

THE HIGH COURT OF SINDH, AT KARACHI

Present: MR. JUSTICE AQEEL AHMED ABBASI
JUSTICE Mrs. RASHIDA ASAD

High Court Appeal No. 171 of 2006

Muhammad Saleem Asar
& 7 others Appellants

versus

Sindh Building Control Authority
& 9 others Respondents

High Court Appeal No. 192 of 2006

Maj. (Retd.) Nawazish Ali Appellant

versus

Muhammad Saleem Asar
& 16 others Respondents

Date of hearing: 10.11.2021

Date of decision: 10.11.2021

Mr. Muhammad Zahid Khan, Advocate for the Appellants in HCA No.171/2006 & Respondent in HCA No.192/2006.

Maj. (Retd.) Nawazish Ali, Respondent No.10 in HCA No.171/2006 & Appellant in HCA No.192/2006, present in person.

Mr. Iqbal M. Khurram, Advocate along with Ms. Naheed Akhtar, Advocates for KMC.

Mr. Mukhtiar Ali Junejo, Assistant Attorney General. Pakistan.

Mr. Jawad Dero, Additional Advocate General, Sindh.

JUDGMENT

Rashida Asad, J. Through this single judgment we are disposing off High Court Appeal No. 171 of 2006 & 192 of 2006, both are against one and same judgment, passed by learned Single Judge (on original side) in Civil Suit No. 1269 of 2003, whereby the said suit,

filed by the Appellants in HCA No. 171 of 2006, was disposed off with certain observations and as such the appellants, who were plaintiffs, feel aggrieved of the said judgment. HCA No. 192 of 2006 has been filed by one of the 10 Defendants (Defendant No.10). He is also aggrieved of the impugned judgment as he alone being material, relevant and necessary defendant contested the suit. During proceedings on original side, some of the defendants either were struck off or deleted. Even in the appeals proceedings, rest of the respondents remained aloof and hence the real contest was between appellants in HCA No. 171 of 2006 and respondent No. 10. Maj ® Nawazish Ali, appellant in HCA No. 192 of 2006. For convenience, hereinafter the appellants in HCA No. 171 of 2006 and appellant in HCA No. 192 of 2006 shall be described, respectively, as Plaintiffs and Defendant.

2. The bone of contention and/or dispute between the parties, culminated to cause of action, agitated by the plaintiffs in the suit was the change of use of an amenity plot No. 7-L, Block 2, P.E.C.H.S on 23.06.1973 from Park to Hospital. The said plot originally measured 1100 Sq yards, however, after its conversion from park to hospital it was divided into 2 plots each measuring 550 Sq Yards. The other sub divided plot was allotted to Dr. Khawaja Fazal Ahmed who raised construction thereon long before, however, its conversion or use was never objected by any one including the plaintiff in the suit. The allotment of plot in question, (hereinafter the subject plot) was made on 24.08.1973 to Dr. Maula Bux Jamali who sold it on 09.07.1996, through an agreement to sell coupled with

registered Irrevocable General Power of Attorney to Muhammad Khalid Naeem Cheema from whom the defendant purchased it on 01.02.1999, which transaction is not under dispute. In the year 2003, when construction of building on the subject plot for a hospital was in progress, the plaintiffs filed the subject suit, challenging conversion, change of use of plot, approval of building plan etc. The defendants objected on various grounds including but not restricted to, maintainability of suit for want of notice under section 70 of the Cooperative Societies Act, as well as for being time barred in view of acquiescence by the plaintiffs during all these years since the date of its conversion as on 23.06.1973.

3. Notwithstanding, the claim of parties as reflected in the pleadings in the suit, both the parties consented to framing of following single issue, without formality of recording of evidence, and argued their case accordingly:-

“Whether an amenity plot meant for particular purpose such as park can be used for another amenity purpose such as construction of a hospital and whether the authority is competent to grant permission for such conversion?”

4. Although, the learned counsel for the parties argued in detail on the point of limitation and maintainability of the suit and also produced the case law in support of their arguments, whereas, the learned Single Judge also dilated upon the question of limitation, and was pleased to observe that plaintiffs remained indolent and silent for about thirty (30) years over the issue of conversion or change of use of subject plot, however, no conclusive finding has

been recorded on this point, and the suit has been finally disposed of in the terms as detailed in the impugned judgment.

