

MAQBOOL BAQAR, J.- The above criminal original petition was filed by the petitioners alleging contempt/violation of judgement of this Court rendered in Suo Moto Case No.10 of 2005 on 31.7.2009.

2. The above proceedings were initiated with regard to environmental hazard that was apprehended as a result of the development/construction of New Murree Project in compartment Nos.21 to 38 of Patriata reserve forest, Tehsil Murree, District Rawalpindi over an area of 4111 acres. Various orders were passed, and several reports were submitted during the pendency of the above proceedings. However on 28.7.2009, this Court was informed that the New Murree Development Authority has been dissolved and the New Murree Development project has been disband. The Court thus raised the following two queries for the official representatives appearing in Court to respond to:-

- (1) Why the New Murree Development Authority has been dissolved?
- (2) What measures the Government of the Punjab has taken to ensure that in future no project detrimental to the environment would be launched?

In response to the above, the Secretary Environment appeared before the Court on 31.7.2009 and submitted that NOC for

Environmental Impact Assessment (EIA), was never issued by the Government of Punjab because the environment department was not in favour of New Murree Development Project. He submitted a statement enumerating various measures enforced, to protect the environment in and around Murree. The following of the said measures may be found relevant for the present purpose:-

- “(ii) All kinds of construction and development activities are banned in these areas.
- (iii) Across the board application of section 12 and 16 of the Act is being ensured in these areas. The District officer (Environment) Rawalpindi has been directed to carry out effective monitoring of these areas.
- (iv) All kinds of development activities are banned along both sides of Murree Express Way.
- (v) No construction allowed within 100 meters along both sides of Murree Express way.
- (ix) Proponents of thirteen (13) properties i.e. M/s Moin and Jan Associates, M/s Quality Apartment Phase-II, M/s Tourism Development Corporation of Punjab, Awan Market, Abbasi Market, Gulistan market, Raja Hafeez Market, Al-Khair Market, Ajmal Market, Raftar Abbasi market, Saad market and M/s Hakas (Pvt.) Ltd are being proceeded against under section 16 of the Act *ibid* (Environmental Protection orders have been issued to them).
- (x) One proponent M/s Judicial Town (Housing Scheme) has been summoned for hearing under section 16 of the Act *ibid*, whereas M/s Commoner garden, M/s

Husnain Resorts-I have been advised to restrain from carrying out any constructive/development activity and obey environmental laws."

This Court after narrating the relevant facts and incorporating the relevant portion of various reports submitted during the proceedings, and keeping in view the above reports and assessment, and particularly assessment of ecological significance prepared by WWF, whilst holding that there was no probability of the revival of the project, disposed of the above proceedings through judgment dated 31.7.2009 in the following terms:-

"7. It is important to note that in view of the above reports including a comprehensive assessment of ecological significance report prepared by the WWF, there was no probability of the revival of the project. At the time when the project was started, the apprehension of the environmental experts was that nearly 4000 trees (one per cent of the total tree population of the area) would be affected by the aforesaid project, which, in turn, would adversely affect the Patriata Forests, which were responsible for boosting high average of rainfall anomaly in the country (around 1.77 millimetre) as it was situated in the catchments are of simly and rawal dams, which provides drinking water to almost half of the population of Rawalpindi and Islamabad. It is noteworthy that all over the world national parts are developed to preserve flora and fauna facing threat of extension in the wake of modern-day-life development projects

including mushroom growth of housing projects, recreational facilities, etc. The need is to sensitize the general public to the fundamentals of sustainable development so as to achieve the goal of a healthy environment, not only for the present population, but also for the future generations.; the concerned agencies of the Government including Environmental Protection Agencies at different levels have a heavy onus to discharge in this regard. The Government of the Punjab, considering the environmental hazard posed by the New Murree Development Project, has taken a right decision in disbanding the same. Since the project has been disbanded and presently there is no threat of environmental hazard in the area on account of the project, no further action is called for in the instant proceedings. The suo motu has fructified and the same is disposed of accordingly."

3. However, through the above petition, the petitioners, namely, Muhammad Asjad Abbasi, Muhammad Faiz and Muhammad Imran, alleged that construction is being raised in Mouzah Mengal and Khatar of Tehsil Murree in violation of the above judgment. However the later two did not pursue their petition.

4. Sardar Muhammad Aslam, learned ASC for the petitioner, in order to substantiate the petitioner's claim that the judgment is being violated referred to paragraph 4 thereof wherein the measures said to have been enforced as contained in the statement of Secretary Environment were incorporated.

He submitted that in view of the foregoing no construction work could have been undertaken or continued in the entire Tehsil Murree. Learned counsel emphasised that the construction work is being carried out in the land comprising in Shamalat-e-Deh, which land cannot be broken up for cultivation, or for any other purpose not envisaged by the relevant Wajabul Arz, and such land can also not be partitioned in violation of the provisions of Wajibul Arz. Learned ASC contended that the subject construction is not only permissible under the relevant Wajibul Arz, but is also violative of the provisions of Forest Act, 1927 and the Rules framed thereunder.

