

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI

Before: Nadeem Akhtar &
Mohammad Abdur Rahman, JJ,

C.P. No.D-3128 of 2013

Naushirwan Perozshaw Dubash
through his legal heirs Roshan N. Dubash & others

Vs.

Federation of Pakistan & others

For orders as to maintainability of petition.

Petitioner : Through Mr. R. F. Virjee, Advocate.

Respondent No.1 : Through Kazi Abdul Hameed Siddiqui,
DAG a/w. Fida Rehman, Deputy MEO,
Farhan Ali Assistant & Hassan Bin
Attiquie, UDC, MEO Office Karachi.

Respondent Nos.3,4, 8&10 : Through M/S Khalid Javed, Munawar
Juna, Yousuf Makda & Farkhanda
Shaheen, Advocates a/w. Fida Rehman,
Deputy MEO, Farhan Ali Assistant &
Hassan Bin Attiquie, UDC, MEO Office
Karachi.

Respondent No.5 : Through Mr. Jawwad Dero, Additional
Advocate General, Sindh.

C.P. No.D-6475 of 2017

Mst. Katy Meheryad Dubash

Vs.

Federation of Pakistan & others

For orders as to maintainability of petition.

Petitioner : Through Mr. R. F. Virjee, Advocate.

Respondents : Nemo.

C.P. No.D-6476 of 2017Jehangir Perozshaw Dubash
Vs.Federation of Pakistan & others

For orders as to maintainability of petition.

Petitioner : Through Mr. R. F. Virjee, Advocate.

Respondents : Nemo.

Date of hearing : 18.12.2023
-----**ORDER**

MOHAMMAD ABDUR RAHMAN, J. The Petitioners in these Petitions are lineal descendants of one Jehangir Perozshaw Dubash (hereinafter referred to as the “Deceased”) and each of whom have maintained these Petitions, under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, claiming compensation from the Federation of Pakistan for the acquisition of an undivided share that was held by the Deceased in a piece and parcel of land bearing Survey No 56, Deh Okewari, Tapoo Drigh Road, Talkuka Karachi and Survey No. 57, Deh Okewari, Tapoo Drigh Road, Talkuka Karachi (hereinafter collectively referred to as the “Said Property”).

A. The Petitions**(i) CP No. D- 3128 of 2013**

2. The Petitioner in CP No. D-3128 of 2013 claimed to be the grandson of the Deceased and who during the pendency of this Petition had died and whose legal heirs represented by his widow and children have been impleaded as Petitioners in his stead. This Petition was contested by the Respondent No. 3, 4, 8 and 10 and was heard on merits.

(ii) CP No. D-6475 of 2017 and CP No. D-6476 of 2017

3. The Petitioners in CP No. D-6475 of 2017 and CP No. D-6476 of 2017 each claim to be the grandchildren of the Deceased. The Petition was listed before this Court on 13 October 2017 and on which date a questions as to the maintainability of that Petition had been raised on the ground of laches. During the pendency of the hearing of CP No. D-3128 of 2013 it was brought to our attention by the counsel for the Petitioner, that this

Petition was pending and we had heard and reserved these Petitions on the issue of their maintainability.

B. The Title to the Said Property and the Acquisition of the Land

4. The Deceased purchased the Said Property vide a registered Sale Deed on 14 March 1932. During World War II, the Said Property was, on 7 June 1944, requisitioned by the Government of India under Rule 75 A of the Defence of India Rules, 1939 (hereinafter referred to as the "1939 Rules") that had been promulgated under the Defence of India Act, 1939 (hereinafter referred to as the "1939 Act"). Thereafter, a decision was made by the Government of India to acquire the Said Property and which acquisition was effected on 21 May 1947, by the issuance of a notification under Section 5 of the Requisitioned Land (Continuance of Powers) Ordinance, 1946 (hereinafter referred to as the "1946 Ordinance"). There is no dispute as to the ownership of the Said Property or as to the fact that the Said Property was requisitioned under the 1939 Rules or that the Said Property was acquired pursuant to a notification under Section 5 of the 1946 Ordinance on 19 May 1947.

C. The Legal Framework for the Acquisition of the Said Property.

5. The Said Property was initially requisitioned under Rule 75-A of the 1939 Rules. The 1939 Act was repealed on 30 September 1946. To continue the requisition of properties, the Governor General promulgated the 1946 Ordinance and which was brought into force with effect from the next date i.e. 1 October 1946. **Clause 3** of the 1946 Ordinance dealt with the continuance of requisitions made under the 1939 Act and the 1939 Rules and was in the following terms:

" ... 3. *Continuance of Requisition-Notwithstanding the expiration of the Defence of India Act, 1939 (XXXV of 1939), and the rules made thereunder, all requisitioned land shall continue to be subject to requisition until the expiry of this Ordinance and the appropriate Government may use or deal with any requisitioned land in such manner as may appear to it to be expedient.*"

Clause 4 of the 1946 Ordinance dealt with the release from requisition of requisitioned properties in the following terms.

