

IN THE HIGH COURT OF SINDH AT KARACHI

H.C.A No.236 of 2009

The Member (L.U) Board of Revenue Sindh

Versus

KPT Officer Cooperative Housing Society Ltd. & others

BEFORE:

**Mr. Justice Mushir Alam, CJ
Mr. Justice Muhammad Shafi Siddiqui**

Date of Hearing:	06.11.2012, 13.11.2012, 27.11.2012, 18.12.2012 & 19.8.2013
Petitioner/Appellant:	Through M/s Abdul Sattar Prizada and Rana Ikram Advocates.
Respondent No.1:	Through M/s Mushtaq A. Memon and Farogh Naseem Advocates.
Respondent No.2:	Through M/s Aziz A. Munshi and Abdullah Munshi Advocates.
Respondent No.5 to 16:	Through Mr. Faisal Siddiqui Advocate.
Province of Sindh:	Through Mr. Adnan Karim Memon A.A.G.
Board of Revenue:	Through Mr. Iqbal Khurram Advocate.
Intervenor:	Through Mr. Ravi R. Pinjani Advocate.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- This appeal is arising out of an interlocutory order dated 07.07.2009 passed by learned Single Judge of this Court in Suit No.735 of 2011 pursuant to CMA No.6159 of 2009.

2. Brief facts of the case are that respondent No.1 filed a suit bearing No.735 of 2001 for permanent.

3. The suit was contested and the appellants filed written statement denying the contentions raised in the plaint. The primary defence taken was that the grant of lease by Karachi Port Trust (Respondent No.5) with regard to land under their operation speaks only about the declaration of prohibited areas but it does not confirm the ownership of the KPT. Such prohibited area, per learned counsel for the appellant, is no man's land as due to security reasons no residential, commercial or industrial or any other activity is to be allowed unless allotted under the provisions of Colonization Act, 1912.

4. The appellant submitted that vide order dated 22.03.2005 the learned Single Judge in the suit passed the order for maintaining status quo. Subsequently the learned Single Judge vide order dated 28.05.2009 on the application under section 151 CPC (CMA No.5652 of 2009) filed by respondent No.1 seeking vacation of order dated 22.03.2005 required formal verification of the Chief Secretary, Government of Sindh, and he was directed to put his appearance personally or through an officer not below the rank of Secretary to Government of Sindh. On 05.06.2009 the learned Single Judge of this Court on the application under section 151 CPC moved by the KPT authority for vacating the interim order dated 22.03.2005 after hearing the arguments of the parties ordered that, "It is rather clear that the defendant No.2 (appellant No.1) an important functionary, has not given any consent this being so the listed application cannot be granted in view of such lack of consent and directed the office to fix all the applications along with listed application on the next date of hearing".

5. The KPT authority moved an application under section 151 CPC bearing CMA No.6159/2009 for vacating/modifying the order of status

quo dated 22.03.2005 pursuant to the minutes of the meeting held under the chairmanship of Chief Secretary, Government of Sindh.

6. In response to the said application i.e. CMA No.6159 of 2009 the appellant No.1 filed objections and on 07.07.2009 after hearing the counsel for the respondent No.1, Board of Revenue and other respondents passed the order and the relevant portion is as under:

“It was unanimously decided that after obtaining the above mentioned undertaking by the Chairman the Honorary Secretary of KPT Officers Cooperative Housing Society the ban in respect of sublease, transfer and mutation of the plots of KPT Officers Cooperative Housing Society shall be lifted to the extent of 130-0 acres only.”

7. With this background the learned counsel for appellant submitted that the Minister Incharge of Land Unitization Department at the relevant time was the Chief Minister of Sindh who's approval was not obtained on the decision of the Chief Secretary Sindh in respect of allowing conditional execution of lease deeds and as such it cannot be treated as consent of the Government of Sindh for execution of such lease deeds.

8. It is contended by the learned Counsel for appellant that the primary issue before the learned single Judge while passing orders in a suit was whether the suit in the present form is or is not maintainable and as to whether the Court has jurisdiction to decide the issues which sought to be resolved by the parties through the application despite not being the subject matter of suit. The suit was primarily filed for permanent injunction only. The prayer clause in the suit out of which the instant appeal arises is as under:-

a) Permanent injunction restraining the Defendants, their subordinates, agents or employees or any one claiming through or under them from interfering with the

possession of Plaintiff Society and its members/allotees of the land measuring 130 acres situated at Southern Bypass also known as Mai Kolachi, across China Creek Back Waters Area, off Moulvi Tamizuddin Khan Road, Karachi and from interfering with development of and construction over the suit land in any manner whatsoever.

b) Permanent injunction restraining the Defendants, their subordinates, agents or employees from acting in pursuance of letter dated 21st April 2001 in any manner whatsoever.

c) Cost of the proceedings; and

d) Any other, further or better relief as may be considered fit and proper in the circumstances of the case.

9. It is further contended by appellant's counsel that in the written statement filed by them, it was clarified categorically that the notification showing limit of Karachi Port Trust does not confer the ownership of the land on KPT. The bed of seashore is not a land to be disposed of by the authority. It is further mentioned that where any part of the land reclaimed naturally or artificially, it is a property of Government of Sindh which contention was up held by another learned single Judge of this Court in terms of the order dated 18.10.1998 in Suit No.778/98 (Province of Sindh v. Administrator DHA & another) where the issue of reclaimed land is discussed in detail. Thus by disputing the authority of the KPT it became inevitable for them to have obtained this declaration as to their entitlement and ownership as far as the issuance of leases/sub-leases out of the land in question to their allottees are concerned.

10. It is on this background learned Counsel further argued that the status, maintainability and the scope of the suit has to be seen first before passing the impugned order dated 07.7.2009. Learned Counsel for the appellant further submitted that in view of such facts and on

account of the earlier order dated 05.6.2009 in terms whereof it was categorically observed that the appellant, defendant No.2 in the suit which is an important functionary has not given any consent and being so the listed application was not granted in view of lack of consent. It was pointed out by the learned Counsel that the application bearing CMA No. 5652/2009 was primarily and substantially the same as the application (CMA No.6159 of 2009) on which the impugned order was passed. Learned Counsel in support of his arguments has relied upon the case of (i) Hadi Buksh Memon reported in PLD 2006 Kar. 16, (ii) Abdul Shakoor & others Vs. Haroon & others (2008 SCMR 896), (iii) Noor Muhammad Etc. Vs. Province of Punjab Etc. (NLR 1985 Civil 743).

11. In addition to the above the learned Counsel has also relied upon following the case laws on the ground of rule of non-applicability of consent decree wherein the exceptions were shown (i) Dwarka Math Chakraborti Chowdhary v. Atul Chandrabarti Chowdhary & others (AIR 1928 Calcutta 108), (ii) Madhu Sudan Pal v. Parbati Sundari Dasya & others (AIR 1917 Calcutta 607), (iii) Sagwa, defendant-appellant v. Dalwa & others (AIR 1952 Allahabad 97).

12. In terms of the judgment in case of Abdul Shakoor & others Vs. Haroon & reported in (2008 SCMR 890) referred above it was observed that the Counsel has to only compromise if in the circumstances the parties settled the matter amicably which settlement can only be endorsed by the learned Counsel in terms of the compromise application and not otherwise.

13. On the other hand learned Counsel for the respondent No.2 submitted that the impugned order dated 07.7.2009 passed in Suit No.735/2001 was pursuant to the minutes of meeting dated 18.3.2009 which meeting was attended by the following:

1. Chief Secretary, Government of Sindh
2. Principal Secretary to Governor Sindh
3. Secretary (GA&C), SGA&CD
4. Member (RS&EP), Board of Revenue Sindh
5. Secretary Cooperation, Government of Sindh
6. Member (L.U), Board of Revenue Sindh
7. Special Secretary, Board of Revenue Sindh
8. Additional Secretary (Coord.), SGA&CD
9. Chairman, Managing Committee, KPTOCHS and
10. Honorary Secretary KPTOCHS.