5. There seems no dispute over the date of conversion or change of use of plot from one amenity to another amenity, contents of approval of change of use, allotment of subject plot, and approval of its building plan. The defendant further produced irrefutable record which reveals that conversion of suit plot was cancelled on the complaint of other allottees of PECHS earlier on 25.03.1977, under the garb of MLO 34 issued on 20.09.1977; and such decision/order of Ministry of Housing & Works, Government of Pakistan was challenged in a Constitutional Petition No.D-868/1984 and the said order of cancellation was set aside vide order dated 22.11.1990, leaving it for the Administrator to hear the parties and to take a decision. Accordingly, after inviting objections from public, the plot was regularized in favour of allottee (Dr. Maula Bux Jamali in furtherance of a letter dated 10.06.1999 of Sindh Co-operative Housing Authority. The defendant also placed on record and referred to another letter dated 13.02.1995 of Housing & Works Division, Government of Pakistan whereby, besides regularization of allotment of plot for Hospital, even permission for running of school has been granted. Since the parties contested their respective case on the basis of documents, without any oral evidence, it can be lawfully presumed that there was no denial or dispute relating to the documents available on record in the suit.

6. The learned Single Judge, on original side, after careful and threadbare scrutiny, consideration and thoughtful excogitation arrived to conclusion emanating to a judicial verdict that conversion and change of use of plot from park to hospital was not against the law but such hospital shall be used for welfare of residents of the vicinity and will not be allowed to run on commercial basis. The learned Single Judge was also of the firm opinion that suit was hit by limitation in view of long acquiescence. The suit was, however, neither dismissed, nor decreed, rather it has been disposed off. It will be appropriate to reproduced operative part of the judgment from both the parties felt aggrieved and have filed subject appeals:-

“In the circumstances of the case, it appears that the concerned authorities were competent to grant permission for conversion of plot from Park to Hospital at the relevant time in 1973 but there remains another question as to whether the hospital constructed on amenity plot can function commercially or not. In this respect, the letter of regularization dated 13.02.1995 issued by Government of Pakistan, House and Works Division is very relevant, which has already been reproduced earlier and relevant para 3 is again copied.

“The plot would not be utilized other than amenity purpose i.e on commercial basis”.

According to above letter regularization of amenity (Hospital) is allowed. In the second para of letter use of the plot has also been allowed for school purpose but for the welfare of the residents. Paragraph 3 prohibits use of plot for any purpose other than amenity i.e on commercial basis. The said letter has been strongly relied upon by defendant himself. Keeping in view the language of the said letter, I decide that plot in question was basically an amenity plot, which has been converted from one amenity to another amenity in 1973 and cannot be challenged after 30 years but it will remain for the welfare of the residents and will not be utilized on commercial basis, therefore, the hospital which may be constructed on that plot will be for the welfare of the residents of the vicinity and will not be allowed to run on commercial basis”.

7. The learned counsel for the appellant and the respondent namely Nawazish Ali (in person) in HCA No.171/2006, have reiterated their respective arguments as advanced before the learned Single Judge, and also placed reliance on almost same case law. The crux of arguments of the learned counsel for the Appellant in HCA No.171/2006 was that change of use of amenity from park to hospital was unlawful, in violation of provisions of KDA, Order V of 1957, Rules framed thereto, in excess of authority vested under MLO-34 issued on 30.09.1977. It has been further argued that change of use is also in violation of Zoning Regulation of 1972, also contrary to the wishes of the people in the vicinity, and as such, the matter was of public interests, as would affect the rights of general public at large. Conversely, the respondent appearing in person argued that suit being hopelessly time barred should have been dismissed on this account as well as on the merits instead of disposal. It is further contended that conversion from one amenity (Park) to another amenity (Hospital) was permissible under the prevailing law i.e. KDA Order 1957, prior to insertion of 52-A in the years 1994, whereas, Article 40 of KDA Order is applicable to individual plots and not to amenity plots. According to respondent, Article 52-A, though deals with amenity plots, but same is not applicable to conversion in question as said Article became part of statute in 1974, subsequent to conversions in 1973. Further that there was no zonal plan in PECH as envisaged under Article 40 of the KDA Order, 1957. And the change of use of plot in question was

accorded in accordance with clause II (2) of License Agreement of Society which was duly approved by KDA vide a letter dated July, 3rd, 1973.