" ... 4. *Release from requisition-*

(1) Where any requisitioned land is to be released from requisition, the appropriate Government may, after making such enquiry, if any, as it considers necessary, specify by order in writing the person to whom possession of the land shall be give”

Clause 5 of the 1946 Ordinance gave the power to acquire requisitioned land and which read as under:

- “ ...
- (1) *Subject to the provisions of Sub-Section (3), the appropriate Government may, at any time when any requisitioned land continues to be subject to requisition under Section 3, acquire such land by publishing in the Official Gazette a notice to the effect that the Central Government has decided to acquire such land in pursuant of this Article.*
- (2) *When a notice as aforesaid is published in the official Gazette, the requisitioned land shall on and from the beginning of the day on which the notice is so published, **vest absolutely** in the appropriate Government free from all encumbrances and the period of requisition of such land shall end*
- (3) *No requisitioned land shall be acquired under this Article except in the following circumstances, namely:-*
- (a) *Where any works have during the period of requisition been constructed on, in or over the land wholly or partly at the expense of the government and the appropriate Government decides that the value of, or the right to use, such works should be preserved or secured for the purposes of Government; or*
- (b) *Where the cost of restoring the land to its condition at the time of its requisition would in the determination of the appropriate Government be excessive having regard to the value of the land at that time; or*
- (c) *Where the appropriate Government decides that the such acquisition is necessary for any purpose connected with the maintenance of the defence services or with the maintenance of supplies and services essential to the life of the community.*
- (4) *Any decision or determination of the appropriate Government under Clause (3) shall be final and shall not be called into question in any Court*
- (5) *For the purpose of sub-clause (a) of Clause (3) "Works" includes building and structures improvements of every description."*

Compensation for land that acquired pursuant to a notification under Section 5 of the 1946 Ordinance was regulated by **Clause 6** of the 1946 Ordinance and which reads as under:

“ ... Where under this Ordinance any requisitioned land is continued under requisition for a period and is thereafter released from requisition or is acquired, compensation for such continues requisition and, as the case may be, acquisition of the land shall be determined and paid in accordance with the provisions of Section 19 of the Defence of India Act, 1939 (XXXV) of 1939, and the rules made thereunder; and for the purposes of such determination and payment---

(a) the said provisions and rules shall be deemed to be in force subject to the modification that reference therein to Section 19- A of the Defence of India Act, 1939 (XXXV of 1939) shall be constructed as references to Section 5 of this Ordinance; and

(b) all agreement and awards under Section 19 of the Defence of India Act, 1939 (XXXV of 1939), in regard to the payment of compensation for the period of requisition before the commencement of this Ordinance shall continue to be in force and shall apply to the payment of compensation for the period of requisition after the commencement of this Ordinance.”

Section 19 of the 1939 Act clarified the basis for making such compensation and which is indicated as hereinunder:

19. Compensation to be paid in accordance with certain principles for compulsory acquisition of immovable property eto,

(1) Where by or under any rule made under this Act any action is taken of the nature described in sub-section (2) of section 299 of the Government of India Act, 1935, there shall be paid compensation, the amount of which shall be determined in the manner, and in accordance with the principles, hereinafter set out, that is to say:-

(a) Where the amount of compensation can be fixed by agreement, it shall be paid in accordance with such agreement.

(b) Where no such agreement can be reached, the Central Government shall appoint as arbitrator a person qualified under sub-section (3) of section 220 of the above-mentioned Act for appointment as a Judge of a High Court.

(c) The Central Government may, in any particular case, nominate a person having expert knowledge as to the nature of the property acquired, to assist the arbitrator, and where such nomination is made, the person so nominated may also nominate an assessor for the said purpose.

(d) At the commencement of the proceedings before the arbitrator, the Central Government and the person to be compensated shall state what in their respective opinions is a fair amount of compensation.

(e) The arbitrator in making his award shall have regard to-

(i) the provisions of sub-section (1) of section 23 of the Land Acquisition Act, 1894, so far as the same can be made applicable; and

(ii) whether the acquisition is of a permanent or temporary character.

(f) An appeal shall lie to the High Court against an award of an arbitrator except in cases where the amount thereof does not exceed an amount prescribed in this behalf by rule made by the Central Government.

(g) Save as provided in this section and in any rules made thereunder, nothing in any law for the time being in force shall apply to arbitrations under this section,

(2) The Central Government may make rules for the purpose of carrying into effect the provisions of this section.

(3) In particular and without prejudice to the generality of the foregoing power, such rules may prescribe-

(a) the procedure to be followed in arbitrations under this section;

(b) the principles to be followed in apportioning the costs of proceedings before the arbitrator and on appeal;

(c) the maximum amount of an award against which no appeal shall lie.

D. The Dispute

6. The Petitioners and each of them contend that despite the land having been acquired, compensation was never paid to the Deceased and which right to compensation endures in them. The Petitioners contend that the Deceased died in 1955 and they were not aware as to his ownership of the Said Property. They contend that they first came to have notice of their ownership of the Said Property when a notice was issued to them by the Karachi Development Authority on 20 January 1979 for the acquisition of the Said Property and which acquisition was based on the land record maintained by the Mukhtiarakar indicating the Deceased as the owner of the Said Property.