14. It is contended that under the rules of business the said exercise was carried out in the exercise of executive powers. It is contended that the Secretary and Member (L.U) agreed to the minutes of meeting dated 18.3.2009 and hence they were legally bound to honour and uphold their commitments as Government officials acting in accordance with law and rescindment pursuant to the above Board meeting leads anarchy of the Government officials and failure and break down of the Government to implement its decision. It is submitted that such person cannot rescind legally and their such conduct would amount to breach of rules of business. Learned Counsel submitted that since Member (L.U) is a part of the Government of Sindh and if he changes his opinion after the joint decision of the Chief Secretary to the Government of Sindh, it would amount to existence of two Governments in province of Sindh.

15. Learned Counsel submitted that after passing of the impugned order dated 07.7.2009 the present appellants as defendants No.1 to 4 in Suit No.735/2001 have obtained order dated 22.03.2012 on the basis of same facts and relying on the order dated 07.7.2009 which the appellants have impugned and challenged in the present appeal, therefore, they cannot have two recourse.

16. Mr. Farogh Naseem, learned counsel for the respondent No.1, submitted that the identical issue as is involved in this appeal is raised by the learned counsel for the appellant in CMA No.2712 of 2012 and has obtained order dated 22.3.2012 in the suit. Learned counsel in support of this contention has relied upon Abdul Hamid v. Mumtaz Hussain & another (1972 SCMR 132) and Shawsawar Versus State (2000 SCMR 1331). He further submitted that under the doctrine of election once the party has chosen to decide a forum then he cannot elect to agitate the same ground in another forum. He relied upon the case of Tanveer Jamshed Versus Ghulam Haider (1992 SCMR 917). He further submitted that the impugned order dated 07.07.2009 in fact is a review of earlier order dated 22.03.2005.

17. Learned counsel in addition to the above submitted that the appellants have no authority to file this appeal as it is to be filed through DCO/EDO. This appeal has been filed by the Assistant Advocate General without any authority. Learned counsel in support of this contention relied upon Kadir Bux Versus Crown (PLD 1955 FC 79) and Haji Abdullah Jan Versus The State (2003 SCMR 1063). Learned counsel submitted that they have not filed any affidavit that the consent was not given at the relevant time. He submitted that the Chief Secretary is no one but Minister of LU and that the concerned minister at the relevant time was the Chief Minister.

18. Mr. Faisal Siddiqui, learned counsel for respondents No.5 to 15, adding to the arguments of respondent No.1 and 2 submitted that it is a case of double consent and the minutes of the meeting have not been withdrawn on the basis of which the impugned order dated 07.07.2009 was passed. He submitted that according to appellants the land pertains to the mangroves forest and in terms of Para 10 of petition which is

pending before the Hon'ble Supreme Court and in terms of ground 'H' therein, the matter is deemed to be subjudice before the Hon'ble Supreme Court. Learned counsel has relied upon the arguments mainly advanced by Mr. Aziz Munshi.

19. In respect of the case of private respondents who are intervenors and allegedly claiming rights in respect of the plots either allotted/subleased or purchased, the individual allottees/purchasers who have been joined as intervenors by moving such an application have also mainly relied upon the arguments of Mr. Aziz Munshi and submitted that they are bonafide purchases of the plots in question situated at KPT Officers Cooperative Housing Society and the order dated 22.03.2005 was passed in their absence. It is however a fact that some of the intervenors claimed to be purchasers and allottees of amenity plots as well.

20. In rebuttal to the above contention Mr. Abdul Sattar Pirzada, learned counsel for the appellant, has submitted that the application bearing CMA No.2712 of 2012 is different and distinct as compared to this appeal as in the undertaking the word of "development" was not incorporated. Learned counsel submitted that on 07.07.2009 Mr. Usman Hadi filed no Vakalatnama and as such he was neither competent nor he gave any consent and that the concerned secretary was not present on 07.07.2009 who was called earlier pursuant to the orders of the learned Single Judge.

21. We have heard the learned counsel for the parties and perused record.

22. The undertaking which forms part of the minutes of the meeting on the basis of which injunction/interlocutory application was disposed

of is a main issue as the said undertaking provides an inbuilt way and mode of transferring the government land. The core part of this undertaking is as under:-

“In case, the KPT Officers Cooperative Housing Society fails to get the title of KPT cleared from the competent court/Authority, then the title of Society will automatically be withdrawn and the KPT Officers Cooperative Housing Society shall get the land allotted from the Government of Sindh and shall make payment of lease money to the Government of Sindh.”

23. In view of the above it appears that in case the KPT Officers Cooperative Housing Society fails to get the title of the KPT cleared from the concerned Court/authority then the title of the Society will automatically be withdrawn and the KPT Officers Society shall get the land allotted from the Government of Sindh and shall make payment of lease money to the Government of Sindh. This observation on the basis of which learned Single Judge disposed of the application ought to be examined on the touch stone of Land Revenue Act, 1967, Colonization Act, 1912 and Article 172 of the Constitution of Islamic Republic of Pakistan, 1973 as the mode that has been prescribed in the undertaking with regard to the disposal of the government land needed to be in consonance with the relevant law and not by way of agreement between the two functionaries i.e. KPT and the Government of Sindh itself. Thus, while the Court observed the disposal of the application and suit itself on the basis of this undertaking it simply changed the manifested mode of transferring the government land in the manner prescribed under the law. All that has been suggested in the undertaking is that on payment of lease money to the Government of Sindh by Society (not KPT), the land will stand transferred in their names. This is not permissible under the law nor it can be made so simple.

24. What substantially comes out of this undertaking is that KPT is absolved from any kind of consequences. Secondly it emanates that if any trespasser occupies the government land he can simply plead that if he failed to get the title from the Court or authority then it can be transferred to him on payment by concerned authority/owner.

25. Two questions need to be addressed out of the pleadings of the parties. The primary question that goes to the root of the controversy is as to whether the land in question is owned by the Government of Sindh and if it is so whether the process with regard to its sale, transfer, mutation pursuant to the above referred law is followed and it does not negate the provisions of Colonization Act, 1912 and Land Revenue Act, 1967 and Constitution of Islamic Republic of Pakistan.

26. Before we examine the impugned order on the touch-stone of above, we may discuss very brief history of the case before passing the impugned order. On 28.05.2009 CMA No.4446 of 2009 which was fixed at Sr. No.1 contained the following text:-

“For reasons stated in the accompanying affidavit it is prayed on behalf of the plaintiff above named that this Hon’ble Court may be pleased to direct modification of order dated 22.3.2005 passed by this Hon’ble Court directing the parties to maintain status quo with clarification that sub-lease, transfer and mutation of record in respect of the subject land may be accepted by the Registrar of Registration, Karachi and other public functionaries provided such deed(s) contain the following clause in terms of mutual understanding between the plaintiff and the def. Nos.1 to 4.

“The ownership of 130-00 acres of land at Mai Kolachi Bypass is disputed. Sindh Government claims that the land in question is owned by the Government of Sindh. The KPT Officers Cooperative Housing Society has filed Suit No.735/2001 to get declaration that the title of land is of KPT and not the Government of Sindh, which is pending before High Court Sindh. In case, the KPT Officers Cooperative Housing Society fails to get the title of KPT cleared from the Competent Court/Authority,

then the title of Society will automatically be withdrawn and the KPT Officers Cooperative Housing Society shall get the land allotted from the Government of Sindh and shall make payment of lease money to the Government of Sindh.”

