operate with the commissioner and also did not provide complete approved revised plans as well as applications received and the reasons for revise plans regarding both the above said schemes. Besides, the Assistant Mukhtiarkar, Qasimabad also failed to provide the sketch of measured amenity plots of the streets of the entire area were found under encroachment. However, the negligence on the officers of H.D.A. and S.B.C.A.

viii) That no any amenity plot was found in existence during the inspection except an open plot of about 1200 sq.ft and a mosque about 2400 sq.ft in Kehkashan Housing Scheme and Midland Bungalows adjacent with plot No.38 and 39, showing the above said un-approved sketch.

ix) That the road admeasuring 20' was found closed with iron gate by the owner of RC-18 (Aslam Ansari), the same ends at the backside wall of Bungalow No.38 (under construction) leading towards the road of Midland Bungalows.

x) That Bungalow Nos. 38 & 39 are constructed over some part of amenities reserved for Kehkashan and Midland Bungalows and the remaining reserved amenity plots of the said schemes including 2nd portion of amenity plot including road reserved for Midland Bungalows situated on the backside just between plot No.57 and 15, have been encroached upon by the inhabitants of Midland Bungalows.

16. In our view this issue, conversion of an amenity plot to commercial/residential use had already been discussed and adjudicated by the Honorable Supreme Court in the case of Ardeshir Cowasjee vs. Karachi Building Control Authority (1999 SCMR 2883). It was held that the conversion of an amenity plot is illegal. The encroachment of amenity plot cannot be allowed to sustain under the law, which aspect, the official respondents have to look into and restore its possession in accordance with law.

17. Basically the conversion of an amenity plot to another use without inviting and deciding objections is illegal. Such conversion is treated as

an abuse of discretion and therefore is unlawful for the simple reason that the paramount object of modern city planning is to ensure maximum comforts for the residents of the city by providing maximum facilities and that a public functionary entrusted with the work to achieve the above objective cannot act in a manner, which may defeat the above objective and deviation from the planned scheme will naturally result in discomfort and inconvenience to others.

18. Framing of a housing schemes does not mean simpliciter, leveling of land and carving out plots, but it also involves working out approximate requirement of water, electricity, gas, sewerage lines, streets and roads etc. and if a housing scheme is framed on the assumption that it will have residential units 1 + 1 but factually if the builders or allottees of the plots are allowed to usurp public utility services and it will result in suffering for everyone living in the scheme, therefore it is imperative on the public functionaries like the competent Authority as well as owners of the plots in question to ensure adherence to the Building Rules and Regulations, enforced for the time being. However, it is clarified that it may not be understood that once a housing scheme is framed, no alterations can be made. Alterations in a scheme can be made for the good of the people at large, but not for the benefit of an individual for favoring him at the cost of other people. The infrastructural facilities of a housing scheme or society like electricity, water, gas, roads, sewerage, etc. can be overburdened dramatically when land reserved for residential purposes is converted to commercial use. Equally, public interest suffers through deprivation when amenity plots are converted to other use.

19. The learned counsel for the Petitioner has emphasized that the present matter pertains to illegal conversion of amenity plot by way of creation of plots bearing Nos.B-38, 39 & A-37. the learned counsel for the Respondents No.8&9 has refuted the claim of the Petitioner and argued

that the interim order in respect of aforesaid three plots was obtained in C.P No.D-1796/2010, which has been withdrawn by order dated 24.4.2014 and said vacation of interim order was assailed before the Hon'ble Supreme Court of Pakistan, however, same remained unaffected. In our view the above will not help the respondents as it was not a decision on merits. The irregular and unlawful conversion of plot usage creates undue congestion and load on the infrastructure and facilities of a housing scheme which puts the entire community to injury and loss, as such the same cannot be allowed under any law. To prevent such congestion is the primary consideration of this Court in ordering the strict enforcement of building and land usage laws.

20. Again reverting, to the main contention of the learned counsel for the Respondents No.8 & 9 the petition bearing No.D-1769/2010 was dismissed on account of non-prosecution vide order dated 28.2.2018. Therefore, the Petitioner No.2 cannot file the instant petition on the same cause of action which has already been adjudicated upto the level of Hon'ble Supreme Court of Pakistan on the issue involved in the present matter.

21. We have also perused the order dated 24.4.2014 passed by this court in CP No. D- 1769 of 2010 which explicitly show that the interim order passed on 28.12.2010 shall not be applicable to the residential plots bearing No.B/38, 39 & A-37. The Honorable Supreme Court in CPLA No.222-K/2014 vide order dated 24.7.2014 has endorsed the view of this Court. Therefore, no further action on our part is required on the aforesaid matter. For convenience, an excerpt of the order is reproduced as under:-

“We have heard the learned ASC for the Petitioners and perused the record. The impugned order before us has been passed by the learned High Court which pertains to clarification of an earlier order of interim nature. We do not find any infirmity in the

impugned order which could warrant interference by this Court. This petition is misconceived and is accordingly dismissed.”

22. In the light of foregoing, we have reached the conclusion that the amenity plots cannot be converted into either commercial or residential purposes and no encroachment can be allowed on the amenity plot as discussed supra. The report of learned Commissioner is very clear in its terms that no any amenity plot was found in existence in the housing scheme during the inspection, except one open plot of about 1200 sq.ft and a mosque about 2400 sq. ft. in Kehkashan Housing Scheme and Midland Bungalow adjacent with plot No.38 and 39, therefore, the objections raised by the learned counsel for the Respondents 8 & 9 on the site inspection report are of no consequence in view of the orders passed by this Court and Hon'ble Supreme Court.

23. In the light of decision rendered by the Honorable Supreme Court in the case of *Ardeshir Cowasjee vs. Karachi Building Control Authority (1999 SCMR 2883)* and report of site inspection carried out by the Additional Registrar of this court in the matter, we are of the considered view the respondents are under legal obligation to restore the amenity plots, according to original or revised layout plan. Let this exercise be completed within 03 months, whereafter the compliance report shall be submitted in the Court for perusal.

24. The petition stands disposed of in the above terms.

JUDGE

JUDGE