

IN THE HIGH COURT OF SINDH AT KARACHI

Constitutional Petition No.771 of 2004

Present:

Mr. Justice Irfan Saadat Khan

Mr. Justice Muhammad Faisal Kamal Alam

Dates of hearing : 09.08.2021, 17.08.2021, 02.09.2021
& 15.09.2021.

Petitioner : Capt. S.M. Aslam in person.

For the Respondents No.1 & 4 : Mr. Khurram Ghayas, Advocate.

For the Respondent No.2 : M/s. Dhani Bux Lashari and Sartaj
Malgani, Advocates

For the Respondent No.3 : None.

Mr. Miran Muhammad Shah,
Additional Advocate General (AAG)
on Court notice.

J U D G M E N T

IRFAN SAADAT KHAN, J. The petition was filed on the ground that as per the petitioner, commercialization rates per square yard of the property owned by him bearing Plot No.D/5, Block 10-A, Rashid Minhas Road, Gulshan-e-Iqbal, Karachi may be fixed at Rs.300/- per square yard , as per GB Resolution 220, dated 11.05.1980.

2. Previously the matter proceeded before a Bench of this Court which, vide order dated 03.12.2004, allowed the petition by giving permission to the petitioner to construct a commercial building on the plot and by further observing that there would be no question of paying any commercialization fee. Being aggrieved with the said

order, an appeal thereafter was filed before the Hon'ble Supreme Court of Pakistan by the Karachi Development Authority (**KDA**) [respondent No.4] and the Hon'ble Apex Court, in Civil Appeals No.319 to 323/2006 and 86-K and 87-K/2011 (it would not be out of place to mention that the case pertaining to the present petitioner, who was the respondent in the matter, was assigned Civil Appeal No.320/2006) disposed of the matters by observing as under:

“2. Having gone through the documents on the record particularly the Change of Land Use and Master Planning Bye Laws – 2003 which are approved vide Resolution no.383 dated 6.1.2004 by the appellant upon which reliance has been placed by the respondents, we are of the considered view that though the respondents can seek commercialization of their respective properties, but not without payment of commercialization fee/charges. However the rate of commercialization fee/charges at a particular of time is undoubtedly a question that needs to be determined on a case to case basis which, as mentioned earlier, has not been so done by the learned High Court in the impugned judgments. As regard the argument of the learned counsel for the respondents in Civil Appeal No.322/2006 that the matter has already been decided as per paragraph No.14 of the impugned judgment, suffice it to say that the learned High Court has relied upon a leave refusing order dated 28.6.2004 passed by this Court in Civil Petition No.429-K/2004 which is not as such the law enunciated (by this Court) and has no binding effect. In light whereof, these appeals are allowed to the extent that the matter are remanded to the learned High Court where the respondents' writ petitions shall be deemed to be pending before it which should determine the rate of commercialization fee in each case.”

3. The petitioner is present before us and has stated that the entire Rashid Minhas Road, on which the property of the petitioner is located, was commercialized on 05.06.1991, whereas the petitioner has purchased the property in the year 1981. According to the petitioner since his property has been considered commercial in the year 1991 hence the commercialization fee /charges, which were

Rs.300/- per square yard, [as applicable in the year 1991], may be applied rather than the rates of the year 2004, as demanded by the respondent No.4, which comes to Rs.8000/- per square yard along with other ancillary charges. He stated that from the owners of other neighbouring plots, including Plot No.D/6, commercialization charges at the rate of Rs.300/- per square yard were charged but it is only with the petitioner that the rates of the year 2004, which comes to Rs.8000/- per square yard along with other ancillary charges, are being demanded, which are not only exorbitant but also uncalled for and discriminatory; as according to him since the property was commercialized in the year 1991 hence the rates as that of 1991 could only be applied, as per GB Resolution 220 dated 11.05.1980.

4. Mr. Khurram Ghayas Advocate has appeared on behalf of the respondents No.1 & 4 and stated that no doubt the property of the petitioner was commercialized in the year 1991 and the petitioner did apply for the commercialization thereof in the year 1991 but the application filed by the petitioner was defective and the petitioner was duly informed that his application is defective since at that time, according to the department, the matters with regard to commercialization pertained to the Faisal Cantonment Board (**FCB**), hence his application was not entertained. He stated that subsequently when the matter with regard to charging commercialization fee was resolved, thereafter the rates as that of the year 2004 were applied, which is also the year when this Court vide order dated 05.11.2004 allowed the petition filed by the present petitioner. He stated that it is the petitioner who was at fault to file a defective application who

never cared to cure the defect of the said application and even after being informed did not care to file a proper application, which is the mandatory requirement. Hence, according to the learned counsel, the petitioner cannot at this juncture claim that the rates as applicable to a commercial property in the year 1991 should be applied on the basis of defective/incomplete application, if any, moved by him. He further stated that even today the petitioner has not filed a proper application and hence one could argue that if the petitioner files an application today the rates as applicable for conversion of a property from residential to commercial prevailing today are to be applied. According to him the department, however, quite reasonably has demanded the rates as applicable for the year 2004 from the petitioner which, according to him, are in accordance with law and in conformity with the decision given by this Court dated 05.11.2004. He, therefore, has prayed that the instant petition may be dismissed by directing the petitioner to pay the commercialization fee /charges at the rate of Rs.8000/- per square yard, as prevailed in the year 2004, and the concerned respondent is ready to process the case of the petitioner for commercialization, in accordance with law, along with ancillary charges.

