

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

Present:

Mr. Justice Nasir-ul-Mulk, HCJ

Mr. Justice Gulzar Ahmed

Mr. Justice Mushir Alam

Civil Petitions No.1700 & 1701 of 2011

Against judgment dated 28.09.2011 of Lahore High Court, Lahore, passed in Intra Court Appeals No.154 & 155 of 2009.

American International School System

Petitioner *(in both cases)*

VERSUS

Mian Muhammad Ramzan & others
Sakina Bibi & others

Respondents *(in CP#1700/11)*

Respondents *(in CP#1701/11)*

For the Petitioner(s):

Mr. Rashid A Rizvi, Sr.ASC

For the Respondent(s):

Ch. Amir Hussain, Sr.ASC

#1-3 in CP#1700 & #1-2 in CP#1701/11

Rana Shamshad Khan, AAG, Pb.

#4-8 in CP#1700 & #3-7 in CP#1701/11

Date of Hearing:

09.12.2014

JUDGMENT

Mushir Alam, J- Through this single judgment, we propose to decide Civil Petitions No.1700 & 1701 of 2011, filed by the petitioner-American International School System, arising out of a common judgment of Lahore High Court, Lahore, dated 28.09.2011, rendered in Intra Court Appeals No.154 and 155 of 2009.

2. Facts, in brief, appear to be that each set of private respondents' refugee claimants asserted their rights in respect of subject property in their respective possession (*total land measuring 59 Kanals 2 marlas, situated at Harbanspura, Tehsil Lahore Cantt, District Lahore*) to claim subject land against their purported rights as occupancy tenant and transferee from Settlement Department under the residual property scheme through legal proceedings, which culminated in the judgment cited as Muhammad Ramzan v. Member (Rev.)CSS (1997 SCMR 1635). It was held that after the issuance of "*Scheme for Management and Disposal of Available*

Urban Properties, 1977" dated 16.5.1977 issued under Section 3 of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975 as prepared by the Government of Punjab (*hereinafter referred to as 'Scheme, 1977'*) and consequent upon issuance of Notification No.1697-73/1567-R(L), dated 16.5.1973, issued by the Chief Settlement Commissioner, subject agricultural land was declared as 'Building Site' and could not be allotted or transferred against unsatisfied claims. They were, however, given liberty to assert their rights in accordance with law, if so available.

3. The private set of respondents in each of the Petition herein, however, retained their possession and never availed the benefit of *Scheme, 1977*. It also appears that subject property on the direction of the then Chief Minister was allotted to the Petitioner-School through allotment order dated 10.05.2007 made by the Member (Colonies), Board of Revenue, Punjab, Lahore. Consequently, each set of private Respondents herein were forcefully dispossessed by the Executive District Officer, Government of the Punjab, Lahore, from the subject property and possession was handed over to the Petitioner-School.

4. Both sets of the private respondents challenged their respective dispossessions and allotment of the subject land to the petitioner-School through two different constitution petitions (Writ Petitions No.5939 & 5940 of 2007) claiming their right, title and interest in the land as against the petitioner-School. Both the Writ Petitions were heard together and dismissed through a common judgment dated 19.02.2009, whereby a learned Single Judge in Chambers in the Lahore High Court held that the petitioners therein (*private respondents herein*) have no *locus standi* to file the petitions and at the same time, the allotment made in favour of the petitioner-School was found to be in order. It was, however, observed that the price at which the property was allotted to the Petitioner-School was on the lower side and they were directed to pay the amount of the subject property as per evaluation to be carried out by the Government of Punjab. The judgment of the learned Single Judge was challenged by each set of the private respondents herein, through Intra Court Appeals No.154 and 155 of 2009. A learned Division Bench of the High Court vide judgment

dated 19.09.2009 maintained the finding against the private respondents herein, for the reasons as stated therein, that they have no *locus standi* to claim subject property. However, allotment order dated 10.05.2007 whereby the subject land was allotted to the petitioner-School by way of private treaty at a throwaway price of Rs.600,000/- per kanals was held to be illegal and without lawful authority; it was further held that Colonies Department, Government of the Punjab had no jurisdiction to deal with subject Evacuee Property, and authority vests with Member (Residual Properties), Board of Revenue, Punjab as per clause 30 of Scheme for the Management & Disposal of Available Urban Properties, 1977.