27. The said application was disposed of on 28.05.2009. On the same day another application with the same prayer was filed (which was subsequently assigned CMA No.5652 of 2009) almost with the same prayer. As stated above on 28.05.2009 CMA No.4446 of 2009 was disposed of having become infructuous however with regard to CMA No.5652 of 2009 it was in addition to above further observed that, “The contents of application require formal verification of Chief Secretary, Government of Sindh, therefore, Chief Secretary, Government of Sindh was directed to appear in person or depute an officer not below the rank of Secretary to Government of Sindh to appear in person and verify the contents of the listed application on 30.05.2009 at 10.00 a.m.” The copy of the order was made available to the Chief Secretary, Government of Sindh, Advocate General Sindh, Member (RS&EP), Board of Revenue Sindh and Member Land Utilization, Board of Revenue, Government of Sindh. On 30.05.2009 Syed Hashim Raza Zaidi, Member (RS&EP), Board of Revenue, Government of Sindh, who was also Secretary Health, Government of Sindh had filed authority letter dated 29.05.2009 to appear in Court and verify and sign the contents of the application under section 151 CPC dated 28.05.2009. This CMA which was filed on 28.05.2009 which was assigned CMA NO.5652 of 2009 was then fixed in Court on 05.06.2009 and in terms of Para 3 of the said order, it was observed that Mr. Ahmed Pirzada, special counsel for the Board of Revenue, along with Special Secretary, Board of Revenue, Land Utilization Department, Government of Sindh, appearing for the Land Utilization Department/defendant No.2 in the suit opposed the

application refuting the alleged compromise and filed objections which has been taken on record. It was further observed that Mr. Aziz Munshi, learned counsel appearing for defendant No.5/KPT contended that the consent of the Chief Secretary is sufficient for the purpose of disposing of present application as prayed and since the Government of Sindh having devolved its authority with Chief Secretary, no other secretary can oppose the decision of the Chief Secretary. Mr. Shahid Ali Ansari, learned counsel for the plaintiff therein and Mr. Adnan Iqbal Chaudhry learned counsel appearing for other defendants have supported the contention of Mr. Aziz Munshi. As against this Mr. Ahmed Pirzada along with Special Secretary appearing for Board of Revenue, Land Utilization Department contended that the Land Utilization Department directly falls under Chief Minister and the directions of the Chief Secretary are not binding thereon. On an objection from Mr. Aziz Munshi that there is only one Government of Sindh which is represented by the Chief Secretary, Mr. Pirzada contended that the plaintiff itself has made the defendant No.2 as a separate party in the suit and therefore its independent consent is inevitable so as to bring out a consensus between all the parties to the suit.

28. It is very material that with this history, the learned Single Judge refused to grant the said application bearing CMA No.5652 of 2009 and added that it is rather clear that the defendant No.2 i.e. Member Board of Revenue, Land Utilization Department, an important functionary, has not given any consent and consequently the application was not be granted and directed the office to list all the applications along with listed application on the next date of hearing.

29. Substantially the learned Single Judge declined to allow the said application bearing CMA No.5652 of 2009 however subsequently another

counsel appearing for the respondent No.1 (Plaintiff in suit) moved another application bearing CMA No.6159 of 2009 which was fixed for hearing on 07.07.2009, exactly and substantially on the same grounds as raised in the earlier application bearing CMA No.5652 of 2009 and 4446/09 and which grounds were earlier discussed at length by the learned single Judge, however such applications was moved without disclosing the fact that earlier applications with same prayer were filed which are based on the same grounds i.e. constitution of the sub-committee by the Chief Secretary Sindh in terms whereof the issue was purportedly agreed to be resolved in terms of the undertaking to be given by the Karachi Port Trust Officers Housing Society which was also part and parcel of the earlier application, was not granted.

30. Such subsequent application was heard on 07.07.2009 and was granted by modifying the earlier order dated 22.03.2005 (in terms where of parties were directed to maintain status quo) and disregarded the earlier order dated 05.06.2009 passed on CMA No.5652/09 and 4446/09.

31. A substantial point/question that arises is that since the earlier two applications i.e. CMA No.4446 of 2009 and CMA No.5652 of 2009 were disposed of and in fact dismissed with the observation that in the event of refusal of the defendant No.2/ Member (Land Utilization Department), Board of Revenue, the application could not be granted, the grant of subsequent (third) application, which is based on the similar facts, is illegal and unlawful and cannot be granted in terms of the reasoning given by the learned Single Judge earlier and hence by granting the application bearing CMA No.6159 of 2009 the learned Single Judge in fact sat as an appellate judge over its own finding and reasoning and set aside, discarded, ignored the earlier reasoning and

findings of her own in terms whereof the two applications with the same prayer were not granted.

32. The bone of contention in this appeal is the “undertaking” which is allegedly agreed to be provided by KPT Officers Cooperative Housing Society at the time of registration of lease and/or sublease in favour of individuals. It is pertinent to point out that the individual lessees have not participated in meeting and it was agreed by KPT Authority only and KPT Authority has not filed any suit for Declaration of title. Be that as it may, what was agreed to be provided in the registered lease which is to be executed in terms of the impugned arrangement is that since the Government of Sindh claims that the land in question is owned by it and the KPT Officers Cooperative Housing Suit has filed suit bearing No.735 of 2011 for injunction, therefore, the ownership is disputed and the KPT Officers Housing Society will get the declaration from the court that the title of the land is of KPT and not of Government of Sindh. This dispute of declaration of title, in the subject undertaking, was shown to be pending before the High Court of Sindh in form of Suit No.735 of 2011, which in fact is not correct. Neither any suit filed by KPT is before us nor aforesaid suit meant for such declaration. In fact the suit wherein impugned order was passed is filed by KPT Officers Housing Society and not by KPT Authority.

33. Another point that was allegedly agreed is that in case the Society failed to get the title of KPT cleared from the competent Court/ authority then the title of the Society will automatically be withdrawn and the “society” shall get the land allotted from the Government of Sindh on making payment of “lease money” to the Government of Sindh. It seems that KPT Officers Cooperative Housing Society surprisingly contesting for rights of KPT for obtaining its title in favour of KPT

Authority and not the KPT itself. The KPT authority has not filed any suit for declaration of their title in respect of the land in question which they have allegedly allotted to the Society and hence such undertaking in the above form becomes highly questionable. This undertaking on the face of it in terms of the above two points is also very shaky and perhaps could not sustain lashes of section 42 and 56 of the Specific Relief Act pursuant to suit No.735 of 2001.

34. The next question which is co-related to the current issues is as to whether in fact the land which is an artificially reclaimed land is owned by Government of Sindh and that they could exercise such jurisdiction to transfer the title of the subject land as demonstrated in the undertaking or is it the Federal Government who enjoys not only the jurisdiction but the ownership of the land as well.