5. On the other hand, Mr. Aitzaz Ahsan, learned Sr.ASC appearing for the purchaser of the property in Commoners Flower Valley, and on behalf of Bahria Town respectively, submitted that in the first place the purported contempt application is not maintainable as neither is there any order banning or restricting any construction or development activity beyond 4111 acres land of patriata forest, contained in the judgment dated 31.7.2009 of this Court, nor were the proceedings in the criminal original petition No.57 of 2015 related to any land other than the above land of Patriata

forest. Learned counsel further submitted that paragraph 4 of the judgment dated 31.7.2009, merely refers to the statement made by Secretary Environment and incorporated the measures said to have been enforced by him to save/avoid environmental degradation. Mr. Ahsan further submitted that the perusal of the various measures as enumerated in the aforesaid paragraph make it quite clear that in fact the ban was enforced on carrying out construction without complying with the provisions of section 12 and 16 of the Pakistan Environmental Protection Act, 1997, and that even otherwise such measures/restriction did not form part of the judgment dated 31.7.2009 and therefore the purported contempt application was/is liable to be dismissed. The learned Sr.ASC further submitted that through the contempt petition the petitioner in their petition did not raise any issue pertaining to Shamalat-e-Deh but it was only during the course of arguments that such issue was raised on behalf of the petitioner. Mr. Ahsan further submitted that contrary to the claim of the petitioners none of the relevant Wajibul Arz placed any restriction on cultivating the land comprising Shamalat-e-Deh, and/or using the same for raising any construction thereon. He submitted that the provision of Wajibul Arz did not

have the force of law and as defined/described by section 39 of the West Pakistan Land Revenue Act, 1967, is merely a statement of custom respecting rights and liabilities in the estate, and has also been so defined by J.M.Douie in his famous book titled "Settlement Manual" in the following words:-

"The Wajib-ul-Arz, or village administration paper, should be a record of existing customs regarding rights and liabilities in the estate."

He submitted that though it has been recognized that at times Wajibul Arz may be recital of the agreements, but such status of the documents, cannot be accepted without any proof and in the present case there is absolutely no proof that the provisions contained in the relevant wajibul Arz are result of any agreement amongst the village proprietary body and the government, as alleged, and therefore the same cannot be used to place any restriction on the proprietor of the land constituting shamalat. Tthe Learned counsel referred to section 3 of the West Pakistan Land Disposal (Saving of Shamilat) Ordinance 1959, which reads as follows:-

"3. Shamilat not included in disposition of land unless specifically mentioned as subject matter of the disposition.- (I) Notwithstanding any law, usage or custom to the contrary, in any disposition of land, whether testamentary or

otherwise, effected by the maker by means of a writing or orally and whether made before or after the commencement of this Ordinance, words or phrases of a general nature, purporting to convey rights, or interests incidental, contingent or collateral, to that land, shall not be so construed as to include unless such shamilat or a portion thereof has been specifically mentioned as the subject matter of the disposition."

He submitted that the above provisions clearly recognise the right of selling of his share by the joint owner in the Shamalat-e-Deh and thus any restriction on the rights of such owner to alienate or sell his share in the shamalat would be violative of the above provision, and also of his fundamental rights, as enshrined/protected by the Constitution. Learned counsel referred to form XXXVI as prescribed under Rule 72 of the West Pakistan Land Revenue Rules, 1968. The specimen whereof shows that the same is titled as "Statement of custom (Wajibul Arz)" and the first heading/item of custom as contained therein reads as follows:-

(1) Common land, its cultivation and management, and the enjoyment of the proceeds thereof"

Learned counsel submitted that from the very first content of the prescribed form for Wajibul Arz, it can be seen that the common land is certainly cultivatable and there is no

restriction on cultivating the same as wrongfully claimed. Mr. Ahsan further submitted that the contents of Wajibul Arz are not the same in respect of all the Mouzahs. He pointed out that in respect of Mouzah 'Mengal', there is not restriction on partitioning shamilat, and in Mouzah 'Khattar', there is no Shamalat-e-Deh, whereas the entire land constituting Shamalat-e-Deh in Mouzah 'Salkhater' has been transferred and mutated in the name of the original owners thereof according to their respective shares. Learned counsel contended that there is absolutely no basis for the claim that the rights in the shamalat-e-Deh are confined merely to grazing cattle and no more, as neither the relevant Wajibul Arz nor any law places any such restriction. As per learned counsel, by curtailing the rights and privileges of the owners of Shamalat-e-Deh and restricting its user, merely to grazing grounds, would remove the distinction between shamalat-e-deh, the land comprising wthereof is individually owned by the residents of the Mouzah proportionately and the land comprising 'Rafah-e-Aam'. Learned Sr.ASC also submitted that no trees have been cut by his clients in violation of any law, or the contents of the Wajibul Arz and has in fact deposited Rs.20 Million with the forest department as 'replenishment charges'

and has also planted more than 1.4 million trees in and around its projects.