7. The notice, issued by the Karachi Development Authority, caused this dispute to arise as between various persons, claiming to be the lineal descendants of the Deceased and the Respondent No. 1, and resulted in the Deputy Commissioner Karachi (East) issuing a letter on 24 June 1981 to the Military Estates Officer, Karachi Circle, Karachi calling on it to provide proof of the payment of compensation to the Deceased for the acquisition of the Said Property. The intervening correspondence as between the Deputy Commissioner Karachi (East) and the Military Estates Officer, Karachi Circle, Karachi is not on the record; however it seems that a letter dated 20 March 1947 that was issued by the Collector of Karachi to the Deputy Collector Thatta showing that certain compensation paid pursuant to an award had been deposited with the Deputy Collector Thatta, was made available to the Deputy Commissioner Karachi (East) and on which basis the Deputy Commissioner Karachi (East) issued a letter on 11 March 1983 to the Mukhtiarkar directing it to mutate the name of the Defence Department, Government of Pakistan as the owner of the Said Property in its record.

8. The Petitioners thereafter maintained Suit No. 920 of 1986 before the Vth Senior Civil Judge Karachi East and which, on account of various administrative notifications, was renumbered as Suit No. 2 of 1994 and which was dismissed for non-prosecution on 4 March 1998. The prayer clause of that Suit reads as under:

- “ ...
- A. *Declaration that the Plaintiffs are the owners of the Survey No. 56 and 57 situated in Okewari, Tapo Songal, Taluka and District Karachi East and are entitled to compensation regarding the said lands.*
 - B. *That the defendant No. 1 be directed to take further steps for completing the acquisition proceedings under the Provisions of the Land Acquisition Act, pursuant to Notification NO. F[^]-3/78/Reg/KDA-2377 dated 7.12.1978 published in the Sind Government Gazette dated 20,1.1975 and the Notice issued by them under Article 47 on 20.1.1979 and published by them in Daily Dawn Karachi on 4.2.1979.*
 - C. *Cost of this Suit.*
 - D. *Any other relief this Honourable Court deems fit and proper under the circumstances of this Case.*

9. The Petitioners have thereafter, either themselves or through the Attorney continued to approach the following officers to agitate their claim for compensation:

- (i) The Director General, Karachi Development Authority;
- (ii) The Secretary, Karachi Development Authority;
- (iii) The Land Acquisition Officer, Karachi Development Authority;
- (iv) The Mukhtiarkar, Karachi East;
- (v) The Military Estates Officer, Karachi Circle, Karachi;
- (vi) The Member Land Utilisation, Board of Revenue;
- (vii) The District Officer Revenue, City District Government Karachi;
- (viii) The Deputy District Officer Revenue, City District Government Karachi;
- (ix) The Mukhtiarkar (Revenue) Gulshan e Iqbal Town, Karachi
- (x) The Executive District Officer (Revenue) Gulshan e Iqbal Town, Karachi;
- (xi) The Deputy District Officer (Revenue) Gulshan e Iqbal Town, Karachi;
- (xii) The Additional District Officer Revenue-II, City District Government Karachi; and
- (xiii) The Quarter Master General.

We do not propose to reiterate the entire correspondence that ensued but would clarify that the correspondence does indicate that the demarcation of the Said Property falls with the Central Ordnance Depot and as such there is no question that the land had not been utilised by the Respondent No. 1. Despite the issue of compensation having purportedly been settled by the Deputy Commissioner in its letter 11 March 1983 and which order was in fact acted upon by the Mukhtiarkar Karachi (East) by entering the name of the Defence Department, Government of Pakistan as the owner of the Said Property, quite surprisingly various successors to each of those offices continued to entertain applications by the predecessors in interest of the Petitioners after that date and which culminated in a Section Officer of the Ministry of Defence on 18 May 2011 issuing a letter to the Director Military Lands and Cantonments in the following terms:

“ ...

*Government of Pakistan
Ministry of Defence
D-4 (Army Wing)*

SUBJECT: RELEASE/RETURN OF LAND MEASURING 8 ACRES 10 GHUNTAS IN SURVEY NO. 56 & 57 AT DEH OKEARI GULSHAN TOWN KARACHI, COD AREA OF RASHID MINHAS ROAD, KARACHI

Ref: M/o Defence's u.o. of even number dated 26-3-2010 and subsequent reminder dated 4-5-10, 26-8-10 & 15-11-2010

A copy of self explanatory petition dated 09/03/2010 (copy enclosed) of Nausheriwan P. Dubash, resident of Karachi is sent herewith. Comments of DML&C Karachi MEO Karachi are also sent herewith (copies enclosed). The MEO has stated/confirmed that the land in question has already been acquired and an entry in the GLR is made to this effect. As regards identification of location of land and payment to land owners, MEO has informed (vide letter dated 12/8/2010)- (copy enclosed) that the land of the applicant measuring 08 acres 10 Ghuntas comprising Rev Survey No. 56,57, Defence Deh Okewari is under possession of Central Ordnance Depot and is located under the boundary wall of Central Ordnance Depot as indicated in the Central Ordnance Depot map (copy enclosed) As regards payment of cost of land to the owners, MEO Karachi has forwarded a copy of Mukhtiarkar (Revenue) Gulshan e Iqbal Town CDGK Karachi letter dated 15/07/2010 (copy enclosed) whereby it is intimated that no record acquisition is available in his office to verify payment of compensation to the owners. However mutation in Form VII stands in favour of Ministry of Defence for COD purpose as per report of MEO dated 11/112010 (copy enclosed). **It is thus clear that record available with MEO & Revenue Authorities does no reveal as to whether payment of compensation of land is made to owners or Award under Section 11 of Land Acquisition Act had ever been issued.**

In view of the above, this matter is referred to GHQ for processing the case for making payment of acquired land.

