

IN THE SUPREME COURT OF PAKISTAN
(ORIGINAL JURISDICTION)

PRESENT:

MR. JUSTICE EJAZ AFZAL KHAN.
MR. JUSTICE MAQBOOL BAQAR.
MR. JUSTICE FAISAL ARAB.

CRIMINAL ORIGINAL PETITION NO. 57 OF 2015 IN S.M.C.NO.10 OF 2005.

Muhammad Asjad Abbasi and others. ...Petitioner(s)
Versus
Iqbal Muhammad Chauhan and others. ...Respondents

AND

CRL.M.A. NO.1879 OF 2016 IN CRIMINAL ORIGINAL PETITION NO. 57 OF 2015.

(Impleadment Application)

AND

CRL. O. P. NO. 42 OF 2017 IN S. M. C. NO. 10 OF 2005.

Nawaz Akhtar and others. ...Petitioner(s)
Versus
Capt. (R) Said Anjum and others. ...Respondents

AND

CRL.M.A. NO. 1292 OF 2017 IN CRL. O. P. NO. 57 OF 2015

Muhammad Asjad Abbasi and others. ...Petitioner(s)
Versus
Iqbal Muhammad Chauhan and others. ...Respondents

AND

CRL.M.A. NO. 1293 OF 2017 IN CRL. O. P. NO. 57 OF 2015

Muhammad Asjad Abbasi and others. ...Petitioner(s)
Versus
Iqbal Muhammad Chauhan and others. ...Respondents

AND

C.M.A. 6998 OF 2017 IN C. R. P. NO. NIL OF 2017 IN S. M. C. NO. 10 OF 2005.

Commoners Sky Gardens (Pvt) Ltd and others. ...Petitioner(s)
Versus
Govt. of Punjab thr. Chief Secy., Lahore and others. ...Respondents

AND

CRL.M.A.NO. 1926 OF 2017 IN CRL. O. P. NO. 57 OF 2015.

(Impleadment Application)

AND

CRL.M.A.NO. 430 OF 2018 .

For the petitioner(s): Sardar Muhammad Aslam, ASC
Syed Rifaqat Hussain Shah, AOR.
(in Crl.O.P. 57/15)

Ch. Aitzaz Ahsan, Sr. ASC.
Mr. M. S. Khattak, AOR.
Mr. Gohar Ali Khan, ASC.
(in Crl. M. A. 1879/16,
CMA. 6998/17 & Crl. M. A. 1926/17)

Nemo. (in Crl. O. P. 42/17)

Syed Rifaqat Hussain Shah, AOR.
(in Crl. M. As. No. 1292-1293/17)

For the respondent(s): Mr. Shakeel Ahmed, A. G. Punjab.
Barrister Qasim Chauhan, Addl. A. G. Pb.
(for respdts. 1-2)

Mr. Zahid Saeed, In person.
(for respdt. 3)

Moulvi Anwar-ul-Haq, ASC.
Raja Inam Ameen Minhas, ASC.
(for respdt. 4)

Ch. Aitzaz Ahsan, Sr. ASC.
Mr. Gohar Ali Khan, ASC.
Mr. M. S. Khattak, AOR.
(for respdts. 6-16).

Federation of Pakistan: Mr. Sohail Mehmood, DAG.

Environment EPA. Pb.: Mr. Asif Iqbal, D. G.
Nawaz Malik, Dir (Law).
Shahid Hassan, Dy. Dir.

Date of hearing: 07, 12-15, 22, 28.03.2018, 05, 09, 10-12,
30.04.2018 and 02.05.2018.
(Judgment Reserved).

J U D G M E N T

Ejaz Afzal Khan, J: Environmental hazard which was reported to be imminent on account of proposed New Murree Project was taken notice of, which found expression in one of the

orders passed by his Lordship, as he then was, Mr. Justice Tassaduq Hussain Jillani in the following terms:

"The Report of the International Union of Conservation of Natural Resources (IUCN) submitted to the Government and published on the front page in Daily "The News" dated 29th March 2005 makes startling and shocking disclosures about the apprehended adverse environmental impact of the proposed New Murree Project. The findings, if true, warrant serious attention of all those concerned with the conservation of the Forests, Supply of Clear Water to the Twin Cities of Rawalpindi and Islamabad and the issues of siltation in Simly and Mangla Dams. The issues raised are likely to affect public at large with particular reference to the Fundamental Right enshrined in Article 9 of the Constitution of Islamic Republic of Pakistan, i.e. the Right to life....