5. M/s. Dhani Bux Lashari, Sartaj Malgani and Meeran Muhammad Shah have adopted the arguments of Mr. Khurram Ghayas and stated that it was categorically observed by the Hon'ble Supreme Court that the matter with regard to commercialization fee /charges has to be determined on case to case basis and in the case of the present petitioner since there was no proper application filed by

the petitioner for issuance of challan with regard to commercialization fee /charges, therefore, it is the petitioner who was at fault as due intimation about the defective application was given by the department to him and the petitioner never cared to file a proper application or to cure the defects of an inappropriate application in a timely manner; hence for all practical purposes the commercialization fees /charges, as demanded by the respondent department, as that of the year 2004, which is the year when the petition filed by the petitioner before the High Court was decided, may be directed to be paid by the petitioner, if he wants to use his property for commercial purposes in accordance with law, otherwise this petition may be dismissed.

6. The petitioner, in his rebuttal, stated that he never received any rejection notice /order from the KDA about his application filed before them and since commercialization fee at the rate of Rs.300/- per square yard has been charged by the respondent department from his neighbourer /owner of Plot No.D-6 and other neighbourers, situated on the same road as that of the property of the petitioner, hence same charges may be applied and charged from him as well. He, in the end, prayed that the respondent department may be directed to issue challan for Rs.300/- per square yard, being the commercialization fee, in respect of the plot owned by him, without any further delay.

7. We have heard the petitioner as well as all the learned counsel at considerable length and have also perused the record and the

decisions given in the present matter dated 05.11.2004 by a Division Bench of this Court and that of the Hon'ble Supreme Court of Pakistan dated 22.02.2017.

8. Perusal of the record reveals that the petitioner purchased the above referred plot in the year 1981 and the same was transferred in his name in the year 1982. The petitioner then moved an application to the then Karachi Building Control Authority/KDA for commercialization, however, he was duly informed vide letter dated 13.11.1996 that the jurisdiction for commercialization of his plot rests with FCB. Being aggrieved with the said order the petitioner filed a petition bearing C.P. No.D-589/1998, which petition was disposed of vide order dated 02.06.2000, when the counsel appearing on behalf of the FCB affirmed that the matter with regard to commercialization of the plot rests with FCB, which is the competent authority to sanction commercialization or otherwise of the plot. It was also confirmed by the counsel appearing for the FCB that if the petitioner moves a proper application the same will be considered on merits and in accordance with law. The counsel for the petitioner was satisfied with the statement and did not press the petition any further, which stood disposed of accordingly.

9. Thereafter, on 26.06.2000 the petitioner moved an application to the FCB with the request for commercialization of his property. However, in the meantime, the jurisdiction with regard to commercialization stood changed from Cantonment Boards to KDA. The FCB then referred the matter of the petitioner to the KDA for

commercialization on merits. Then a dispute arose between the KDA and the FCB with regard to assumption of jurisdiction; however it was finally settled that the matters with regard to commercialization would now onwards would be dealt by the KDA. Thereafter vide letter dated 27.09.2001 the petitioner was informed by the KDA that the matter with regard to commercialization of the plots now rests with them and they will proceed with the matter of the petitioner in respect of commercialization. However since there was a ban on commercialization of the residential plots, the petitioner was again informed by the KDA that all the cases with regard to the commercialization have been kept in abeyance till a proper policy in this regard is framed by the Governing Body of the KDA. The petitioner being aggrieved with the said intimation thereafter filed the present petition seeking directions from the Court to direct the KDA to commercialize his property by charging Rs.300/- per square yard, as per GB Resolution No.220 dated 11.05.1980.

10. As stated earlier, the matter proceeded before this Court, which vide order dated 03.12.2004 allowed the petition by categorically observing that firstly no commercialization charges should be charged from the petitioner and moreover the rates of commercialization could only be charged at the rate prevailing on the date of “application”. The matter then went to the Hon’ble Supreme Court of Pakistan, as noted above, which referred the matter back to this Court for deciding the same on “case to case basis”. It is apparent from the record that the petitioner did move an application, but the said application was moved to the FCB and not to the KDA. The previous application filed

by the petitioner to the KDA could not be considered to be a proper application, since at the time the KDA had no jurisdiction over the affairs with regard to the commercialization of residential properties rather the same rested with the Cantonment Board.