5. It appears that the Judgment dated 28.9.2011 rendered in Inter Court Appeals was challenged by the private set of Respondents herein, through Civil Petitions No.27 & 28 of 2012 before this Court, which however, were dismissed being barred by time. Same judgment dated 28.09.2011 has been challenged by the petitioner-School through Civil Petitions No.1700 & 1701 of 2011 which, are being decided through this common judgment.

6. Mr. Rashid A. Rizvi, learned Sr.ASC for the petitioner-School has contended that there were two contenders of the subject property; one is private sets of respondents in each of the two petitions and other is the petitioner-School. It was urged that since the private respondents have lost their claim up to this Court, and their Petitions for Leave to Appeal have since been dismissed, the subject property in terms of the allotment order dated 10.05.2007, referred to in the narrative above, was validly allotted by the Provincial Government and the petitioner-School had acquired the same through a private treaty and a sale deed to such an effect was also executed in favour of the petitioner-School in terms of the decision of the Provincial Cabinet dated 05.01.2007 authorizing sale of 57 kanals of State land in their favour at the rate of Rs.600,000/- per *Kanal*. It was further urged that pursuant to another decision of the District Price Assessment Committee another piece of land measuring 40 Kanals was approved in their favour on 14.04.2007.

7. Mr. Rizvi, learned ASC for the Petitioner-School, has further contended that since there is no contest, no exception could be taken to the disposal of the land by the Provincial Government by

way of a private treaty with the petitioner-School and a number of other institutions were also granted such land in the similar manner. When attention of the learned counsel was drawn to order of this Court passed on 26.02.2013, which clinches to the main issue whereby he was required to satisfy the Court as to the proprietary and legality of the transfer made in favour of the petitioner-School and also as to the Authority of the Member (Colonies) Board of Revenue, Punjab. The said order reads as under:-

"After hearing learned counsel for the parties, we would like to issue notice to the Advocate General (Punjab) to assist us generally in the matter and particularly in interpretation of Section 11 & 12 read with Section 30 of the Scheme for the Management and Disposal of Available Urban Properties situated in the Province of the Punjab dated 13.01.1977, as to whether the power of the Member Board of Revenue (Residual Properties) under Section 30 to transfer public lands is unfettered and whether such properties can be transferred only through public auction under Sections 10 & 11 of the Scheme."

8. Mr. Rizvi, learned ASC for the Petitioner-School in response and in support of his assertion placed heavy reliance on paragraph 30 as amended by Notification dated 18.10.1977 read with paragraph 12 of *Scheme, 1977* as framed under Section 3(1) read with Section 1 of the Evacuee Property and Displaced Persons Laws (Repeal) Act, 1975 [*hereinafter referred to as 'Act, 1975'*]. It was contended that in terms of the powers vested in the Government, subject property was transferred to the petitioner-School in the 'public interest' and no exception to the exercise of such authority by the Government could be taken. It was urged that as per Para 12 read with para 30 of the *Scheme 1977*, the Government of Punjab, had the authority to sell the subject property through private negotiation, which powers were rightly exercised in the public interest as the Petitioner-School has been imparting education and the Government of Punjab, lays much emphasis on education.

9. Learned Assistant Advocate General, Punjab has contended that the petitioner-School was conveyed 84 Kanals of Evacuee Property on political considerations at a throw away price of Rs.600,000 per Kanal. It is stated that the subject Evacuee Property is situated within the heart of the Municipal Limits of Lahore, and the Settlement Commissioner, Punjab, through Notification dated 16.5.1973 issued under Section 13 of the Displaced Person (land

Settlement Act, 1958 declared all the agricultural lands within the Municipal Limits of Lahore as 'Building Site'. It was urged that all the Settlement Laws were repealed by virtue of Displaced Persons Laws (Repeal) Act, 1975, with effect from 1.7.1974. All the Evacuee Properties were transferred to the Provincial Government for their disposal in accordance with the Scheme, 1977 prepared under Section 3 of the Act of 1975.

