

Order Sheet
**IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD**

CP No. D- 2054 of 2019

Before:-

Mr. Justice Nadeem Akhtar

Mr. Justice Adnan-ul-Karim Memon

Date of hearing:
& decision:

11.12.2019

Petitioner:

Natho Kohar through Mr. Bilawal Bajeer,
Advocate.

Respondents 1-7&9.

Through Mr. Allah Bachayo Soomro, Addl.A.G.

Respondent No.8

Nemo

ORDER

ADNAN-UL-KARIM MEMON, J:- Through this petition, the petitioner is asking for setting aside the order dated 31.7.2019 passed by learned Presiding Officer Anti- Encroachment Tribunal Hyderabad in Misc. Application No.15 of 2019 (Re-Fayaz Hussain v. Province of Sindh & others) filed by Respondent No.8, whereby the learned Judge has directed the official respondents to remove the illegal encroachment constructed over the public property.

2. Case of the petitioner is that he is residing along with family members and other community people in village Natho Kohar since more than 40 years. Learned trial Court after hearing the parties, directed the official Respondents to remove the illegal encroachment constructed / made over the subject land vide order dated 31.07.2019. The petitioner being aggrieved by and dissatisfied with the aforesaid order preferred the instant petition before this Court on 7.8.2019.

3. Learned Counsel for the petitioner has mainly contended that the judgment of trial Court is against the law and facts; that the trial Court without recording evidence of either party passed the impugned judgment, which is not warranted under the law; that the impugned judgment is based upon misreading and non-reading of facts, as such, is liable to be set-aside and the matter may be remanded back for recording evidence of both the sides; that learned Anti-Encroachment Tribunal Hyderabad vide order dated 31.07.2019 directed the petitioner to vacate the public property; that the impugned order is against the basic spirit of law thus is liable to be set-

aside; that learned trial Court has no jurisdiction to adjudicate the matter under Sindh Public Property (Removal of Encroachment) Act, 2010; that no evidence of the parties has been recorded and the impugned order is passed without ascertaining the factual position of the case; that learned Tribunal failed to appreciate that village Natho Kohar is 40 years old village. He lastly prayed for allowing the instant petition.

4. Learned A.A.G. has supported the impugned order and argued that the petitioner has occupied the public property which needs to be removed under the law.

5. We have heard learned counsel for the petitioner and learned A.A.G. at considerable length and also reviewed the record available before us.

6. The allegation in the present case against the petitioner is encroacher of public property. Record reflects that Executive Engineer Irrigation Department submitted report before learned Tribunal that the subject property is a public property. Under Section 2(o) of Sindh Public Property (Removal of Encroachment) Act, 2010 "Public Property" is defined, to be a building, land, place or premises vesting, in or under the management or control of Government, local council, autonomous body or registered cooperative society or such other authority.

7. To understand the rule position of the case, it is expedient to have a glance on various Sections of the Act, 2010. Section 11(1) provides that no Civil Court shall have the jurisdiction to entertain any proceedings, Bar of jurisdiction and abatement of suits, grant any injunction or make any order 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 purpose of this Act, or anything done or intended to be done under this Act (2) All suits, appeals and applications relating to, encroachment and dispute that any property is not a public property or, that any lease or license in respect of such property has been determined, for the purpose of this Act, shall abate on coming into force of this Act. Provided that a party to such suit, appeal or application may; within seven days of the coming into force of this Act, file a suit before a Tribunal in case of 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. Section 13 provides that a Tribunal shall have exclusive jurisdiction to adjudicate upon 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 purpose of this Act. Section 14(1) provides that Tribunal shall decide any

suit or application in such manner and in accordance with such procedure as may be prescribed. (2) Any order made by the Tribunal which conclusively determines the rights of the parties with regard to all or any of the matters in controversy shall be final and binding on the parties. (3) The Tribunal shall have power of a Civil Court under the Code of Civil Procedure, 1908 (Act V of 1908). (4) The proceedings before the Tribunal shall be judicial proceedings within the meaning of Sections 193 and 228 of Pakistan Penal Code (Act No. XLV of 1860), Section 27 provides an appeal against the order passed by a Special Court shall lie to the High Court of Sindh.