35. Along with the above we would now examine the relevant law concerning the transfer of government land. Apparently the provisions of the law that deal with the situation are section 50 of the Land Revenue Act, 1967 and section 172 of the Constitution of Islamic Republic of Pakistan, 1973 and section 10 and 10-A of Colonization Act, 1912. The earlier two provisions for the time being are reproduced as under:-

“Section 50 of Land Revenue Act, 1967:

50. Presumption as to ownership of forests, quarters and wastelands. (1) *When in any Record of Rights completed on or before the eighteenth day of November, 1871, in territories where the Punjab Land Revenue Act, 1887 (Punjab Act XVII of 1887), was, with or without modifications, in force immediately before the commencement of this Act, or completed on or before the seventeenth day of July 1897, in territories where the Bombay Land Revenue Code, 1897 (Bombay Act V of 1879), or the Sindh Land Revenue Code, 1879 (Sindh Act V of 1879), was so in force, it is not expressly provided that any forest or quarry, or any unclaimed, unoccupied, deserted or wasteland, or any spontaneous produce or other accessory interest in land belongs to the land owners, it shall be presumed to belong to Government.*

(2) *When in any Record of rights completed after the eighteenth day of November, 1871, or the seventeenth day of July, 1879, as the case may be, it is not expressly provided that any forest or quarry, or any such land, produce or interest as aforesaid, belongs to Government, it shall be presumed to belong to the land owners concerned.*

(3) *The presumption created by subsection (1) may be rebutted by showing-*

(a) *From the record or report made by the assessing officer at the time of assessment, or,*

(b) *If the record or report is silent, then from a comparison between the assessment of villages in which there existed, and the assessment of village of similar character in which there did not exist, any forest or quarry, or any such land, produce or interest, that the forest, quarry, land, produce or interest was taken into account in the assessment of the land revenue.*

(4) *Until the presumption is so rebutted, the forest, quarry, land, produce or interest shall be held to belong to Government.”*

36. The land which is the subject matter of this suit is adjacent to Mai Kolachi By-pass and a substantial part of land was once a forest of mangroves which are considered as tropical and subtropical evergreen trees that grew in salt marches and on mudflats, along tropical coasts and forms branches that form a dense tangled network. Thus, in terms of section 50 of the Land Revenue Act, the presumption of ownership of forest, queries and wasteland vest with the province.

Article 172 of the Constitution of Islamic Republic of Pakistan, 1973.

172. *Ownerless property. (1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government.*

(2) *All lands, minerals and other things of value within the continental shelf or underlying the ocean beyond the territorial waters of Pakistan shall vest in the Federal Government.*

(3) *Subject to the existing commitments and obligations, miner oil and natural gas within the Province or the territorial waters adjacent thereto shall vest jointly and equally in that Province and the Federal Government.”*

37. It is pertinent to point out that Article 172 of the Constitution was amended by 18th Amendment (18th Amendment Act X of 2010) in terms whereof the word “within” was substituted by the word “beyond” and sub-article 3 was added in the said article in terms of 18th Amendment. Deeper look at the said article provides that in terms of sub-article 1 of Article 172 only word “property” was used and in that context it was said that if a property has no rightful owner it shall, if located in a province, vest in the government of that province and in other case, in the federal government whereas sub-article 2 of Article 172 specifically deals with land, mineral and other things of valuable within the continental shelf or underlying in the ocean “within” the territorial waters of Pakistan shall vest in the federal government. This word “within”, as mentioned above, replaces by the word “beyond” in terms of 18th amendment and as such this amendment has no retrospective effect as far as the present dispute in the suit is concerned and it would be governed by word “within”. The contents of the plaint shows that the respondent No.2 claimed its ownership on the basis of certain events though they have not sought any declaration in this regard in this suit. It is alleged that pursuant to a notification (Ports), Department of Communication, Government of India dated 02.05.1940 issued under Indian Ports Act, the land stood transferred to this authority. Similarly it is claimed that the notification dated 02.05.1940 was issued under section 3 of the Act 1886 and the limits of the property of the proforma defendant No.5 as declared in both the notification of 1940 was defined as under:-

“From Municipal Boundary Pillar No.1 across to the sea side of Manora spit and thence along High Water Mark to New Karachi Port Trust Pillar No.46 and from thence seawards along the circumference of a circle of 3 miles radius, having its centre at the extreme end of

Manora Breakwater until a point on the circumference due east of the centre of the circle is reached and from thence in a straight line due east to the shore at Ghizree and thence by High Water to the Northern end of Keamari Groyne, thence North following the High Water Mark of the Disinfecting Station, Chemical analyser's Laboratory, Boat Basin and east wharf to the entrance to the China Creek back water, thence round the China Creek by the High Water mark and by High Water mark falling the Juna Bandar and west wharf, and thence by High Water Mark round the west back water to Municipal boundary Pillar No.1 as indicated in Karachi Port Trust Plan No.B-II/V-34 dated the 9th June, 1039, and including all wharfs and other works made on behalf of the public for convenience of traffic for safety of vessels or for the improvement, maintenance or good governance of the port and also including all portions of the shore of bank within 50 yards of High Water mark."

38. It is also claimed that in terms of Notification dated 21.12.1975 the properties inter alia included bed of the sea particularly the high water mark fall within the limits of the port. Similarly, in Para 3 of the plaint it is claimed that in 1973 the Deputy Secretary, Government of Sindh, Land Utilization confirmed in writing that with respect to the bed of the sea and the foreshore area up to 50 yards, defendant No.1 i.e. appellant No.1 Government of Sindh has no concern as it is not within its jurisdiction. It is contended that Karachi Port Authority was established under the Presidential Order and as successor of Karachi Improvement Trust and it continued with revision and modification of Kehkeshan Scheme, which was known as Scheme No.5 which scheme was approved by the erstwhile Government of West Pakistan vide Governor's Order dated 06.10.1964. It is also admitted in terms of Para 9 of the plaint that they have sanctioned allotment of sea bed measuring 78 acres and another portion measuring 27 acres respectively for 25 years subject to actual survey on site in favour of KPT Officers Housing Society Limited (who have filed the suit) and this land is in fact abut on Mai-Kolachi by-pass across China Creek and it is alleged that before such allotment all aspects including the environmental and ecological effect of reclamation

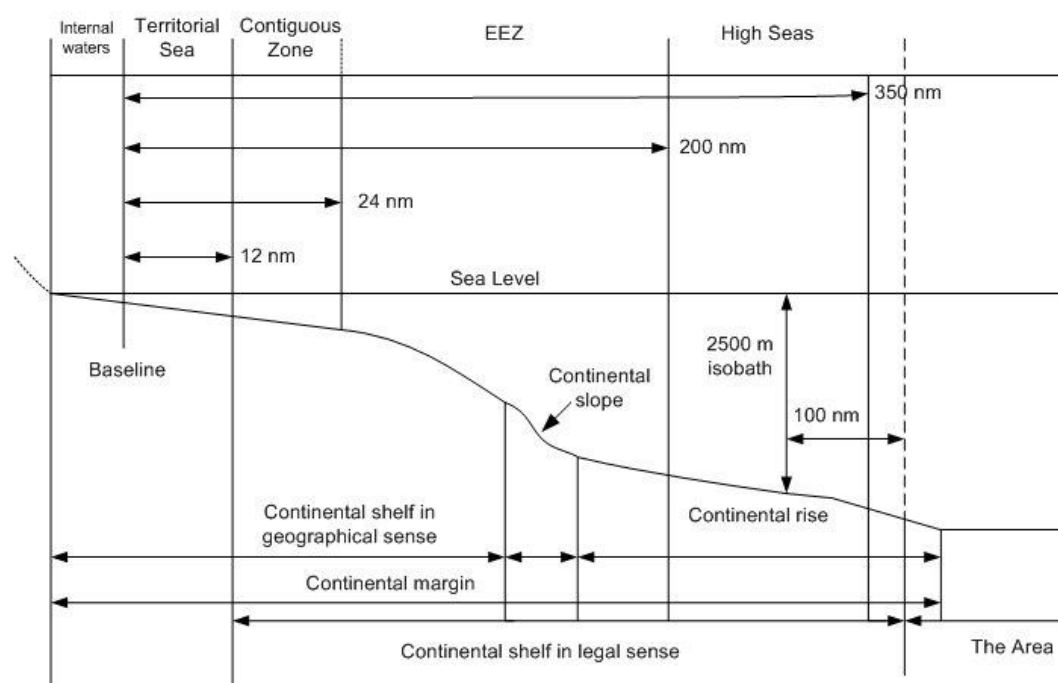
of land were considered. In terms of Para 9 of the plaint it is claimed that the process of reclamation of the land and to obviate the spreading of large quantity of sewage drains over the area services of contractors were obtained through open bidding and the reclamation of the land was completed by spending about 200 million without causing any damage or loss to the marine life and ecologic environment of Karachi.