Muzzafar Iqbal Raja
Section Officer
Tel: 9271142"

E. The Contentions of the Petitioners

10. Mr. Rustom F. Virjee, has appeared before this Court in each of the Petitions and has reiterated the facts as have been narrated above and has contended that he maintains this Petition on the basis of the letter dated 18 May 2011 stating that despite the admission of the claim maintained by the Petitioners by the Section Officer and as to the issuance of such directions to the Director Military Lands and Cantonments, to initiate the process for payment of compensation in favour of the Petitioner, no action has as of yet been taken on the basis of such a letter to process the claim of the Petitioners for payment. He has therefore contended that directions may be

issued to the Respondent No. 1 for processing the claim of the Petitioner in terms of the letter dated 18 May 2011.

F. The Contentions of the Respondent No. 3,4,8 and 10

11. Mr. Khalid Jawed entered appearance on behalf of the Respondent No. 3,4,8 and 10 in CP No. D-3128 of 2013 and contended that the Petition was not maintainable as:

- (i) no evidence had been adduced by the Petitioner in CP No. D-3128 of 2013 to indicate that he is a lineal descendant of The Deceased and as such the Petitioner did not have the requisite locus standi to maintain this Petition;
- (ii) the Petition being maintained on the same cause of action as was maintained in Suit No. 920 of 1986 before the Vth Senior Civil Judge Karachi East, which was renumbered as Suit No. 2 of 1994, and which was dismissed for non-prosecution, was barred under the provisions of Order 9 Rule 8 and Order 9 Rule 9 of the Code of Civil Procedure, 1908;
- (iii) there was a dispute as to whether or not compensation had or had not been paid to The Deceased and which disputed question of fact could not be resolved by this Court in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973;

On the merits of that Petition Mr. Khalid Jawed Khan contended that even if it was conceded that the Petitioner was maintainable the relief being sought by the Petitioner:

- (i) was barred by laches having been sought 67 years after the land acquisition proceedings had been instituted; reliance in this regard was placed on a decision of the Honourable Supreme Court of Pakistan reported as **S.M. Afazi-ur-Rehman vs. Federation of Pakistan and others**;¹
- (ii) could not be claimed by the Petitioner, on account of the Deceased having failed to maintain a claim for compensation in his lifetime; Reliance in this regard was placed on a decision

¹ 2005 SCMR 1322

of a learned Single Judge of the Lahore High Court, Lahore sitting at Multan and reported as **Gaman and others vs. Mureed Hussain and others**²

G. The Contentions of the Petitioner in Rebuttal to the Contentions of the Respondent No. 3,4,8 and 10

12. Mr. Rustom F. Virjee, in response to the contentions raised by Mr. Khalid Javed denied that there was any question of the Petitions being barred by laches and in support of his contentions relied on :

- (i) a decision of the Honourable Supreme Court of Pakistan reported as **Pakistan Post Office vs. Settlement Commissioner and others**³ wherein after reiterating the general principles on which laches was to be determined it was held that where a ground was taken that delay was caused by a government department in deciding an application and which led to a delay in maintaining a Petition, such delay should not be attributed to a Petitioner;
- (ii) a decision of a Learned Division Bench of the Lahore High Court, Lahore reported as **Mst. Sardar Begum vs. Lahore Improvement Trust, Lahore**;⁴ a decision of the High Court of Dacca reported as **Jan Meah vs. Deputy Secretary to Government of East Pakistan, Revenue (Requisition) Department, Dacca and others**;⁵ a decision of a Learned Single judge of the Lahore High Court Lahore reported as **Nazarul Hussain vs. The Collector, Lahore District, Lahore and 5 others**;⁶ and a decision of High Court of Madhya Pradesh reported as **Madhya Pradesh Housing Board vs. State of Madhya Pradesh and another**⁷ wherein in each of these decisions acquisitions of land were set aside on account of the authority failing to comply with the mandatory provisions of the Land Acquisition Act, 1894 and in some of which a delay in maintaining such a petition to challenge such a Land Acquisition was condoned;
- (iii) on a decision of the Supreme Court of Azad Jammu and Kashmir reported as **Nizam Din and 14 others vs. Azad Government of the State of Jammu and Kashmir through Chief Secretary and 2**

² 2020 MLD 1211

³ 1987 SCMR 1119

⁴ PLD 1972 Lahore 458

⁵ PLD 1965 Dacca 36

⁶ PLD 1990 SC 472

⁷ AIR 2014 Madhay Pradesh 1

others⁸ in support a proposition that a Petition should not be held to be barred on the ground of laches as it has been held that a claim for non-payment of compensation pursuant to acquisition proceedings are continuing wrongs;