8. Perusal of the impugned judgment shows that the learned Single Judge has minutely examined the relevant provisions i.e. Article 40 and 52-A of KDA Order 1957 and has made elaborate discussion on the application and scope of such provisions to facts of the case and has recorded detailed finding relating to both these provisions, and has been pleased to hold that MLO-34 does not attract or affect the conversion of one amenity (Park) to another amenity (Hospital) in respect of subject plot as such conversion had already been allowed by the competent authority on 24.08.1973. Detailed deliberation on the facts is avoided as there seems no dispute between the parties, whereas, the core point involved in the matter is to examine as to whether, the impugned judgment, whereby the suit of the plaintiffs was disposed off, instead of being Dismissed, is in consonance with law or not? There is no denial to the fact that suit was filed beyond the limitation and onus was on the plaintiffs to dislodge such legal impediment which comes in the way of maintainability of suit, however, it appears that no reasonable and lawful explanation whatsoever was offered by the plaintiff either before the learned Single Judge or before us in this regard. The learned Single Judge, once having taken cognizance of the issue relating to limitation, should have recorded his decision to this effect, however, it appears that in view of decision on merits of the case, relating to conversion and change of plot use from one amenity

(Park) to another amenity (Hospital), did not record conclusive finding to this effect, otherwise, suit would have been dismissed for being barred by limitation. We may however, observe that the impugned judgment passed by the learned Single Judge in the suit in the aforesaid terms, whereby, after having examined the relevant facts and the provision of law applicable in the instant matter, the learned Single Judge has finally decided the only legal issue formulated by consent of the parties relating to “change of use of an amenity plot meant for the purpose such as park can be used for another amenity purpose such as construction of a Hospital” amounts to decision of the case on merits, whereas, in view of the fact that detailed finding has been recorded by the learned Single Judge on the legal issue involved in the subject suit, the impugned judgment cannot be treated as illegal or unlawful, as it meets the requirements of Order XX CPC, relating to announcement of judgment and decree on the legal issue framed in the suit, and therefore, has the same effect accordingly.

Before parting with the judgment we may further observe that any rights or privilege accrued to the respondent in respect of subject plot in the year 1973, relating to its conversion and change of use from one amenity (Park) to another amenity (Hospital) in terms of KDA Order 1957, prior to insertion of Article 52-A, in the year 1974, particularly, when such conversion was permissible and was also allowed by the competent authority on 23.06.1973, could not otherwise, be taken away retrospectively pursuant to subsequent amendment in law through insertion of Article 52-A in the KDA Order

1957, and therefore, would be available to the respondent in respect of subject plot as per un-amended provision of law.

9. In view of hereinabove facts and circumstances of the case, we are of the considered view that the impugned judgment passed by the learned Single Judge does not suffer from any factual error or legal infirmity, therefore, requires no interference by this Court in the instant High Court Appeal No.171 of 2006, which was dismissed vide our short order dated 10.11.2021, whereas, consequent upon dismissal of the above High Court Appeal, HCA No.192 of 2006 filed by the appellant, namely, Maj. ® Nawazish Ali, whereby, he expressed his grievance against finding of the learned Single Judge to the effect that the “subject Hospital will be used for the welfare of the residents of the vicinity and will not be allowed to run on commercial basis”, was also dismissed for the reasons as recorded hereinabove. In addition to above reasons for dismissal of above High Court Appeal, another reason for dismissal of HCA No.171 of 2006, is the letter of regularization dated 13.02.1995 issued by Housing & Works Division, Government of Pakistan, in respect of subject plot, whereby, in terms of para 3 of such letter, it was mentioned that “the plot would not be utilized other than amenity purpose i.e. no commercial basis”, whereas, the aforesaid condition imposed at the time of regularization of the plot has never been disputed or challenged by the appellant in the aforesaid suit, therefore, any objection to this effect is otherwise, misconceived and not tenable in fact and law.”

Both the High Court Appeals stand dismissed along with listed applications in the above terms.

JUDGE

JUDGE

*Faizan A. Rathore/PA**