39. With these contentions in the plaint the respondent No.1 filed suit only for injunction and it appears that KPT Officers Society in fact arrayed the KPT as defendant No.5 in the suit.

40. As stated above firstly this suit does not pertain to the declaration of the title and as such on this score along this compromise is beyond the ambit of the suit and more importantly beyond the dispute as raised. Secondly the mechanism and method adopted to transfer the land has not been followed which are mandatory provisions as far as the transfer of title of the government land is concerned. Such transfer, sale has to be by way of public auction and not by way of an amicable settlement between the parties.

41. Thus on the strength of above narration the rescue of Article 172(2) of the Constitution of Pakistan is not seems to be available and section 50 of Land Revenue Act, 1967 also provides interest of government of Sindh over the land in question. Though there is no such suit before us which could establish the title of the KPT or could lead to such possible conclusion, however for the sake of litigants we have gone through the above referred law as well as Colonization and Disposal of the Government Lands (Sindh) Act of 1912. Article 172(2) of the Constitution of Pakistan 1973 provides title to the Federal Government in respect of the land within the continental shelf or underline the Ocean beyond (within) the territorial waters of Pakistan. The

continental shelf as described by “Yoshifumi Tanaka”, the author of “the International Law of the Sea”, is an area adjacent to a continent or around an island extending from the low-water line to the depth at which there is usually a marked increase of slope to greater depth. In order to demonstrate such continental shelf or subject land under the ocean in the legal sense he has also drawn certain diagrams one of which is reproduced as under. Even an island and land around such island is covered by same principle of marked and significant increase of slope to greater depth. Thus any island adjacent or in the vicinity of Sindh province are to be dealt with the same analogy.



42. Thus by no stretch of imagination the land in question could vest in the Federal Government. The observation above though may not be necessary as this suit is only for injunction however since in this suit for injunction certain observations regarding the process to convey title of the land in question was obtained without seeking the declaration to the effect of the title of the land, it is necessary and imperative to highlight such important aspects supported by law as to how important it was for the plaintiff as well as for the KPT to have obtained such declaration of

title before reaching to such understanding by way of disposing of suit in terms of undertaking/minutes of the meeting which, as stated above, itself is contrary to law to a great extent.

43. Such views as far as the status of the subject land is concerned, also expressed by the learned Single Judge in the case of Province of Sindh v. Administrator DHA & another passed in suit No.778 of 1998 by Hon'ble Mr. Justice Shabbir Ahmed, as he then was, the relevant portion of the order is as under:-

“The admitted facts are that the land, which came into existence by reclamation process initiated by the authority is not owned by the Authority. The authority has approached the Ministry of Defence through Director General Military Lands for regularization of the area in question. It is also admitted fact that none has come to claim the ownership over the land except the Govt. The question is, who is the owner of the reclaimed land?”

The learned counsel for the Authority has contended that the Federal Govt. is the owner of the land by virtue of Article 1(2) of the Constitution of Pakistan as the land falls within the territory of Pakistan. Article 1(2) reproduced above, defines territories and does not confer the ownership over such land, whereas, Article 172(1) confers the ownership over the ownerless properties to the Province of its location. No doubt sub-Article (2) of Article 172 confers ownership to Federal Government over the properties described therein, but in my view the suit property cannot be categorized under the sub Article (2) of Article 172.

The presumption of ownership over the land would be in favour of the provincial govt. under section 50 referred to above.

By reclamation process, the land of about 240/250 acres has emerged at the sea shore and it is not disputed that such land is located in the province of Sindh. I am of the view that the reclaimed land through natural process or by artificial process, as in the present case, would vest to the provincial Govt. unless the ownership is conferred to any person or authority in accordance with law.”

44. Similarly in the case of M/s Metalex (Pvt.) Limited v. Government of Sindh (PLD 2010 Karachi 414) a similar view was taken by the learned Single Judge, relevant portion of the same is as under:-

“11. The purpose of enacting Karachi Port Trust Act, 1886 was to manage the affairs of Karachi Port in an orderly manner through a Board described as “The Trustees of the Port of Karachi”. To achieve this objective, the Board was conferred with various powers and duties. These are defined in Part V, sections 29 to 59 of the Karachi Port Trust Act. The powers and duties of the Board relate to the running of Karachi seaport which in turn require control over an area as well as on certain immovable properties. Under section 27(1) of K.P.T. Act, certain specified immovable properties of the then Karachi Harbour Port were transferred by the then Government of India to the Board and upon such transfer they stood vested in the Board. These immovable properties are listed in Schedule A to the K.P.T. Act. Apart from so acquiring immovable properties, the Board was empowered to acquire immovable properties directly or through the process of acquisition under Land Acquisition Act. Such powers are contained in sections 25 and 26 of the K.P.T. Act. In order to carry out the purposes of the Act, the Board was also empowered under section 18(1) of the Act to lease, sell and transfer immovable properties that vested in it. To deal with immovable properties that vested in the Board, the K.P.T. Act imposes certain restrictions as is evident from the provisions of sections 18(2) and 27 of the Act. For convenience sake, section 18(1), 25, 26 and 27 are reproduced hereunder:-

- (18) Competency of the Board to lease, sell and transfer.---(1) The Board shall be competent, subject to the restrictions contained in subsection (2) to lease, sell or otherwise transfer any movable or immovable property which may, for the purposes of this Act, have become vested in, or been acquired by them and so far as is not inconsistent with the provisions and purposes of this Act and subject to the restrictions contained in subsection (3) and (4), to enter into and perform all such contracts as they may consider necessary or expedient in order to carry into effect the said provisions and purposes.
- (25) Power of Board as to property.--- The Board shall, for the purposes of this Act, have power to acquire and hold movable and immovable property within or without the limits of the port or city of Karachi.
- (26) Procedure to be observed with the Board are unable to acquire, by agreement, any immovable property.--
- When the Board are unable to

acquire, by agreement, any immovable property required for the purposes of this Act, the Federal Government may order proceedings to be taken for acquiring the same on behalf of the Board as if such property were land needed for a public purpose within the meaning of the Land Acquisition Act, 1894 (I of 1894).

The amount of compensation awarded and all other charges incurred in the acquisition awarded and all other charges incurred in the acquisition of any such property shall be forthwith defrayed by the Board and thereupon the said property shall vest in the Board.

(27) Transfer of Government property to the Board.---(1) The property specified in schedule A shall vest in the Board;

Provided that---

- (i) If any question arises between the Federal Govt. and the Board as to the boundaries of any portion of such property, Govt. may define and demarcate such boundaries, and the decision of Government in respect to such boundaries shall be conclusive.*
- (ii) Any portion of the land specified in the said schedule which shall be required by the Federal Government for a public purpose may be resumed by the Federal Government, without claim to compensation on the part of the Board, except of buildings or other permanent structure erected thereon.*
- (2) Nothing in clause (ii) of the proviso of subsection (1) shall apply to land reclaimed from harbor waters, and the Board shall be compensated for any improvements effected by it on any land resumed under that clause.*
- (3) The railway now under construction between the Bander Station and the Keamari Station may be constructed by Government along the foreshore or on reclaimed land and any other work which the Federal Government may consider necessary in the public interests may be executed by Government in or upon any of the property specified in the said schedule*

without claim to compensation on the part of the Board except for building or other permanent structures which it shall be necessary to clear away for the purposes of such railway or work.