- (iv) a decision of the Learned Division Bench of the Lahore High Court, Lahore reported as **Divisional Engineer (Dev.) N-II T&T, Gujranawala and 3 others vs. Rana Muhamamd Shari**⁹ where delay that was caused by the inaction on the part of the Land Acquisition authorities was held not to be a bar for relief to be granted to a Petitioner;
- (v) a decision of the Honourable Supreme Court of Pakistan reported as **Pakistan Burmah Shell Ltd. vs Province of N.W.F.P. and 3 others**¹⁰ wherein it was held that where a Petition had with bona fides approached an incorrect forum, such an act would not be a ground to dismiss relief available to him on the ground of laches;
- (vi) a decision of the Honourable Supreme Court of Pakistan reported as **Umar Baz Khan through L.Hrs. vs. Syed Jahanzen and others**¹¹ wherein it was held that where an earlier Petition had been filed and withdrawn and thereafter after a period of three years when a second petition was filed, relief in the second Petition would not be refused on the ground of laches where an injustice would be perpetuated;
- (vii) a decision of a Learned Division Bench of the Lahore High Court, Lahore reported as **Muhammad Munir Ahmed vs. Govt. of Pakistan**¹² in support his contention that a petition should not be dismissed on the ground of laches unless the merits of the case are examined;
- (viii) a decision of a Learned Division Bench of the Lahore High Court, Lahore entitled **Mirza Muhammad Hussain Beg and others vs. The Government of Pakistan and others**¹³ wherein it was held that a Court in its constitutional jurisdiction could issue a writ to compel the payment of compensation where land has been acquired but compensation had not been paid;

⁸ 2013 YLR 1489

⁹ 2002 CLC 985

¹⁰ 1993 SCMR 1700

¹¹ PLD 2013 SC 268

¹² NLR 1997 Service 98

¹³ PLD 1961 (W.P) Lahore 696

- (ix) a decision of a Learned Single Judge of this Court hearing a Revision Application on the Appellate side of this Court reported as **F.K. Abbasi vs. M.I. Malik**¹⁴ wherein it was held that until possession of a property is taken over under Land Acquisition proceedings, title would continue to vest in the owner;
- (x) a decision of a learned Division Bench of this Court reported as **Government of Pakistan vs. Ch. Muhammad Saddiq**¹⁵ wherein when a person's property was compulsorily acquired and payment was made to and received by him one day after his eviction, this Court held that in such circumstances, his right to agitate for further compensation would not be waived and he would continue to have a right to agitate as to the inadequacy of the amount paid to him pursuant to such an acquisition;
- (xi) a decision of the Honourable Supreme Court of Pakistan reported as **Sakhi Jan and others vs. Shah Nawaz and another**¹⁶ in which it was held that to allow a benefit to be given to a "wrong doer" would be as against the principle of "administration of justice";
- (xii) a decision of the Honourable Supreme Court of Pakistan reported as **Central Board of Revenue and 3 others vs. Seven-Up Bottling Company (Pvt.) Ltd.**¹⁷ in which it was held that fundamental rights as guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973 could not be waived;
- (xiii) a decision of the Indian Supreme Court reported as **Shahsi Gupta and and other vs. State of Haryana and others**¹⁸ and a decision of the High Court of Bombay reported as **Mrs. Margarida Gomes Pereira vs. State of Goa and others**¹⁹ wherein in **the statute under which land Acquisition proceedings were instituted**, a time period had been stipulated for the completion of land acquisition proceedings and which having lapsed led to the conclusion that the entire land acquisition proceedings stood invalidated;

¹⁴ 1985 CLC 1603

¹⁵ PLD 1968 Karachi 697

¹⁶ 2020 SCMR 832

¹⁷ 1996 SCMR 700

¹⁸ AIR 2016 SC 4817

¹⁹ AIR 1998 Bombay 327

- (xiv) a decision of the Indian Supreme Court reported as **Mahesh Chandra Banerji vs. Uttar Pardeshi Ava Evam Vikas Parishad and others**²⁰ wherein a mis-description of the land that was being acquired led the Court to invalidate the land acquisition proceedings;
- (xv) A decision of the Honourable Supreme Court of Pakistan reported as **Mst. Zahida Sattar and others vs. Federation of Pakistan and others**²¹ wherein it was held that a right to property as detailed in Article 23 and 24 of the Constitution of the Islamic Republic of Pakistan, 1973 must be enforced; and
- (xvi) A decision of a Learned Division Bench of the Lahore High Court, Lahore reported as **Fida Hussain and 2 others vs. Province of Punjab and through Secretary Settlement, Board of Revenue Punjab and 4 others**²² wherein it was held that it was the statutory obligation on the part of the land acquisition officer to complete the process of acquisition by paying compensation for the land so acquired.

H. The Opinion of the Court

(i) Locus Standi

13. Mr. Khalid Jawed has raised a preliminary objection that the right being claimed by the Petitioner, being a right emanating from the Petitioners purportedly being the lineal descendants of the Deceased, they were under an obligation to prove their status. There can be no doubt that the onus is on the Petitioners, in each of the Petitions, to demonstrate to this court that they are in fact the lineal descendant of The Deceased and that they under their personal law, have a right to inherit to his estate. To be able to prove this fact would require the Petitioner to have produced the death certificate of The Deceased and the birth and death certificates of each of his lineal descendants issued by a regulatory body empowered to certify as to the birth and death of persons, thereby allowing the presumption of clause (e) of Article 129 of the Qanun e Shahadat Order, 1984 to be pressed into service in favour of the Petitioners. We confronted Mr. Rustom Virjee on this point and he candidly conceded that the Birth Certificates and Death Certificates of these persons are not within the possession of the Petitioners and he