As regards Rule 4-A and 4-B as contained in the notification No.171 dated 19.3.1909, learned counsel submitted that the Rule 4-A does not pertain to Shamalat-e-Deh but is applicable to the area reserved as Chirah Gah and is thus not relevant whereas Rule 4-B only placed a condition of obtaining sanction of the provisional government before the Shamalat-e-Deh is partitioned. He submitted that such restriction has not been recognized by the subsequent relevant law, being West Pakistan Land Disposal (Saving of Shamalat) Ordinance 1959 which law contrary to placing any restriction on sale of Shamalat land, in terms of section 3 thereof, recognises the owner's right to sell his share therein. As per learned counsel the purported restriction imposed through rule 4-B cannot even otherwise be sustained in view of the right to enjoy or use the property as enshrined in Article 8,9,23 and 24 of the Constitution and that in terms of Article 23, a citizen's right to acquire, hold and dispose of property could only be subject to the constitution or any reasonable restriction imposed by law whereas as noted above such right can only be subject to law whereas the relevant law, being West Pakistan Land Disposal

(Saving of Shamilat) Ordinance 1959, does not place any restriction on the right to sell Shalamat land.

Reverting back to Rule 4-B *ibid*, Mr. Ahsan submitted that though the said rule requires government's sanction for partition of Shamalat land however there is no rule imposing any penalty on partition without prior sanction and therefore such sanction can also be granted *ex-facto*. Non-compliance of the requirement prescribed through Rule 4-B does not call for confiscation or retrieval of the land. More so when partitioning or alienating the shamalat land has been a long standing practise and custom, which as noted earlier is not contrary to the relevant law. In support of his contention, the learned Sr.ASC referred to a document containing details about various projects/buildings situated in Shamalat-e-Deh in Rawalpindi and Islamabad, which contains as many as 28 different buildings, official and private, including public buildings such as public hospitals, colleges, housing societies and also the Rawalpindi Bench of the Lahore High Court, and Shifa Eye Hospital, built on such land. The document also contains a note to the affect that in mouzahs in the Potohar region, including Islamabad, 50% of the land comprises

Shamalat-e-Deh, and all have been partitioned amongst its owners.

The position that emerges from the foregoing is that the only objection raised on behalf of petition to the subject construction/development as that such is being done in Shamalat land in violation of the contents of the relevant Wajibul Arz, in as much as, the relevant Wajibul Arz provides that the land therein cannot be partitioned without sanction of the government and that the trees grown within the shamalat land shall be presumed to be owned by the government. In the first place as noted earlier, the document Wajibul Arz could either be a statement of local custom and usage, or can be a recital of agreements. Since nothing has been placed before us to show that the relevant wajibul arz have been prepared with the consent of the village proprietary body and the government, we cannot treat the same as agreement and therefore can only treat them as statement of local custom or usage. Whereas in view of Article 8 of the Constitution any custom or usage or even law, so far it is inconsistent with the fundamental rights conferred by the Constitution, shall to the extent of such inconsistency be, void. And as noted earlier, contrary to the relevant Wajibul Arz and the rules framed

under the Forest Act which rules have been discussed hereinbefore. The relevant law, being West Pakistan Land Disposal (Saving of Shamilat) Ordinance 1959, "provides for a uniform interpretation of general expression with regard to dispossession of Shamilat" In terms of section 3, recognizes the rights of owner in Shamilat land to sell his share therein. Furthermore any restriction, either through Wajibul Arz, or any rule, which is inconsistent to or in conflict with the provisions of Article 23 and 24 of the Constitution are void. In any event rule 4-A *ibid*, as noted above, has no relevance, whereas Rule 4-B merely requires that the partition be made after sanction by the government, and as noted earlier the partition not being contrary to any law can always be sanctioned subsequently also. The partitioning of the Shamilat land has been in practice since long and as per the documents referred to hereinabove, almost 50% of the land in Potohar region including, Islamabad, comprises of Shamilat and the same has been partitioned amongst its owners, and a number of housing project and buildings, such as High Court building, Shifa Hospital and Fauji Foundation Hospital, are constructed on such land. As regard the cutting of the tress, as noted above, Bahria Town claims to have deposited substantial

amount towards replishment charges and to have planted a large number of trees. Further more the question of compliance or non-compliance of the environmental laws and as to whether the subject construction/development is causing any damage to the environment and ecology are sub judice before the Environmental tribunal. In view of the foregoing it would not be just and fair to order retrieval of the subject lands but the issue requires indepth and detailed hearing so that the same be decided after thrashing out material aspects of the case and in view of the relevant law, its implications, more particularly keeping in view that substantial construction/development has already taken place and the government of Punjab has never raised objection to the utilization of the shamilat land like in the present case, and further according to the AG Punjab none from the village proprietary body raised any objection to the subject construction/development before any governmental authority and thus a large number of people have invested their life long saving and the money they raised as bank loans in buying properties therein. The petition therefore be fixed for further hearing.

Judge