17. Applying the above discussed interpretation of the provisions of Article 172(1) and (2) of the Constitution and section 3 of the K.P.T. Act to the present case, all land reclaimed from sea adds to the boundaries of Sindh Province irrespective of the fact that such addition has taken place within the limits allocated to the Karachi Port Trust. In fact such a situation calls for making changes in the limits of Karachi Port under section 3 of the K.P.T. Act as the boundaries of High water mark have changed. As discussed earlier the limits of Karachi Port Trust that are defined through notification issued under section 3 of the K.P.T. Act are only functional or jurisdictional limits conferring no title or proprietary interest in favour of Karachi Port Trust but only allows the Board constituted under K.P.T. Act to run and manage the affairs of the Port within such limits. The proprietary interests in any immovable property in favour of the Board are created only under the provisions of section 25, 26 and 27 of the Act. The disputed land admittedly being part of land that stood reclaimed from sea through a natural process and its ownership was never conferred upon the Board under the provisions of section 25, 26 and 27 of the K.P.T. Act, therefore, Karachi Port Trust cannot stake any claim to it and the same belongs to Government of Sindh. Hence, Phase 1 of K-28 Trans Lyari Quarters, Hawks Bay Road, District West, Karachi, is not owned by K.P.T. but is owned by Government of Sindh. The sole issue in all the connected sixteen suits is answered accordingly.”

45. Apart from the above test prescribed by law, such compromise also to pass test of Order 23 rule 3 CPC which provides that the satisfaction of the Court is inevitable before the Court could reach to a definite conclusion that it is a lawful compromise that the parties are entering into. The proper course for the trial Court is to proceed and satisfy itself as to lawfulness of agreement and all the issues arising out of the suit are within the contemplation of Rule 3 of Order 23 CPC. If the lawfulness of the agreement is not found to the satisfaction of the Court, the suit on such situation was not to be disposed of on such unjust terms. If any reference is needed we may look at the case of Muhammad

Sardar Versus Muhammad Riaz (2005 MLD 574) and Bank Of America Versus Mairaj Sons Ltd (1988 CLC 2106).

46. Now we may discuss the relevant law i.e. the Colonization and Disposal of the Government Land Act 1912. Section 10 and section 10A provides issuance of statement of conditions of tenancy. It would be advantageous to reproduce the above relevant provision in order to proceed further:-

10. Issue of Statement of conditions of tenancies- (1)
The [Board of Revenue subject to the general approval of the Government] may grant land in a colony to any person on such conditions as it thinks fit.

(2) The [Provincial Government] may issue a statement of statements of the conditions on which it is willing to grant land in a colony to tenants.

(2A) Notwithstanding anything contained in sub-section (1) Or sub-section (2), such land shall, not be exchangeable with private or kabuli land].

(3) where such statements of conditions have been issued, the Collector may, subject to the control of the [Board of Revenue], allot land to any person, to be held subject to such statement or conditions issued under sub-section (2) of the this section, as the Collector may by written order declare to be applicable to the case.

(4) No person shall be deemed to be a tenant or to have any right or title in the land allotted to him until such a written order has been passed and he has taken possession of the land with the permission of the Collector. After possession has been so taken, the grant shall be held subject to the conditions declared applicable thereto.

(5) If a person who has been granted, allotted or leased out, land after applicability of this Act to the Province of Sindh, or a person who may be granted land under this Act hereinafter for specific purpose has-

(a) Failed to deposit the occupancy price within a period of six months after the issuance of offer letter or allotment letter regarding grant, allotment or lease of land, such offer letter or allotment letters shall automatically stand withdrawn and shall not be restored; provided that the grantee, allottee or lessee may apply afresh for grant, allotment or lease of the land and the Competent Authority may make a fresh grant, allotment or lease as the case may be; and

(b) Failed to use the land for the purpose for which it was granted or allotted or converted or leased out and the period of five years from the date of grant, allotment, conversion or lease has expired, the grant, allotment, conversion or lease of the land shall automatically stand cancelled and the amount deposited shall stand forfeited;

Provided that the competent authority may extend the period for one year more in the justified cases on payment of ten percent (10%) of the occupancy prices.

Provided further that the Chief Minister may extend the period of completion of projects in respect of land granted for education and health purposes in the cases where the delay in completion of project is not on account of any negligence on the part of grantee.]

[10A. (1) No land shall be disposed of except by Government in accordance with the provision of this Act, to an autonomous body, authority, company, a person or a group of persons.

(2) Save as otherwise provided under this Act or rules-

- (a) no land for agricultural purposes shall be disposed of except under the statement of conditions issued under sub-section (2) of Section 10, of this Act;
- (b) no land for commercial purpose shall be disposed of except by open auction at a price not less than market price;
- (c) no land exceeding one hundred and twenty square yards under incremental housing shall be disposed of at a price not less than twenty five percent of the market price;
- (d) residential land exceeding one hundred and twenty square yards shall be disposed of at a price not less than fifty percent of the market price;
- (e) no land for industrial purpose shall be disposed of at a price not less than twenty five percent of the market price;
- (f) no residential-cum-commercial land shall be disposed of at a price not less than seventy five percent of the market price;
- (g) no amenity plot shall be disposed of at a price not less than fifty percent of the market price.

(3) All grantees of land shall pay ground rent as determined by Government in addition to the occupancy value.

47. Section 10-A was added in terms of Sindh Amendment Ordinance, 2005 which prescribes that no land for commercial purpose shall be disposed of except by auction at a price not less than market price and that no residential-cum-commercial land shall be disposed of at a price not less than 75% of the market price and that no land for industrial purpose shall be disposed of at a price not less than 25% of the market price and similarly no amenity plot be disposed of at a price not less than 50% of the market value. The “undertaking” which is referred above is absolutely silent as far as the application of the above provisions are concerned. Firstly it is agreed that the land may be transferred on payment of “lease money” which subscribes to an example that any trespasser could occupy any piece of land and then subsequently could plead and agitate that on payment of “lease money” same may be transferred to him by the owner whoever it may be. This undertaking is not only contrary to the above relevant provisions of law but also amounts to regularizing the attempt of trespassing the land that could eventually be the fact that may come on surface and this possible trespasser i.e. KPT is not even before the Court for the redressal of their grievance by filing suit for declaration, if permissible under the law.

48. Similarly in terms of Notification No.09-294-03-SO-I/336 dated 25.02.2006 which was issued under the powers conferred by subsection 2 of section 10 of the Colonization of the Government land Act, 1912, the entire mechanism of issuance of statement of condition, availability of land and determination of market price, occupancy price and project is to be ascertained by price committee and scrutiny committee. The said notification also prescribes a procedure for the grant of land and the procedure of auction of land. The notification which is relevant for the purpose of arriving at a just conclusion is very material and is reproduced as under:-

“Notification No. 09-294-03-SO-I/336.-In exercise of the powers conferred by Sub Section (2) of Section 10 of the Colonization of Government Lands Act, 1912, and in supersession of all previous notifications issued in this behalf, the Government of Sindh are pleased to issue the following statement of conditions for grant of State Land for non-agricultural purpose including amenity, residential, flat site, incremental housing, residential-cum-commercial, commercial, industrial purposes, on lease upto 99 years.