The Patriata Forest according to the afore-referred report has a highly fragile eco-system and was declared as reserved forest as far back as 1886 is going to receive the worst blow i.e. at least 50% of the existing standing stock of 1.4million conifer trees are likely to be cut. Imploring protection of this valuable forest reserve the report maintains that "the development of new township could result in the catastrophes like loss of protective forest cover resulting in more rapid runoff following storm event; higher peak stream flows; increased instability; and increased sedimentation. "Such adverse changes in watershed hydrologic conditions result in degradation of water quality for the population particularly residing in Islamabad, the report said, demanding, "to avoid such compound disasters and to ensure supply of safe water for twin cities, the valuable Patriata forests have to be preserved." "To develop new city by cutting sharp slope bedrocks will further aggravate the situation for new city and will cause heavy rain siltation in the Simly and Mangla Dams". This move, it is said, would cause serious damage to the ongoing Mangla Dam Raising project, which was approved at a total cost of Rs. 62.552 billion including foreign exchange component of Rs. 9.6 billion. The main objective of the project was to raise Mangla Dam by 30 ft to regain the lost storage capacity due to silting and heavy sedimentation."

While the New Murree Project may have been motivated to improve, expand and create recreational facilities at the hill resort in question with regard to which none would have any cavil. However, if such a scheme raises serious environmental questions requiring deliberations by Authorities and Experts concerned and if such a deliberative exercise has not been carried out, this Court is under a Constitutional mandate in terms of Article 184(3) read with Article 9 of the Constitution of Islamic Republic of Pakistan to issue appropriate directions to forestall the likely adverse effects on the quality of life in the areas to which reference has been made in the report. But before proceeding any further it would be fair to issue notice and hear learned Advocate General Punjab Inter alia on following preliminary queries:-

- (i) *Whether any environmental impacts survey was ever carried out before approving the New Murree Scheme?*

- (ii) Whether the Government of Punjab has considered the report of International Union of Conservation of Natural Resources, if so what effect?

Since the issues likely to be raised would require interpretation of Environmental Laws, it would be appropriate to call upon Dr. Pervaiz Hassan to appear and assist the Court as amicus curiae. Notice shall also issue to Director General, Pakistan Environmental Protection Agency, Islamabad.

Let this matter be placed before the Honourable Chief Justice of Pakistan for consideration and constitution of an appropriate Bench. Subject to the order to be passed by him the case shall be fixed before the Bench so constituted for 11.04.2015. Till then no tree shall be felled and no hill shall be tinkered with in Patriata pursuant to the project in question."

Following the order reproduced above, many other directions and orders were passed by this Court. In the meantime, WWF prepared an assessment of ecological significance in respect of the proposed New Murree Development Project which being relevant in this case also deserves a look and thus runs as under:

The following brief describes the ecological significance of the New Murree Project area and the resulting devastating environmental impacts visualized due to the proposed New Murree Development Project (NMDP). The proposed NMDP propositions the development of Patriata Reserved Forests (Compartments 21 to 38), Murree Tehsil, Rawalpindi District, an area of 4,111 acres, into a 'tourist city of international standards.'

Located at the highest point in the Punjab (about 2,223 m), the project area is part of the Himalayan hill tract that includes one of the best remaining Himalayan (temperate) forest areas in Punjab. There are two ecological zones present in the area, the 'moist temperate coniferous forests' (Blue pine or kail zone) and the 'subtropical Chir pine forests' (Chir zone); the former being the dominant zone. Considered particularly ecologically rich, the area boasts the existence or probable occurrence of more than 200 plant species, 146 bird species, 15 mammals, 22 reptiles, and 6 amphibians.