11. In the petition bearing C.P. No.D-589/1998 counsel for the petitioner did not press the petition when a statement was given by the counsel appearing for the FCB that if an application is given by the petitioner the same would be considered on merits. The record reveals that after the disposal of that petition, the only application given by the petitioner was to the FCB, and not to the KDA. In the affidavit filed by the concerned officer of the KDA, it was duly mentioned that even today no proper application has been filed by the petitioner so as to justify his claim with regard to charging of commercial rate on the property. During the course of the arguments a question was posed to the petitioner that whether he has moved any application after the disposal of the petition bearing C.P. No.D-589/1998 to the KDA, to which he candidly replied that he had moved the application to the FCB, as he was of the view that they were the competent authority in this regard.

12. It may be noted that so far as the contention of the petitioner that he did not receive any reply from the KDA is concerned, the record reveals that the petitioner was duly informed that the jurisdiction with regard to commercialization rested with the KDA, and it was then the petitioner filed the petition bearing C.P. No.D-589/1998 agitating that the KDA were not commercializing his above referred plot, upon which the decision dated 02.06.2000 was

given by the High Court on which date upon satisfaction of the undertaking given by the counsel for the FCB the counsel for the petitioner did not press the petition. Hence, it is apparent that neither after the disposal of the petition bearing C.P. No.D-589/1998 nor after the assumption of the jurisdiction with regard to commercialization by the KDA the petitioner has moved any application to the KDA.

13. The petitioner has also agitated that Rs.300/- were being charged from his neighbours, having property bearing No.D-6 and others, with regard to commercialization hence similar treatment may be accorded to the petitioner. Here again we tend to disagree with the contention of the petitioner as it is apparent from the record that the application moved by his neighbours were found to be in order and thereafter their cases were processed in accordance with law and the applicable rates as prevailing at that time were applied, which could be seen from the counter affidavit filed by the concerned official of the KDA, hence, no lease could be granted to the petitioner on the ground that similar treatment may be accorded to the petitioner as given to his neighbours. Moreover, it is also a matter of record that the applications filed by his neighbours were moved around one and a half year prior to the application filed by the petitioner. Hence on this aspect we do not find any force in the argument as advanced by the petitioner.

14. So far as the contention with regard to the application of rates is concerned, we have observed that a proper application, which was considered on merits, was moved for the first time by the petitioner to the FCB in the year 2001. The petitioner was duly informed by the

KDA, vide letter dated 27.09.2001, whom the matter was referred by the FCB due to change in jurisdiction, that the policy with regard to commercialization of residential property into commercial is in abeyance for framing of the policy by the Governing Body (GB) of the KDA. Then the policy was framed by the respondent in the year 2003 which was approved vide Resolution No.383 dated 06.1.2004. As per the said Policy the commercialization rate in respect of the area, where the plot of the petitioner is situated, was fixed at Rs.8000/- per square yard and the petitioner vide letter dated 10.03.2004 was duly informed by the respondent that since a policy has been approved he was directed to complete the formalities necessary in this regard so that his application may be considered /processed.

15. In view of the above referred facts of the case, it is imperative that the case of the petitioner has to be examined on the facts of “this very case”; therefore, firstly the rates as applied to his neighbours could not be applied for the reasons mentioned above; secondly, since it has been acknowledged by the KDA that a letter dated 30.05.2003 has been addressed to them by the petitioner, which only could be considered to be a proper application by the petitioner, as mentioned above. It is noted that the petitioner was duly informed by the respondent that the rate of Rs.8000/- per square yard, as per Resolution No.383 dated 06.01.2004, would be applied to his plot being commercialization fee payable along with other ancillary charges for converting the residential property into commercial. Moreover the learned Bench of this Court, while disposing of the

matter on 03.12.2004, has duly observed that “CDGK could only demand the commercialization fee at the rate prevailing “on the date of application” for change of land use and not at any other rate on the basis of a policy which they have framed subsequently” (underline ours for emphasis). The above categoric observation of the learned Bench leaves no room for any further deliberation in the instant matter, as when an application has been made in the year 2003 by the petitioner, for which period the relevant Policy was that of year 2004 (ibid) hence the rates as prescribed therein, in our view, could only be applied to the case of the petitioner, which are Rs.8000/- per square yard, for Gulshan-e-Iqbal area.

16. We therefore, in view of what has been discussed above, dispose of the instant petition by directing the petitioner to approach the concerned respondent for issuing him a challan with regard to commercialization charges at the rate of Rs.8000/- per square yard, along with other ancillary charges, if any. The Respondents are directed to process the case of commercialization of the petitioner as per the rules and procedure, within one month from the date of disposal of the present petition. With these directions, the instant petition stands disposed of.

JUDGE

JUDGE

Karachi:

Dated: .10.2021.