

Judgment Sheet

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

**Constitutional Petition No. D – 1307 of 2020
& Constitutional Petition No. D – 05 of 2021**

Date	Order with signature of Judge
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Constitutional Petition No. D – 1307 of 2020

Petitioner : Sindh Agriculture University Tando Jam,
through Mr. Muhammad Arshad S. Pathan Advocate.

Respondents : (1) Province of Sindh,
(2) Secretary Land Utilization Department,
(3) Executive Engineer Provincial Highway Division-I
Hyderabad,
(4) Project Manager (PIU), Hyderabad-Mirpurkhas Dual
Carriageway Project Hyderabad,
(5) Commissioner Hyderabad Division,
(6) Deputy Commissioner Hyderabad, and
(7) Assistant Commissioner Taluka Sub-Division
Hyderabad,

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

(8) Shahnawaz Kaleri, called absent.

Intervenors : Dr. Mujahid Hussain and Dr. Zahoor Ahmed Soomro,
through Mr. Ali Ahmed Palh Advocate.

Constitutional Petition No. D – 05 of 2021

Petitioner : Bhattai Builders, through Mr. Imdad Ali R. Unar Advocate.

Respondent No.4 : Sindh Agriculture University Tando Jam,
through Mr. Muhammad Arshad S. Pathan Advocate.

Respondents : (1) Province of Sindh,
1, 2, 3, 5, 6 & 7 (2) Secretary Land Utilization Department,
(3) Secretary Works & Services Department,
(5) Executive Engineer Provincial Highway Division-I
Hyderabad,
(6) Commissioner Hyderabad, and
(7) Deputy Commissioner Hyderabad,

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

Date of hearing : 18.03.2021.

J U D G M E N T

NADEEM AKHTAR, J. – The subject matter, parties and facts in both these petitions are common, and the outcome of any one of them shall decide the fate of the other. Therefore, both the petitions were heard together and are being disposed of through this common judgment. The subject matter of these petitions is a piece / strip of agricultural land of about **1.627 km (1,627 meters)** (**‘subject land’**) belonging to the Sindh Agriculture University Tando Jam (**‘the University’**) which is being acquired by the Government of Sindh (**‘the Government’**) through the Provincial Highway Division (**‘acquiring agency’**) under the Land Acquisition Act, 1894, (**‘the Act’**) by means of the **“third alignment”** for the construction of **9.66 kms** long Tando Jam By-Pass (**‘the project’**) along Hyderabad–Mirpurkhas Road (**‘the highway’**).

2. Relevant facts of the case emerging from the record are that the project was conceived and approved by the Government in the year 2010 in public interest in order to bypass the Tando Jam town that falls on the highway. The object was to create a smooth flow of traffic for the commuters travelling on the highway who did not wish to visit or pass through the Tando Jam town, and also to avoid traffic congestion and hazard for the people of the town. After studying and analyzing the original design / alignment of the project and the traffic flow on the highway, the first and second alignments were revised by the technical team and engineers of the acquiring agency keeping in view safety and other important factors, whereafter the third alignment was finalized and approved in the year 2018. As per the third alignment, a total area of 92-32 acres of land was required for the project, including 13-24 acres of land belonging to the University. The notification under Section 4 of the Act was issued and published by the Government in the Official Gazette dated 08.10.2020. After final alignment of the highway and the project, the acquiring agency discovered that there was some variation in the area to be acquired. Accordingly, the acquiring agency, vide letter dated 25.11.2020, requested the Deputy Commissioner / Collector Hyderabad to issue a revised notification under Section 4 of the Act, that was issued and published in the Official Gazette dated 03.12.2020. It appears that out of the entire length of 9.66 kms of the project, 8.00 kms and the two loops for connecting the subject by-pass with the highway have already been constructed ; whereas, construction on the remaining strip of 1.66 km on the subject land could not commence due to the ad-interim injunctive order passed by this Court in the present C.P. No.1307/2020.