²⁰ (2010) 7 SCC 439

²¹ PLD 2002 SC 408

²² 2002 CLC 790

instead produced a certificate from the Parsi Anjuman which is a public charitable trust that maintains such a record. The Parsi Anjuman while maintaining a record of every person subscribing to Zoroastrianism, is not a regulatory body recognised by the law to certify to such lineage and hence we are unable to rely on such a document to confirm the lineage of the Petitioner to the Deceased. The only other way to obtain such a right, would have been to obtain a Letters of Administration from a court of competent jurisdiction and which also having not been placed before us, we are of the opinion that the Petitioner, on the basis of the documents that have been presented before this Court have not been able to demonstrate that they are the legal heirs of the Deceased and hence would not come within the definition of an "Aggrieved Party" as contained in Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to maintain this Petition. While we would have been inclined to allow the Petitioners time to produce such documents to rectify this deficiency, as for the reasons to follow we have also been inclined to decline relief in this Petition on other grounds, we have chosen not to grant such an opportunity to the Petitioner.

(ii) Order IX Rule 8 and Order IX Rule 9 of the Code of Civil Procedure, 1908

14. It is not in dispute as between the Petitioners and the Respondent Suit No. 920 of 1986, which was renumbered as Suit No. 2 of 1994, was preferred before the Vth Senior Civil Judge Karachi East and which dismissed for non-prosecution on 4 March 1998. On this basis Mr. Khalid Javed had contended that this Court in its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is barred from hearing this Petition on account of the provisions of Order IX Rule 8 and Order IX Rule 9 of the Code of Civil Procedure, 1908.

15. We are clear that our jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is not controlled by the provisions of the Code of Civil Procedure, 1908 and the provisions of that code are only applied in principle to regulate the procedure of this Court in that jurisdiction.²³ While considering the applicability of Order IX Rule 9 of the Code of Civil Procedure, 1908 to this Courts jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 we have considered a decision of a Learned Division Bench of this Court reported as **Messrs Sapphire Textile Mills, Karachi vs. Federation of Paksitan through Secretary (Revenue Division), Ministry of Finance and**

²³ See **Muhammad Idrish vs. East Pakistan Timer Merchants Group and another** PLD 1968 SC 412; and **Shabbir Ahmed and others vs Akhtar Alam and others** PLD 1994 SC 598

Economic Affairs, Islamabad²⁴ and wherein while considering the maintainability of an application that had been maintained under those provisions of the Code of Civil Procedure, 1908 in a Constitution Petition, while holding that such provisions were not applicable, had held that:

“ ... As regard the contention of the learned counsel for the parties about the applicability of different provisions of the Code of Civil procedure, 1908 and the Limitation Act, 1908, to the listed applications, there is a direct authority of a Division Bench of this Court in the case of *Messrs Hina Housing Project (Ltd.) v. Government of Sindh and others 2001 MLD 59* holding that both the statutes were not applicable. We do not find any reason to deviate from the earlier view of the Division Bench. In the case of *Muhammad Baran and others vs. Member Settlement and rehabilitation and others* reported in *PLD 1991 SC 691* it was observed that Article 199 of the Constitution was not subject to any law except the Constitution and any provision of a sub-constitutional statute attempting to control or limit the power or jurisdiction of a High Court would be ultra vires the Constitution. Therefore the provision of the Code of Civil Procedure, 1908, and the Limitation Act, 1908 cannot regulate or control the proceedings under Article 199 of the Constitution. Nevertheless, as observed in the case of *Shabbir Ahmed and others v. Akhtar Alam and others* reported in *PLD SC 598*, the Court while exercising its constitutional jurisdiction can press into service the provision of the Code of Civil Procedure, 1908. In absence of any period of limitation prescribed for filing application under Article 199 of the Constitution or interlocutory applications in such proceedings the only principles for keeping off the state litigation from the Court is that of the laches and an indolent and negligent litigant is not entitled to invoke the extraordinary discretionary jurisdiction of the Court.”

While the decision of the Learned Division Bench is binding on us, we also have no hesitation in saying that we agree with the same. The maintainability of a Petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 is to our mind not regulated by the provisions of the Code of Civil Procedure, 1908 and is governed by the provisions of that Article and once maintainable the relief that is to be granted remains discretionary based on various principles that have developed over the year to decline granting relief in such Petition e.g. laches, disputed questions of facts, unclean hands etc.

16. While we would have been happy to hold that this Petition would not have been maintainable had the Suit been decided on merits as against the Petitioners, this is not the case over here and we are such inclined to hold

²⁴ PLD 2006 Karachi 554

that the Petition could not be dismissed on the law governing the provisions of Order IX Rule 8 and Order IX Rule 9 of the Code of Civil Procedure, 1908.