1. This statement of conditions is issued subject to the provisions of the Colonization of Government Lands Act, 1912.

2. In this statement of conditions, unless there is anything repugnant in the subject or context;-

(a) **“Act”** means the Colonization of Government Lands Act, 1912;

(b) **“amenity purpose”** means a use of plot of land for park, garden playground, graveyard, educational institution, health institution, reading rood, library, community center and places for religious worship;

(c) **“authority”** means a development authority established by Government under a law for the time being in force;

(d) **“autonomous body”** means an autonomous body under the control of Government established under a law and includes an authority but does not include a council;

(e) **“commercial purpose”** means use of a plot of land for commercial purpose;

(f) **“Company”** means a company registered under the Companies Ordinance, 1984;

(g) **“council”** means a council constituted under the Sindh Local Government Ordinance, 2001;

(h) **“District Officer Revenue”** means the District Officer (Revenue) as described in the Sindh Land Revenue Act, 1967 and includes:-

(i) any Officer appointed by the Board of Revenue to perform all or any of the functions and exercise all or any of the powers of the District Officer (Revenue) under this Act; and

(ii) any Colonization Officer or Assistant Colonization Officer appointed as such before the commencement of this Act, whether or not such Officer was by notification appointed to

perform all or any of the functions of a Deputy Commissioner under the Act hereby repealed;

- (i) **“Executive District Officer (Revenue)”** includes any Officer appointed by the Board of Revenue to perform all or any of the functions and exercise all or any of the powers of a Executive District Officer (Revenue) under this Act;
- (j) **“flat site”** means any plot of land used or to be used for constructing residential flats;
- (k) **“Government”** means the Government of Sindh;
- (l) **“Incremental housing”** means a housing scheme sponsored by the Government, or an authority, or an autonomous body or a company for providing residential land to a family not exceeding 120 square yards;
- (m) **“industrial purpose”** means use of a plot of land as:-
 - (a) a cottage, small, medium and large industry or
 - (b) an Industrial Estate or
 - (c) an Information Technology Park or
 - (d) tourism activities including hotels that offer lodgings;
- (n) **“land”** means lands vesting in Government, authority or autonomous body and includes the lands that is used and may be used for commercial residential, residential cum commercial, industrial or amenity purposes;
- (o) **“market price”** means the market price and includes the occupancy value of the land prevailing at the time of disposal of the land by the Government under the Act;
- (p) **“occupancy value”** means the price paid by the occupant of Government land granted for non-agricultural purpose for a period not exceeding ninety nine years;
- (q) **“project”** means commercial, incremental housing, residential, flat site, residential cum commercial, industrial and amenity projects for which land is granted;
- (r) **“residential cum commercial purpose”** means use of land for construction of flats, shops and or private or public offices;

- (s) **“residential purpose”** means use of a plot of land for constructing residential houses;
- (t) **“grant”** means lease of land made under these conditions;
- (u) **“price committee”** means the District Price Committee appointed under the conditions No.8(1)(a);
- (v) **“scrutiny committee”** means the Scrutiny Committee appointed under conditions 8()(b).

3. The land shall be disposed of by the Government in accordance with the provisions of the Act, to the Federal Government, a Provincial Government, autonomous and semi-autonomous bodies, and bonafide housing societies, authority, company, a person or a group of persons at the market price for any purpose mentioned in this statement of conditions.

4. No land shall be disposed of-

- (a) For commercial purpose except by open auction at a price not less than the market price;
- (b) Exceeding one hundred and twenty square yards under the incremental housing at a price not less than twenty five percent of the market price;
- (c) For residential purpose exceeding one hundred and twenty square yards at a price not less than fifty percent of the market price;
- (d) For industrial purpose price not less than twenty five percent of the market prices;
- (e) For residential cum commercial purpose at a price not less than seventy five percent of the market prices;
- (f) For amenity purpose a price not less than fifty percent of the market price; however for mosques and graveyard land can be granted on concessional rates.
- (g) The land can be granted to the Sindh Govt. employees Housing Societies or for the housing projects for Sindh Govt. Employees on concessional rates.

5. **Discretion in selection of grantees.**- No person shall, as a right, be entitled to the grant of land under these conditions and Government shall have absolute discretion in selection of grantees.

6. **Prohibited areas.**- (1) No land shall be granted within the prohibited area of Super highway, National highway, roads, jails, railway lines, port or any other area notified by the Government.

(2) No land which is already reserved or used for any specific public purpose shall be granted without its

relinquishment by the concerned Department or organization.

7. Period of grant.- The land under these condition shall be granted for a period not exceeding ninety nine years as may be fixed by the Government.

8. Procedure of determination of market price.- (1) There shall be appointed-

(a) A price committee consisting of the Executive District Officer (Revenue) to be the convener, Executive District Officer Finance, District Officer (Revenue), District Registrar, Deputy District Officer (revenue) and two nominees of the Local Chamber of Commerce and Industries, one of them shall be from the real estate business shall propose the market price;

(b) A scrutiny committee consisting of the Senior Member, Board of Revenue as convener, Secretaries of the Land Utilization, Finance and the concerned Department of the Government, Chairman Investment Cell Chief Minister's Secretariat and two representatives of the Karachi Chamber of Commerce and Industry, one of them shall be from the real estate business, to process the market price proposed by the Price Committee and make recommendations to Government in this behalf.

(2) The Price Committee shall propose the market price in the District after taking into consideration:-

(i) the price of land transferred in the same area for similar use during the past twelve months;

(ii) The valuation table notified by the Board of Revenue, Sindh under the Stamp Act, 1899 for the purpose of levy of stamp duty at the time of registration of a sale-deed in respect of sale of similar land; and

(iii) Such other modes as deemed fit to provide a fair basis for assessment of such price.

(3) The Price Committee shall submit its recommendations to the Scrutiny Committee which shall after such further enquiry as deemed fit submit its recommendations to Government for determination of the market price.

(4) The market price determined under condition 8(3) may be reviewed at least after every three years.

9. Procedure of auction of land.- (1) Auction of land shall be held by the Executive District Officer (Revenue) after publication of auction notice in the leading English, Urdu and Sindhi newspapers.

(2) *The upset price shall be fixed by the Land Utilization Department in consultation with the Finance Department but such price shall in no case be below the market price.*

(3) *The bidders shall deposit ten percent of the upset price in advance as security deposit.*

(4) *The successful bidder at the close of bidding shall deposit twenty five percent of the bid money including the security deposit on the day of auction or on the next day, failing which the security deposit shall stand forfeited to Government.*

(5) *The final bid shall be subject to the confirmation by the Government.*

(6) *On confirmation, the bidder shall deposit the remaining seventy five percent of the bid money within thirty days of communication of confirmation of the bid, failing which the twenty five percent amount deposited by him shall stand forfeited to the Government.*

10. Procedure for grant of land. - (1) *Applications for grant of land shall be submitted to the Chief Executive of the Province who may require the Land Utilization Department for proceedings.*

(2) *The Land Utilization Department shall send such applications to the Executive District Officer (Revenue) to report the availability of the land with the site plan.*

(3) *On receiving the report under Condition 10(2), the Land Utilization Department shall convene a meeting of the Scrutiny Committee to consider the report and formulate the recommendation for submission to the Government.”*

49. Even earlier the situation was not different. Under the Colonization of Government Lands (Punjab) Act, 1912 [Statement of Conditions for grant of state land in local limits of Karachi Taluka, K.D.A., etc.] (Sindh Gaz., Extra., Pt. I, dated 05-06-75), the Notification No.KB-I 1/30/72/709, issued in exercise of powers conferred by subsection 2 of section 10 of Colonization Act, 1912, the Government of Sindh was pleased to issue the following statement of conditions for the grant of state land within the local limits of Taluka Karachi or of Karachi Development Authority Schemes or Municipal Committees in the

Province on lease for residential, commercial, educational, charitable and religious purposes:-

4(1). The land shall be given by the Deputy Commissioner, or his nominee not below the rank of Assistant Commissioner duly empowered in this behalf under the Act in the manner hereinafter appearing.