10. It was next urged that subject land was not the 'State Land' but the 'residual evacuee property' under the Act of 1975, and could be disposed off strictly in accordance with the Scheme, 1977 framed for the purpose under Section 3 of the Act, 1975. It was further urged that such Scheme, 1977 for the disposal of residual evacuee property was prepared in the year 1997, which has received approval in the case reported as Muhammad Ramzan (supra) and so also in the case of Member, Board of Revenue v. Rafiqat Ali (1998 SCMR 2596). It was, therefore, urged that the land could not have been dished out to the petitioner-School by the Member (Colonies), Board of Revenue, Punjab at a throw away price. According to him, per Scheme 1977, the competent authority is 'Member, Board of Revenue (Residual Properties)' appointed by the Government of Punjab. It was urged that the Petitioner-School did not qualify the criteria as laid down under the Scheme, 1977, therefore, was and is not entitled to be doled out State property for a song. It was contended that subject property is a valuable piece of land falling within the Municipal Limits of Lahore and under the Scheme, 1977 it could only be sold out through an open auction under Para 11, thereof.

11. We have heard the learned counsel for the petitioner-School as well as the learned Assistant Advocate General, Punjab and perused the record. In order to appreciate the contentions of respective parties it would be beneficial to glance at Paragraphs 11, 12 and 30 as amended of the Scheme, 1977, which read as follows:-

11. Sale by auction.-- A house, shop or a building site having permanent construction for the transfer of which no application is received and every property that is cancelled from the name of a defaulter and a vacant building site shall be disposed of by unrestricted public auction.

12. *Disposal of houses, shops or building sites by negotiation.—If a house, a shop or a building site having been put to auction twice fetches no bid or fetches a bid short of the reserve price, it shall be disposed of by negotiation by inviting sealed tenders which shall be opened by the Deputy Administrator (Residual Properties) of the area concerned in the presence of the tenderers. If the highest offer made for such a house, a shop or a building site is equal to or exceeds 75% of its reserve price, it may be accepted by the Deputy Administrator (Residual Properties) and where the highest offer made is below 75% of the reserve price but not less than 50%, it may be accepted by the Administrator (Residual Properties), of the area or where the highest offer made is below 50%, it may be accepted by the Member, Board of Revenue (Residual Properties) (underlined to add emphasis).*"

"Un-amended para 30.

30. Powers to transfer properties in public interest. *The Member, Board of Revenue (Residual Properties), may transfer, in public interest any available property in such manner and on such price as he may deem proper.*

13. Paragraph 30 of the Scheme 1977 was amended through Notification dated 18.10.1977, whereby the words "*Public Interest*" in Clause (1) were deleted and sub paragraph (2) was added; after the amendment it reads as follows;

30 .Powers to transfer properties.(1) *The Member, Board of Revenue (Residual Properties), may transfer, in public interest, any available property in such manner and on such price as he may deem proper.*

s (2) "Where a property is partly available property and partly owned by any person, the Member of Revenue (Residual Properties) may transfer the available property on application to such person on payment of transfer price."

14. As noted in the narrative above, the status of the subject property was already determined by this Court in the case of Muhammad Ramzan (*ibid*), as 'residual evacuee property' and a "building site". Building Site, Government, and Member Board of Revenue (Residual Properties) are defined in the Chapter I, definition Paragraph 1, of the Scheme, 1977 as follows:-

(d) *"Building Site" means any plot of land which is not with in a well-defined compound of a permanent building and includes:-*

(i) *A site on which the permanent construction, if any does not exceed in area by 1/8th of the site.*

(ii) *Any site on which any building existed but completely demolished by flood, fire, incendiary or by any natural clammily.*

(g) *"Government" means the Government of Punjab;*

(h) "Member" Board of Revenues (Residual Properties) means the Member, Board of Revenue appointed under the Board of Revenue Act/Rules"

15. When Mr. Rizvi, learned ASC was confronted that the allotment relied upon by him does not speak of any '*public interest*', he promptly responded that '*public interest*' which was mentioned in paragraph 30, of the un-amended provision of the Scheme, 1977 was deleted through Notification dated 18.10.1977, therefore, it cannot be pressed into service now. Contentions of the learned counsel are fallacious for more than one reason. Firstly, Mr. Rizvi, learned ASC for the Petitioner-School, was not able to controvert that the status of the subject property is 'residual evacuee property'. Secondly, heading of any provision does not govern or control the substantive provision; it may be used in case of an ambiguity to understand the purport and object of any provision and or enactment thereof. Thirdly deletion of '*public interest*' in the title of para 30, through amending Notification is purposive and understandable as, by addition of *subsection (2) thereof*, another class of the property was added viz '*where a property is partly owned by a person*'. Under the added sub paragraph (2) to Paragraph 30 of Scheme, 1977, *a part owner was given an option to acquire such property on payment of transfer price*' in which case obviously no public interest would be attracted, which option could not be extended to any other class of persons. Where the property as a whole is available, as "Building Site" as is in the instant cases, its transfer is to be made in the public interest, as is clearly specified in the substantive part of sub paragraph (1) of Paragraph 30 *ibid*; which remained un-amended. Fourthly, paragraph 30 is not to be read in isolation but, is to be read with Sections 11 & 12 of the Scheme, 1977, which read as follows:-