(iii) Disputed Question of Facts

17. Mr. Khalid Jawed has contended that compensation had been paid to The Deceased and had stated that such payment had been deposited with the Deputy Collector Thatta and which fact had been confirmed in a letter dated 20 March 1947. It is therefore contended before us that as the Petitioners claim that payment had not been made to The Deceased there are disputed questions of fact which prevent us from exercising our jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

18. We are unable to agree to such a contention. It is not disputed by any person that the notice under Section 5 of the 1946 Ordinance had been issued on 19 May 1947 and on which basis the Said Property was acquired by the Respondent No. 1. It is therefore illogical for the Respondents No. 3,4,8 and 10 to contend that the payment of compensation for acquisition of the Said Property was made on 20 March 1947 i.e. prior to the date when the acquisition was notified in the Official Gazette. We are inclined to hold that the argument raised was spurious and was a feeble attempt to create a disputed question of fact when in fact there was none. We are of the opinion that this contention is reinforced by the letter dated 18 May 2011 issued by the Section Officer of the Government of Pakistan to the Director Military Lands and Cantonments in which an admission has in fact been made that no payment had been made to the Deceased and directing the Director Military Lands and Cantonments to process the claim being maintained for compensation. We are therefore of the opinion with regard to the issue of payment of compensation that there is no question of there being any dispute as to a fact in respect of the same before this Court.

(iv) Laches

19. The Honourable Supreme Court of Pakistan in the decision reported as **Ardeshir Cowasjee and 10 others vs. Karachi Building Control Authority (KMC), Karachi and 4 others**²⁵ while discussing as to how a Court is to exercise its jurisdiction while determining a question of laches has held that:

²⁵ 1999 SCMR 2883

“ ... *In our view laches per se is not a bar to Constitutional Petition. There is marked distinction between delay in filing of a legal proceedings within the period specified in Article of the Schedule to the Limitation Act, 1908 and the delay in filing of a Constitutional petition. In the former case delay of each day is to be explained by furnishing sufficient cause for seeking condonation of delay under Section 5 of the Limitation Act, in filing of a legal proceedings after the expiry of the of the statutory period. Where, in the latter case, the delay or the question of laches is to be examined on equitable principles for the reason that grant of Constitutional relief is a discretionary relief and the Court decline to press into service its Constitutional jurisdiction if it would be inequitable keeping in view the conduct of a Petitioner. The question of delay or laches is to be considered with reference to the facts of each case. Delay/laches of several years can be overlooked in a Constitutional petition if the facts of the case and dictates of justice so warrant as pointed out by this Court in the case of *The Chairman District Screening Committee, Lahore and another v. Sharif Ahmad Hashmi (PLD 1976 SC 258) (supra)*, or the delay/laches of a few months may be fatal to a Constitutional Petition.”*

As can be seen the determination of laches in respect of Petition is not a bar to maintaining the petition, rather it is bar to the grant of relief on the basis that on account of the delay caused in maintaining the Petition other rights have accrued in favour of another person and which rights having been permitted to accrue impress on the Court not to grant the Petitioner relief. There must therefore be a comparison as between the rights lost by a Petitioner and the rights that accrued in favour of a Respondent **on account of the delay on the part of the Petitioner to maintain the Petition.**

20. The provisions of Sub-Clause (2) of Clause 5 of the 1946 Ordinance hold that from the date of that notification the Said Property is published in the Official Gazette the property would “vest absolutely in the appropriate Government”. In the decision of the Honourable Supreme Court of Pakistan reported as **Pakistan through Secretary, Ministry of Defence vs. Province of Punjab and others**²⁶ the expression “vest” and “vest in and belong to” in the context of property were contrasted and it was held that where property is held to “vest” in an entity and where that expression is used by itself in a statute it would not be enough to indicating a transfer ownership but where the expression is coupled with the words “and belong to” i.e. “vest in and belong to” it would amount to a transfer in ownership. A Learned Division Bench of the Lahore High Court reported as **Mirza**

²⁶ PLD 1975 SC 37

Muhammad Hussain Beg and others vs. The Government of Pakistan and others²⁷ while interpreting the expression “Vests Absolutely” as used in Section 16 of the Land Acquisition Act, 1894 has, after quoting that provision and Section 17 of the Land Acquisition Act, 1894, held that:

“ ... *Now the above reproduced provisions of law, which are binding on parties as well as the Courts, make it clear that the Provincial Government becomes owner of the property which has come to it by means of acquisition effected under the provisions of the Land Acquisition Act, 1894, and gets absolute title in the property which thenceforth vests in the Government free from all encumbrances.*”

We have no hesitation in holding that the expression “vest absolutely” would have the same meaning as “Vest in and belong to.” As such when the notification under Sub-Section (2) of Section 5 of the 1946 Ordinance was published in the Official Gazette indicating that the Said Property vested “absolutely” in favour the appropriate Government from that moment forward there can be no other opinion that the Said Property, having been transferred by operation of law, become the sole and absolute property of the “appropriate government” leaving The Deceased only with the right to claim compensation under Clause 6 of the 1946 Ordinance.

21. The Petitioners in this Petition make no claim as to the ownership of the Said Property so as to challenge the right of the ownership of the Respondent No. 1 to the Said Property. They only seek compensation in the form of payment to be made to them. Such a claim was first rejected by the Deputy Commissioner in its letter 11 March 1983 when he directed the Mukhtiarkar (East) to mutate the Said Property into the name of the Respondent against the contention that compensation due had been deposited with the Deputy Commissioner Thatta on 20 March 1947 and which was done. The Petitioners thereafter maintained Suit No. 920 of 1986, renumbered as Suit No. 2 of 1994, and which was dismissed for non-prosecution on 4 March 1998. Thereafter instead of seeking restoration of that Suit, the Petitioners have agitated their claim before the Respondent No. 1 and who had on 18 May 2011 directed the Director Military Lands & Cantonment i.e. the Respondent No. 4 to process the claim for compensation and which having not been complied with led to the presentation of this Petition in February 2013. While, we do not think that a delay of two years, during which period the Petitioners were attempting to seek the implementation of the letter dated 18 May 2011, is inordinate delay

²⁷ PLD 1961 (W.P) Lahore 696

and on account of which any rights may have come to vest in the Respondent which need to be undone so as to disentitle the Petitioner from maintaining this Petition. The Respondents right in the Said Property remains intact and being distinct from the Petitioners claim for compensation is not impacted on the basis of such a claim for compensation being maintained. We therefore are of the opinion that the Petition is not barred on the ground of laches on these facts.