(2) No lease shall be granted within the prohibited area of Super Highway, National Highway, Roads, Jails, Railway Lines, Port Trust or Sea Shore limits.

5. The lease shall be granted for a period of ninety-nine years or such period as may be general or special order be determined by Government.

RESIDENTIAL PLOTS

6. The land for residential purpose shall ordinarily be leased out after being laid out in suitable plots by auction: (i) provided that a plot the area whereof does not exceed 120 square yards may be leased out by negotiations with the prior approval of the Commissioner, if the Deputy Commissioner, is satisfied that auction of such plot is not in the public interest: (ii) Provided further that similar small plots not exceeding an area of 80 Sq. Yards adjacent to a building or site shall be leased out by negotiations and preference shall be given to the owner of such building or site if he is agreeable to pay the price and annual rent as determined by the Deputy Commissioner.

7. The upset occupancy price or occupancy price for plots shall be determined by the Deputy Commissioner on the basis of market value obtaining in the locality or in the adjoining for last twelve months in respect of similar plots :- Provided that where no data is available for determining upset occupancy price a fair index to the prevalent market value shall be determined by the Board of Revenue.

8. The disposal of the plots by auction shall be made in the following manner:-

(i) The auction shall be held after wide publicity to be made at least not less than thirty days before such auction. (ii) The auction shall be conducted by any officer authorized in this behalf by the Deputy Commissioner. (iii) The intending purchaser shall bid in person or through a duly authorized agent (iv) The highest bidder shall pay 1/4th of the total amount of the bid on the spot. (v) The acceptance of the highest bid shall be subject to the confirmation by the Deputy Commissioner. (vi) The Deputy Commissioner, reserves the right to accept the highest bid, or to reject any bid without assigning any reason therefor. (vii) The bidder whose bid is accepted shall pay the balance of the price within thirty days of the acceptance of the bid; provided that the Deputy Commissioner may in

suitable cases extend the period which shall not in any case exceed six months from the date of acceptance of the bid. (viii) If the bidder fails to pay the balance by the due date or within the period extended by the Deputy Commissioner, the 1/4th price paid by him under clause (iv) shall be forfeited to Government and the plot shall be re-auctioned at the risk of the bidder and all liabilities incurred and losses, if any, sustained by Government by re-auction of the plot shall be recovered from the bidder as arrears of land revenue.

9. *The disposal of plots by negotiation shall be made in the following manner:- (i) The plot shall be leased out after negotiation to suitable person. (ii) The lease of plot situated within the limits of Karachi Municipal Corporation, K.D.A. Schemes and People's Municipality, Hyderabad, shall be subject to the information by the Board of Revenue, except as provided in proviso (ii) of condition No.6. (iii) The lessee shall pay the occupancy price determined by the Deputy Commissioner, within four months of the confirmation of the lease by the Board of Revenue, provided that the Deputy Commissioner, may in suitable cases extend the period upto twelve months from the date of confirmation of lease. (iv) If the lessee fails to pay the price by due date or within the period extended by the Deputy Commissioner, the lease shall be cancelled and all liabilities incurred and losses, if any, sustained by Government shall be recovered from the lessee as arrears of land revenue.*

10. *The possession of plot shall be delivered after the occupancy price has been paid in full.*

11. (1) *The lessee shall pay to Government annual rent on 1st August of every year.*

(2) *The rent shall be determined by the Deputy Commissioner, on the basis of average annual rent payable on lease by a Municipal Committee, Karachi Development Authority or Cantonment in the same locality or adjoining locality during last twelve months.*

(3) *The rent shall be liable to revision by Government after successive period of ten years in perpetuity.*

12. *The lessee shall pay to Government all rates, taxes, cesses and charges payable in respect of the plots under any law for the time being in force.*

13. *The lessee shall construct a residential house on the plot within a period of two years from the date of delivery of possession of plot provided that the Deputy Commissioner may extend the period which in no case shall exceed five years from the delivery of the possession of the plot.*

COMMERCIAL PLOTS AND PLOTS FOR PETROL PUMPS AND CINEMAS.

14. *The Commercial plots and plots for Petrol Pumps and Cinemas shall be leased out by open auction to the highest bidder.*

15. *Conditions 7, 8, 10, 11, 12 and 13 shall apply mutatis mutandis to plots specified in conditions 14 subject to the following modifications:- (i) That reference to "Deputy Commissioner" in condition 8 (vi) shall be construed as "Commissioner". (ii) that reference to upset occupancy price" or occupancy price", in condition 7 shall be construed as upset occupancy price". (iii) that reference to "residential house" in condition 13 shall, as the case may be, be construed "commercial plot", plot for petrol pump" and "plot for cinema".*

50. In terms of statement of conditions pursuant to the aforesaid, it was prescribed in terms of condition No.4(2) that no lease shall be granted within the prescribed area of Super Highway, National Highway, roads, jails, railway line, port trust or "Seashore limits". In terms of statement of condition No.6 which pertains to the residential plots, it was prescribed that the land for residential purpose shall ordinarily be transferred by auction. The said condition is already reproduced above.

51. Thus, even prior to notification of 2006, referred to above, the statement of conditions prescribing terms of lease of land is similar which is apparently not in consonance with the "undertaking" as given by the Society in this case. Certainly the KPT Officers Cooperative Housing Society does not enjoy any privilege to overcome such legal requirement for the grant of lease whether commercial or residential or residential-cum-commercial and that too in the vicinity of seashore which apparently was prohibited area. All these aspects were to be looked into before the parties could set a mechanism to throwaway the land in such manner which no doubt is a very precious piece of land if market value is ascertained, which is also otherwise mandate of law.

52. There can be no cavil to this proposition that the statement of conditions in terms of Section 10 of the Colonization of the Government Land Act, 1912 provides the provincial government to issue statement of conditions on which it is willing to grant land in a colony to tenants. Subsection 3 of Section 10 provides that where such statement of conditions has been issued the Collector may, subject to the control of the Board of Revenue, allot land to any person to be held, subject to such statement of conditions issued under subsection 2 of section 10 of Act 1912. The provincial government issued these statement of conditions by virtue of authority delegated to it under the *ibid* Act and thus constitute a statutory force. This question was also discussed by the Hon'ble Supreme Court in case of *Sub. Muhammad Asghar v. Mst. Safia Begum* reported in PLD 1976 SC 435 in terms where of these statement of conditions were held as statutory instructions, having force of law.

53. We may further add that in view of order dated 22.03.2005 in terms whereof application bearing CMA No.5652 of 2009 was disposed of by observing that no such compromise can be entered into without the consent of the Land Utilization Department, it was not open to the learned Single Judge to *suo moto* assume jurisdiction of appellate Court which powers were not available to the learned Single Judge once he had dismissed such application. Such powers were exercised without even discussing the earlier order and its applicability.

54. As far as the question of doctrine of election is concerned, the appellant had obtained an interim order from the learned Single Judge with regard to the development of the land. We may observe that since the alleged undertaking does not talk about the development to be made by the allottees, therefore, it was well within their rights to move

such application for appropriate orders and such issue of development is not the subject matter of this appeal.

55. Thus, we conclude that in view of the above facts and circumstances, the compromise entered into between the parties is one which is beyond mechanism and mandate which enabled the Government of Sindh to have transferred the land in question and the learned single Judge ought to have considered aforesaid aspects before allowing the compromise application as prayed. In view of these, we set aside the impugned order, dismiss the compromise application bearing No. 6159/2009 and direct the learned signal Judge to proceed with the case in accordance with law.

Dated:03-09-2013

JUDGE

CHIEF JUSTICE