"11. *Sale by auction.-- A house, shop or a building site having permanent construction for the transfer of which no application is received and every property that is cancelled from the name of a defaulter and a vacant building site shall be disposed of by unrestricted public auction.*

12. *Disposal of houses, shops or building sites by negotiation.—If a house, a shop or a building site having been put to auction twice fetches no bid or fetches a bid short of the reserve price, it shall be disposed of by negotiation by inviting sealed tenders which shall be opened by the Deputy Administrator (Residual Properties) of the area concerned in the presence of the tenderers. *emphasis* If the highest offer made for such a house, a shop or a building site is*

equal to or exceeds 75% of its reserve price, it may be accepted by the Deputy Administrator (Residual Properties) and where the highest offer made is below 75% of the reserve price but not less than 50%, it may be accepted by the Administrator (Residual Properties), of the area or where the highest offer made is below 50%, it may be accepted by the Member, Board of Revenue (Residual Properties) (underlined to add)".

16. Admittedly, the land subject matter of the present proceedings is a 'building site' within the contemplation of definition of Paragraph 1(d) of the Scheme, 1977 which is as follows:-

"(d) 'Building Site' means any vacant plot of land which is not within a well defined compound of a permanent building and includes

- (i) a site on which the permanent construction, if any, does not exceed in area by 1/8th of the site;*
- (ii) any site on which any building existed but was completely demolished by floods, fire, incendiary or by any natural calamity."*

17. Paragraph 12 of the Scheme, 1977 as reproduced above is not attracted for the simple reason that subject property was never *"put to auction twice"* before invoking *"negotiation."* Even negotiation, within the contemplation of Paragraph 12 *ibid* is not negotiation with one person of any body's choice, but very intent of Paragraph 12 thereof; is vividly clear that such negotiation is to be carried out *"by inviting sealed tenders, which shall be opened by the Deputy Administrator (Residual Properties) of the area concerned in the presence of the tenderers."* In event, highest offer received for such a property is equal to or exceeds 75% of its reserve price, authority vests in the *Deputy Administrator (Residual Properties)* to accept it and where the highest offer received is below 75% of the reserve price but not less than 50%, authority to accept vests in *the Administrator (Residual Properties)*, of the area or where the highest offer received is below 50%, the authority vests in the *Member, Board of Revenue (Residual Properties)* to accept the bid, but before accepting bid of highest bidder it is incumbent on the designated authority to negotiate with the highest bidder whosoever it may be to obtain best possible value for the property put to auction. Admittedly, in instant case no sealed tenders or bids from any interested contenders were ever invited, but subject valuable commercial "Building Site" was quietly doled out to the Petitioner-School on the directions of the then Chief Minister, at the rate of

agricultural property. Therefore, Mr. Rizvi, learned ASC for the petitioner-School was not able to persuade us to agree with him that the subject property was sold in exercise of power conferred under Paragraph 12 read with paragraph 30, of the Scheme, 1977. Even otherwise record shows that subject property was not sold out to the petitioner-School by the *Member, Board of Revenue (Residual Properties)*, who for the purposes of disposing off the residual evacuee property is the competent authority under the Scheme, 1977.

18. It was next argued by Mr. Rizvi, learned Sr.ASC for the petitioner-School that framing of Scheme by the Government is to be considered as in line with the concept of Principal and Agent. The Government of Punjab acts as a Principal through its agents and in this case by framing the 'Scheme, 1977' it did not divest itself from the ownership of the State land, and retained all the plenary and ancillary authority and jurisdiction to deal with its property together with the "*Member, Board of Revenue (Residual Properties)*". To support his contention, he has placed reliance on *Abdur Rahim v. Federation of Pakistan* (PLD 1988 Supreme Court 670). Reliance on cited case is totally misplaced. Contentions are ill-founded. In cited case, the Government in exercise of powers conferred on it under clause 18 (2) of the Customs Act, 1969 imposed regulatory duty, which was sustained by this Court.