3. C.P. No.1307/2020 has been filed to challenge the third alignment and the notification issued by the Government for acquisition of the subject land. This petition was originally filed by Dr. Mujahid Hussain and Dr. Zahoor Ahmed

Soomro as members of the teaching faculty of the University, and instead of joining the University as a party therein, they had impleaded the Vice Chancellor of the University as respondent No.3. When the said petition came up for hearing before us on 23.02.2021, we were of the view that the above named faculty members had no locus standi to file the petition in their personal names and capacity in respect of the University's land and if the University had any grievance against the acquisition of the subject land, the petition ought to have been filed by the University itself. In view of the above, learned counsel appearing for the said faculty members / original petitioners undertook on that date to file amended title within seven days by deleting the names of the said faculty members and by transposing respondent No.3 viz. Vice Chancellor, Sindh Agriculture University Tando Jam, as the petitioner with correct description i.e. Sindh Agriculture University Tando Jam, through its Vice Chancellor. Thereafter, the amended title in the above terms was filed, and hence the University is now the petitioner in C.P. No.1307/2020. It may be noted that subsequently an application bearing M.A. No.1647/2021 under Order I Rule 10 CPC was filed by both the above named faculty members, praying that they may be impleaded in the above petition as petitioners 2 and 3. This judgment shall also dispose of their above application which was heard along with the main petition.

4. C.P. No.05/2021 has been filed by M/S Bhitai Builders (**'the contractor'**) to whom the contract for construction of the project was awarded by the Government through formal work orders. The contractor has prayed that as he has successfully constructed 8.00 kms out of 9.66 kms of the project, the Government and the acquiring agency be directed to expedite the process of acquisition of the subject land to enable him to complete the construction on the remaining part of 1.66 km of the project / subject land.

5. It is stated in C.P. No.1307/2020, wherein now the University is the petitioner, that as a result of the impugned third alignment the project will pass through the research zone of the University comprising mango orchard research and experimental farms which will be inappropriate and inconvenient for the University and its students. It is alleged in this petition that the said research and experimental farms and the irrigation system thereof as well as the plantation of mango trees thereon will be destroyed if the project is constructed on the subject land ; the said farms will be divided into small portions which will not be useful for research and experiments ; because of the traffic, the environment of the farms will get polluted ; the University will be deprived from the income generated from the subject land ; instead of acquiring the subject land for the project, the adjacent land owned by private parties

ought to have been acquired by the Government ; and, the impugned third alignment is malafide as the same has been designed and prepared in order to save the agricultural land with mango orchards owned by respondent No.4 (now respondent No.3) i.e. Executive Engineer of the acquiring agency. It was proposed in this petition that the project should be constructed by making a bigger curve so that the subject land may be spared.

6. Comments were filed in C.P. No.1307/2020 by the University through its authorized officer viz. Vice Chancellor, who was originally respondent No.3 in the said petition. In the said comments, construction of the project on the subject land was opposed on behalf of the University by reiterating and supporting the grounds urged in the said petition. As noted above, C.P. No.1307/2020 was originally filed by two faculty members of the University by signing and verifying the same in their personal names and capacity, whose names were subsequently deleted and the name of the University was substituted in their place as the petitioner. Despite the above, the University did not file the amended petition duly signed and verified by its authorized officer. Be that as it may, since the Vice Chancellor of the University had filed the above comments in the said petition by opposing the construction of the project on the subject land and by supporting and reiterating the grounds urged in the petition, the stance of the University is clear. Due to this reason, we deem it appropriate to decide the case on merits rather than drawing any adverse inference against the University for not filing the duly signed and verified amended petition.

7. Mr. Muhammad Arshad S. Pathan, learned counsel for the University / petitioner in C.P. No.1307/2020, relied heavily on the contents of the petition and the grounds urged therein as well as on the comments filed by the Vice Chancellor of the University, and strongly reiterated the same. It was submitted by him that the project is indeed in the public interest, but the subject land is being used by the University also for the benefit of the public as the farms thereon are used for research and experimental purposes for the students of the University as well as for the development of different varieties of mangoes. According to him, a land used for the benefit of the public cannot be acquired for any other public interest or purpose. In support of this contention, he relied upon Masood Ahmed Wassan and 3 others V/S Province of Sindh through Chief Secretary Sindh and 13 others, **2020 YLR 2597**. He also referred to a case wherein acquisition of the land of Punjab University was set aside by the Hon'ble Supreme Court, however, details and/or citation of the said case were not disclosed by him. He reiterated the suggestion that the project should be constructed by making a bigger curve so that the subject land may be saved.