8. We have perused the findings of learned Tribunal, which explicitly show the following factual position of the case:-

- i. That watercourse No.1-T is running through its sanctioned alignment from old government bhada.
- ii. Petitioner and others have allegedly encroached upon the watercourse and have constructed their katcha and pacca houses over the water course and are residing since last 40 years;
- iii. that the khatedars of the area is deprived to avail his legal share of water on account of such illegal hindrance in the smooth flow of water by the illegal encroachers;
- iv. Merely possession of the public property cannot legalize the encroachment of the same property;
- v. Anti-Encroachment Tribunal opined that the petitioner is occupying the public property and raised illegal construction and ordered for its removal vide order dated 31.07.2019.

9. Admittedly, the subject bhada land is an old piece of government land and the encroachment over public property cannot be allowed to sustain under the law, which aspect, the official respondents have to look into and restore its position in accordance with law. The encroachment of public property to another use is treated as unlawful. Without prejudice to above, at this juncture, we would like to refer the order dated 11.9.2009, passed by the honorable Supreme Court of Pakistan in Suo Moto case No.14 of 2009 wherein it is held that:

No one in authority, whosoever high office such person in authority may be holding, has any power, jurisdiction or discretion to distribute any public property or asset and in these cases extremely valuable lands, on nominal consideration, which land or asset essentially belong to the People of Pakistan. It was patently malafide exercise of power. This Court further ordered that the grants of lands to the

petitioner specially in the manner, the same was done are **prima facie violative of Article 3 (elimination of exploitation) Article 25 (equality clause) and Article 31 of the Constitution of Islamic Republic of Pakistan which requires the State to endeavour to promote observance of Islamic moral standards and Article 38 of the Constitution which *inter alia* requires the State to secure the well-being of the people by preventing concentration of wealth in the hands of a few to the detriment of general interest. The grant of lands to the petitioner in these cases were reprehensible acts on the part of the highest executive authority in the province, totally alien to the concepts of Islam.**

In another case, reported as 2014 SCMR 1611, it was held with regard to manner of exercise of powers by an authority regardless of its status that:

13. Looking at the powers of the Chief Minister for allotment of public property, here a reference to the case of Iqbal Hussain v. Province of Sindh through Secretary, housing and Town Planning Karachi and others (2008 SCMR 105) will be useful wherein this court has observed as under:-

“3. We are in complete agreement with the view taken by the Division Bench of the High Court when it says that public functionaries including the Chief Minister can deal with the public property only under a prescribed procedure within the parameters of law under a duly sanctioned scheme and not at their whims. Even if such order was passed by the Chief Minister in favour of the petitioner, authorities concerned would not be bound to follow such illegal and void order of a superior authority. It would rather be in the exigencies of good order of administration and their duty to point out to the high ups that they were acting in excess of their lawful authority and in violation of law and the constitutional mandate. They may be apprised of the legal consequences flowing from such acts. **The compliance of any illegal and arbitrary order is neither binding on the subordinate forums nor valid in the eyes of law.** Reference in this behalf may be made to decision of this Court in (i) Abdul HaqIndhar v. province of Sindh (2000 SCMR 907 and (ii) Taj Muhammad v. Town Committee (1994 CLC 2214)

(Underlining has been provided for emphasis).

10. Suffice to say that what is prohibited by the Honorable Supreme Court of Pakistan cannot be sought to be permitted by any other Court or authority, whosoever, it may be. Since the relief which is being sought in *all senses* shall amount to permitting what is prohibited/stopped by Honorable

Supreme Court which cannot be granted to the appellant because the law is clear that one cannot obtain directly, cannot obtain indirectly. Thus, now we can safely conclude that instant petition *from all angles* is incompetent and the jurisdiction of this Court is barred by Article 189 of the Constitution even, more particularly the principle enunciated by the Honorable Supreme Court in removal of encroachment of public property cases. Additionally the petitioner has failed to avail the remedy of appeal as provided under Section 27 of the Act, 2010 and directly approached this Court in constitutional petition, therefore, the instant petition merits no consideration.

11. 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 order passed by the learned Tribunal in the matter, the official respondents are under legal obligation to comply the directives of the Honorable Supreme Court passed in the cases of removal of illegal encroachment of public property(ies) from its occupants.

12. The petition stands dismissed in the above terms with no order as to costs.

JUDGE

JUDGE