The NMDP proposes development projects in the only surviving, intact habitat of the Blue pine ecosystem - the other habitat being badly degraded due to 'its proximity to Murree; this will result in a regrettable fragmentation of this periphery is liable to become swarmed by unplanned housing development schemes, such as those surrounding Bhurban and Murree. As a result, other than the White oak and Yew trees, which are already locally threatened, an additional 17 commonly used medicinal plants will be endangered due to the development operations.

The Patriata hill tract has the richest flora to be found in the country. According to a recent study conducted by Pakistan in 2008, a total of 224 vascular plants were identified from the study area, belonging to 166 genera and 71 families. A high

proportion of endemic species and, old forests render the area the status of a unique habitat. Since the area contains a very dense patch of the only remaining tract of pine trees in the Punjab Province, it is highly significant in terms of holding a rich diversity of fauna and flora.

The Himalayan forest vegetation provides relatively undisturbed habitat for wildlife species, sustaining their needs for food, water and shelter. Any change in the habitat structure will affect the variety and population of wildlife species. Changes in the vegetation structure will definitely affect the wildlife fauna associated with them and, conversely, changes in faunal composition as well as influence the vegetation it is complexly integrated with. Leopards, once reported from the area, are no longer sighted; their disappearance can threaten the already decreasing population of Common Leopards in the Murree hills. The Koklass Pheasant, the White-Crested Kalij Pheasant, and the Paradise Flycatcher are some of the unique bird species inhabiting the Patriata forests, which will also be endangered.

Natural forests form a vital part of catchments, guaranteeing better quality water with lower levels of sediments and pollutants. The loss of forest cover and subsequent conversion to other land usage is rapidly being identified as the major reason for the depletion and contamination of freshwater supplies, aggravating the looming water crisis that is threatening the whole country. Since the concerned area is an integral part of the important watersheds of Mangla and Simly dams, the proposed development plan, which entails large scale decimation of this surviving tract of forest, will have massive negative repercussions. Since much of the remaining catchment area of these dams has already been built up, protection of this region is imperative to guarantee groundwater replenishment along with regulation of water table, and to prevent rapid soil erosion - with consequential silting of water channels and dams downstream, flash floods and landslides.

The Government of Pakistan has pledged to preserve and rehabilitate the country's remaining natural forests in a number of policy documents, for example, the National Environmental Policy 2005, that commits to increase forest cover to 5.6% by 2010 and to 6% by 2015. Even the Pakistan Poverty Reduction Strategy Paper (PRSP-2003) makes projections to increase forest cover from 4.8% to 5%. This project is, thus, in direct contradiction with these policies and goals to conserve natural forests.

The FAO report, "Situation and Developments in the Forest Sector -2005", mentions that Pakistan is losing forest cover at the rate of 1.5 % each year. This is one of the worst rates amongst the 48 Asian countries that have been listed. The current distribution reveals decline (almost 40%.) in the char pine zone, which has been predominantly exploited for agricultural and residential land use, along with a significant decrease (approximately 51%) in blue pine forest compared to estimated forest cover in the past. Pakistan has only 1.8% productive forests out of the total 3.1% existing forest cover. Under these alarming conditions, it is imperative that remaining natural forests in Pakistan, which includes the ' Patriata forest, must be protected from further degradation.

The Project objectives and components have kept changing and have still not been clearly defined or been disclosed to the public. At the time of this report being written, the New -Murree

Project included a 6 Star hotel along with other hotels, exclusive housing units, golf course and mono-rail. All these mentioned projects are absolutely inappropriate for a unique ecological area, since the heavy machinery required during construction portends severe damage to the ecosystem.

In conclusion, the Punjab Government is advised by WWF Pakistan to abandon the existing New Murree Development scheme, which is completely unsuitable for this unique and environmentally rich region. In its place, the Punjab Government can undertake more suitable ecotourism initiatives, which conserve the unique natural and cultural heritage in Punjab and provide tourist facilities in conformity with local traditions, for the benefit of all levels of society."