(v) **Waiver**

22. Mr. Khalid Javed final argument is that as a claim for compensation had not been maintained by The Deceased such a right as to compensation was to be considered to have been waived by him and cannot now be entertained by this Court.

23. The argument is premised on various decisions of the Honourable Supreme Court of Pakistan wherein it is held that where a person who has a claim, fails to enforce such a claim in their lifetime, that claim is deemed to have been waived and cannot be enforced by the legal heirs of such a person after his demise. In the decision reported as **Mst. Grana through Legal Heirs and others vs. Shaib Kamala Bibi and others** the Honourable Supreme Court of Pakistan held that:

“ ... 6. *It appears that in a suit which involves some element of inheritance the Courts are generally quick to declare that the law of limitation would not be attracted. It is not in all cases of inheritance that the question of limitation becomes irrelevant. Even in Ghulam Ali's case the Court recognized that there could be exceptional circumstances wherein a suit based on inheritance issue of limitation may become relevant. This Court recently in some cases had invoked the principle of time limitation and acquiescence of the plaintiff material in suits of inheritance. In Mst. Phaphan v. Muhammad Bakhsh (2005 SCMR 1278) a suit for declaration and possession was filed in the year 1983 by the plaintiff/petitioner claiming to be the owner of the inherited property. The suit was held to be barred by time wherein mutations of the year 1959 and 1967 were challenged in the year 1983 when the plea of the defendants was that the plaintiffs had alienated the property of her own free-will. The plaintiff's plea of being pardanashin lady and reliance on the case of Ghulam Ali was not accepted as the plaintiff was found to have remained in deep slumber for 24 years despite the fact that the physical possession of the land was passed on to the defendant. Recently in the case of Lal Khan v Muhammad Yousaf (PLD 2011 SC 657) this Court had set aside the concurrent findings of the three Courts and dismissed the suit filed on 13-5-1970, where the plaintiff had challenged inheritance mutation of 13-*

2-1947; the Court held it to be barred by time. The rationale of the law of limitation has been reiterated in *Atta Muhammad v. Maula Bakhsh* (2007 SCMR 1446) where the concurrent findings of the three Courts were set aside and the suit filed by the respondents/plaintiffs in the year 1988 questioning the inheritance mutation of 1942 was declared to be barred by time. The Court held:--

*"The law of limitation provides an element of certainty in the conduct of human affairs. Statutes of limitation and prescription are, thus, statutes of peace and repose. **In order to avoid the difficulty and errors that necessarily result from lapse of time, the presumption of coincidence of fact and right is rightly accepted as final after a certain number of years. Whoever wishes to dispute this presumption must do so, within that period; otherwise his rights if any, will be forfeited as a penalty for his neglect. In other words the law of limitation is a law which is designed to impose quietus on legal dissensions and conflicts.** It requires that persons must come to Court and take recourse to legal remedies with due diligence. There have been cases where even to claim inheritance law of limitation was applied."*

The Court found that the real dispute was whether a particular person was or not a legal heir of one, Mst. Khairan, whose inheritance mutation was attested in favour of appellant, Atta Muhammad."

It is on the same basis that Mr. Khalid Javed has relied on the decision of the Multan Bench of the Lahore High Court, Lahore reported as **Gaman and others vs. Mureed Hussain and others**.²⁸

24. On this issue we find ourselves in agreement with Mr. Khalid Javed. While the Deceased had every right to maintain a claim to compensation, he did not maintain any such claim during his lifetime and nor for that matter did his children as the first claim that was in fact maintained was made by his daughter in law and his grandchildren by instituting Suit No. 920 of 1986, renumbered as Suit No. 2 of 1994 before the Vth Senior Civil judge Karachi (East). As held by the Honourable Supreme Court of Pakistan that the Deceased and his children having failed to claim such rights in their lifetime these rights must be "forfeited as a penalty" for their "neglect" and his lineal descendants, if the Petitioner are in fact such persons, clearly cannot enforce such rights 67 years after the notification was issued for the acquisition of the Said Property. It may well be that the Deceased received the compensation during his lifetime and for that reason he did not institute

²⁸ 2020 MLD 1211

a claim but for whatever reason neither he nor his children instituted such a claim. That being the case we cannot see how the Petitioners can maintain the Petitions as clearly their claim must be deemed to have been waived on account of the omissions on the part of the Deceased and his Children. The Petition must therefore fail.

25. For the foregoing reasons, we hold that The Deceased having not maintained any claim for compensation for the Said Property in his lifetime, such a claim was deemed to have been “forfeited” and such a claim cannot now be maintained by his lineal descendants. All of these Petitioner are therefore dismissed, along with all listed applications with no order as costs.

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