8. On behalf of the official respondents, detailed and separate comments have been filed by the Executive Engineer and Assistant Engineer of the acquiring agency and the Deputy Commissioner and Assistant Commissioner Hyderabad. In their comments they have stated that the project has been conceived, designed and prepared in the larger interest of the public as the highway leads to Umerkot, Mithi and Tharparkar till the border of India ; due to the heavy flow of traffic, it is imperative to ensure that a smooth and straight passage is provided for traffic on the highway so that the traffic should flow smoothly and without any obstruction or hindrance and without disturbing the Tando Jam town ; the bigger curve proposed by the University in lieu of the subject land will be dangerous and fatal for the commuters in view of sharp bends therein ; the third alignment was specially designed with an engineering point of view keeping in view the safety of the commuters ; the project is being constructed in view of the judgment delivered by a learned Division Bench of this Court on 17.01.2017 in C.P. No.D-677/2012 wherein the need of the project was highlighted and discussed ; the first two alignments were dropped as they were not feasible or practical because of sharp curves and involvement of lands of Pasaki Oil Fields ; in any event, more land of the University would have been required in case of execution of any of the first two alignments ; the University has no right to decide as to which part of the land is suitable or feasible for the project ; such decision, involving highly technical expertise, can be made only by the acquiring agency ; the third alignment cannot be changed or altered as most of the project has already been constructed by incurring a huge cost of Rs.974.791 million from the national exchequer ; and, the University owns more than 600 acres of agricultural land out of which only an area of 13-24 acres is under acquisition. On the basis of the survey report submitted by the Tappeddar of the beat, the official respondents have denied in their comments that any valuable plantation is existing on the subject land, or that the subject land is being used or utilized for any research or experimental purpose. They have stated that the Tappeddar concerned had reported that in fact the subject land is being used for cultivation of cotton, sugarcane and wheat, which is auctioned by the University on commercial basis.

9. C.P. No.1307/2020 was emphatically opposed by Mr. Allah Bachayo Soomro, learned Advocate General Sindh, by emphasizing upon the importance and urgent need of the project and by reiterating the comments filed by the official respondents. He submitted that the project is purely for public purpose and is of public importance, and does not involve self-interest of any officer of the acquiring agency and/or anyone else, as alleged by the University or otherwise. He further submitted that the area under acquisition was identified

and selected by a highly qualified professional team of engineers of the respondents keeping in view all the important factors, particularly the safety and convenience of the commuters, and the duty and sole object of the respondents is to make the project successful by ensuring safety of the commuters and smooth flow of traffic. It was urged by him that under the law it is the sole discretion of the Government and the acquiring agency to decide as to which part of the land is suitable and feasible for the project, and the University or other land owners have no right in law to raise any objection in this regard or to suggest any alternate land or route for the project. The bigger curve proposed by the University in order to save the subject land was vehemently opposed by him by submitting that the same will not only be impractical, but also dangerous for the commuters because of sharp bends therein, and also as the project will be further delayed and the cost thereof will be increased exponentially. In support of his above contention, he referred to the layout plan, drawings and Google map showing the actual path of the project and the bigger curve proposed by the University. It was also urged by him that because of the ad-interim injunctive order obtained by the University in this petition, the project has already been delayed due to which not only the original estimated cost thereof has increased, but the public at large is also suffering immensely. In the end, it was contended by him that the University should not have any grievance as adequate compensation will be awarded to it under the Act in lieu of acquisition of the subject land.

10. Mr. Imdad Ali R. Unar, learned counsel for the contractor / petitioner in C.P. No.05/2021, submitted that the contract for construction of the project was awarded by the Government to the contractor through formal work orders whereafter construction was carried out by him expeditiously as per the terms and conditions of the contract and more than 80% of the project has already been completed by him. It was contended by him that the contract was accepted and executed by the contractor in good faith and he has not committed breach of any of the terms and conditions of the contract, and he is still ready and willing to perform his remaining part of the contract. It was urged by him that despite the above and for no fault on his part, the contractor is suffering huge losses on daily basis because of the dispute raised by the University. In addition to the above, the arguments advanced by learned AAG Sindh were adopted by him. He was also of the view that the University has no right to question the choice or discretion of the official respondents regarding selection of the land to be acquired for the project.

11. Mr. Ali Ahmed Palh, learned counsel for the intervenors in C.P. No.1307/2020, adopted the arguments advanced by learned counsel for the

University. He submitted that the intervenors, being senior faculty members of the University, are necessary parties to the said petition as they are opposing acquisition of the subject land in the best interest of the University and its students.