19. Any Government under the constitutional dispensation derives power and authority under the constitution itself and or under the legislative instrumentalities as may be conferred by the competent legislature. Any public functionary, how high so ever it may be, is subservient to the Constitution and law and has to act within the boundaries assigned by the Constitution and law framed thereunder. It is now a well entrenched in administrative jurisprudence of Pakistan that all the public functionaries including the Chief Minister is bound to deal with the public property strictly in accordance with the parameters laid by the law, rules and regulation framed thereunder. In a number of cases including in the cases of *Abdul Haq Indher v. Province of Sindh* (2000 SCMR 907) and *Iqbal Hussain v. Province of Sindh* (2008 SCMR 105), where the plot of land was allotted on the direction of the Chief Minister, against the law and the scheme, was struck down by the High Court,

which was maintained by this Court and it was categorically held by this Court that the public functionaries are not bound to follow illegal orders even of the Chief Minister. In the instant cases, as record shows that on mere desire of the then Chief Minister of Punjab, the Member (Colonies) BOR, Punjab doled out valuable "residual evacuee property" at a throw away price to the petitioner-School, knowing fully well that the subject property is not the State land and that the subject evacuee land could only be disposed off through open auction in terms of the Scheme, 1977 and otherwise, he was not at all competent to undertake such exercise, which authority under the Scheme, 1977 vested in the *Member, Board of Revenue (Residual Properties)*.

20. The Chief Minister, under the constitutional dispensation is neither the King nor Monarch but, is in the domain of trust and under Article 5 of the Constitution of Pakistan he is obligated to obey the Constitution and law like any other ordinary citizen, though he exercises the executive authority as Head of the Provincial Government either directly and or through the Provincial Ministers, in the name of Governor, but exercise of such authority is not brazen or arbitrary but subject to the Constitution, as he has taken oath to "*discharge his duties and perform*" his *functions, honestly, to the best of his ability, faithfully in accordance with constitution of the Islamic Republic of Pakistan and the law*". His desire and direction, how admirable or praiseworthy it may be cannot be implemented by the subordinate formation in utter disregard and breach of law, and or rules and or regulation framed hereunder. All executive orders emanating from highest of the authority must be backed by law. It may be observed that the Government has no unfettered authority to dole out any property in any manner on its own whims and fancy. Indeed, the Government functions and operates through different instrumentality under well guarded rules and procedures and in accordance with law. This Court, at page 1661 in the case of *Muhammad Ramzan (ibid)* held as under:-

"8. With the repeal of the Evacuee Laws in 1975, the unallotted agricultural land vested in the Provincial Government against price paid for it. Thereafter, its disposal had to take place according to the Scheme to be framed by the Provincial Government. The Scheme framed by the Provincial Government made no

provision for allotments to be made against the pending verified produce index units. For this reason the allotment made after 1975 in favour of the persons from whom the appellant was claiming was wholly without jurisdiction and lacking in authority. Notwithstanding that it was made on the direction of the Board of Revenue, it could not be recognized in law nor could it be allowed to stand on record. It was void ab initio. Consequently, its removal even by an illegal order would not suffer from any infirmity but would rather re-establish the legal and the correct status of the property. On this view of the matter the decree of the Civil Court could also not remain intact."

21. As discussed above, the petitioner-School was not eligible to be allotted evacuee land under the Scheme, 1977. There is nothing on record to substantiate the claim of the petitioner-School that it was allotted subject land in the public interest. The Chief Minister does not possess any plenary authority and or jurisdiction to allot any land as a matter of grace or favour at his whims and fancy, but in accordance with law. The public functionaries are the custodians of the public/State land, which could only be disposed of in accordance with law. For reference, one may see the cases reported as Union Council Dhabeji v. Al-Noor Textile Mills Ltd (1993 SCMR 7) and Multiline Associates v. Ardeshir Cowasjee (PLD 1995 SC 423), Abdul Haq Indher v. Province of Sindh (2000 SCMR 907), Al-Shafique Housing Society v P.M.A (PLD 1992 SC 113), Taj Muhammad v. Town Committee (1994 CLC 2214) and Sindh Peoples Welfare Trust v. Government of Sindh (2005 CLC 713).

22. For the foregoing discussion, we do not find any reason nor could the learned counsel point out any to interfere with the impugned judgment. Accordingly, leave is declined and the petitions having no merits are dismissed.

Chief Justice

Judge

Judge

ISLAMABAD, THE

9th of December, 2014

Zubair

Not Approved For Reporting