12. We have heard learned counsel for the parties and learned AAG Sindh at length and have carefully examined the material available on record with their able assistance. It is not the case of the University that the subject land is being acquired for a purpose other than a public purpose or that the Government and the acquiring agency have no authority to acquire the same. In fact the University has not disputed the importance and need of the project or that the project is for public purpose, or that the Government and the acquiring agency are competent to acquire the subject land. The only dispute raised by the University is that some other piece of land should be acquired in lieu of the subject land as the same is being used for research and experimental purposes. In this context, it is well-settled that the acquiring agency has the sole discretion and authority to see the suitability of the land for the purpose of acquisition ; the land acquisition proceedings are not a direct transaction between a willing vendor and a willing vendee ; it is the will, choice and selection of the Government / acquiring agency with regard to a land which stands paramount ; the land owner has no right whatsoever to hinder such will, choice and selection, except to demand reasonable compensation in lieu of the land ; and, malafides with regard to the will, choice and selection of the land cannot be attributed to the Government / acquiring agency merely on the basis of allegations. The above view is fortified by Muhammad Ashiq and another V/S Water and Manpower Development Authority, Lahore through Chairman WAPOA House and another, PLD 2008 SC 335, and Khalil ur Rehman through legal heirs and others V/S Government of NWFP through Secretary Education Department, Peshawar and 2 others, PLD 2007 Peshawar 141 (Division Bench).

13. Record shows that a meeting was held on 16.07.2020 under the chairmanship of the Commissioner Hyderabad Division which was attended by the Chief Engineer and Executive Engineer of the acquiring agency, the Additional Deputy Commissioner and Assistant Commissioner Hyderabad, the Project Manager, the Vice Chancellor of the University and Professor Dr. I. Rajpar on behalf of the University. This meeting was held in order to resolve the issues and objections raised by the University in relation to the project. It was decided in the above meeting that a team of the Revenue Department, Highway Department and the University shall physically visit the site and propose a

solution in writing. In pursuance of the said meeting, the authorized officers and representatives of the above departments and the University visited the site, whereafter a visit report dated 29.07.2020 was submitted by the Deputy Commissioner Hyderabad. In this report it was stated that the change in the alignment of the project proposed by the University was not feasible as Sui Gas fields and Kaleri village fall in the alignment suggested by the University ; there is a dispute between the residents of Kaleri village and the University which is pending in a Court of law ; the Government will have to bear additional cost from the national exchequer ; and, road safety requirements will be undermined. It was concluded in this report that the alignment decided by the Government was most feasible and the objections raised by the University were flimsy and baseless.

14. It has been claimed on behalf of the University that the subject land and the mango orchards thereon are being used for research and experimental purposes. However, no material whatsoever has been placed on record by the University in order to substantiate the above claim. Moreover, the Tappeddar of the beat had reported that no valuable plantation was found on the subject land which was in fact being used by the University for cultivation of cotton, sugarcane and wheat for commercial gain. This, being a disputed question of fact, cannot be looked into by this Court in the present proceedings. However, it may be observed that if the stance of the University is correct for the sake of argument, even then the University has no locus standi to question the acquisition of the subject land on this ground in view of the well-settled law discussed above. The only remedy available to the University is to claim compensation under the Act. Likewise, the University has no right in law to raise any objection with regard to the will, choice and selection of the subject land by the Government / acquiring agency nor can the University suggest any alternate land or route for the project as, under the law, it is the sole discretion of the Government and the acquiring agency to decide as to which part of the land is suitable and feasible for the project. The University also has no right in law to object to the acquisition of the subject land on the ground of inconvenience. It has been alleged on behalf of the University that the impugned third alignment is malafide as the same has been designed and prepared in order to save the agricultural land with mango orchards owned by respondent No.4 (now respondent No.3) i.e. Executive Engineer of the acquiring agency. It may be noted that except for this vague allegation, no details or particulars of the land allegedly owned by the Executive Engineer of the acquiring agency have been disclosed. Regarding this allegation, suffice it to say malafides with regard to the will, choice and selection of the land cannot be attributed to the Government / acquiring agency merely on the basis of allegations.

15. We have examined the layout plan, drawings and Google map of the project available on record, wherein the actual path of the project and the bigger curve proposed by the University have been distinctly shown. It is clear from the above that if the impugned alignment is altered by including the bigger curve proposed by the University, the overall length of the project will be increased by several kilometers, and a portion of the said proposed bigger curve will pass through the oil and gas fields of OGDC. In such an event, the cost of the project and the time required for its completion will be increased substantially, and the said oil and gas fields will be exposed to the public / commuters and heavy construction machinery which may result into a disaster. Therefore, in addition to the legal position discussed above, *prima facie*, the proposal made by the University does not appear to be practical and safe for the commuters, public at large and the people working at the said oil and gas fields. In view of the object, purpose and urgent need of the project, it shall be in the public interest that the same is completed expeditiously.

16. As a result of the above discussion, C.P. No.1307/2020 and all the applications pending therein are dismissed ; and C.P. No.05/2021 is disposed of by directing the Government and the acquiring agency to complete the project and the land acquisition proceedings in respect thereof expeditiously and strictly in terms of the Act. There will be no order as to costs in any of the subject petitions.

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