Learned ASC appearing on behalf of the petitioner contended that where the orders passed by this Court from time to time and paragraph 4 of the judgement rendered in the case of **Suo Motu Case No. 10 of 2005 (2010 SCMR 361)** are very clear in their tone and tanner, nobody could have continued with the work of construction and that any work done in contravention of the orders of this Court is liable to be undone and the persons at the back of such work are liable to be proceeded against and punished. He next contended that the forest which is a source of natural beauty and one of the causes of rainfalls is being exterminated; that the land comprised in shamilat-i-deh cannot be broken up for cultivation or any other purpose which is not envisaged by the wajib-ur-arz; that taking possession of a few chunks of land comprised in shamilat-i-deh would amount to partition which is not only against the provisions of wajib-ul-arz but also against the enactments passed from time to time and the rules made thereunder. The learned ASC maintained that the property comprised in individual proprietary could be used as a building site if an NOC is issued in conformity with section 12 of the Punjab Environmental Protection Act 1997. The learned ASC next contended that any waste, sewerage, drainage or any other form of garbage flowing from houses, building, hotels and restaurants thus

constructed in the highlands would not only affect the catchment areas but fill them with polluted water. Timely action, the learned ASC added, would be the need of the hour else the land of beautiful landscapes would turn into heaps of stinking dirt. Inaction and acquiescence of the government, the learned ASC went on to argue, facilitated the destruction of the fauna and flora. Simly Dam and Rawal Dam, the learned ASC while winding up his arguments contended would also be the victims of deforestation, construction and consequences flowing therefrom.

2. During the course of arguments, we noticed that a huge property comprised in shamilat-i-deh has been broken up for construction and many other alike purposes in violation of the terms of wajib-ul-arz and the Forest Act 1927. We on our own asked the learned Advocate General Punjab to examine this phenomenon and submit a detailed report in this behalf along with the record of rights, field map and wajib-ul-arz of the respective villages. He accordingly submitted his report along with the relevant record. When we asked him as to how shamilat-i-deh could be broken up for construction etc he could not give any satisfactory answer. We, having realized the gravity of the situation and its adverse bearing on the interest of the government and the environment around, took notice of this aspect of the case and asked the learned ASCs and Sr. ASC of the parties to address us on this issue.

3. Learned Sr. ASC appearing on behalf of Bahria Town contended that any restriction imposed on sale or partition of shamilat-i-deh is violative of fundamental rights; that any such restriction would be void by virtue of Article 8 of the Constitution of the Islamic Republic of Pakistan. He next contended that whether

the proposed construction or the construction already completed is against the provisions of the Punjab Environmental Protection Act is a matter pending before the Environment Tribunal, therefore it would not be just and proper to meddle in such matters while exercising jurisdiction under Article 184(3) of the Constitution of the Islamic Republic of Pakistan. He next contended that some restrictions may have been imposed on the owners of the shamilat-i-deh by the wajib-ul-arz but their effect has been neutralized by section 3 of The West Pakistan Land Disposition (Saving of Shamilat) Ordinance 1959. Even otherwise, the learned Sr. ASC added, wajib-ul-arz cannot limit, diminish, curtail or extinguish any right in the land or property without the consent of the owner, therefore, the owner of shamilat-i-deh can partition it or dispose it without the intervention of the government. The learned Sr. ASC contended that where a great deal of construction work has been done, many plots have been transferred and superstructure has been raised thereon following the previous practice, right or wrong, any order of this Court undoing all that has been done would not only create complications but also deprive the persons investing in the project of a right accrued which is not in conformity with the dictum of this Court rendered in the case of **Government of Pakistan v Manzoor Brothers (1995 SCMR 516)**. The learned Sr. ASC next contended that no exception could be taken to the sale and partition of the property where none of the co-owners in shamilat-i-deh has raised even a whisper in this behalf. Learned Sr. ASC lastly argued that if this Court comes to the conclusion that Shamilat land could not be partitioned, broken-up for construction or any other purpose, any declaration given by this Court cannot operate retrospectively. The learned Sr. ASC to support

his contention placed reliance on the case of Application by Abdul Rehman Farooq Pirzada versus Begum Nusrat Ali Gonda v. Federation of Pakistan (PLD 2013 SC 829).

4. Mr. Maulvi Anwar-ul-Haq appearing for Commoners Sky Garden, respondent no.4 herein, contended that area constructed by it falls within the private ownership; that the construction was preceded by issuance of a proper NOC by the Rawalpindi Development Authority (“RDA”) and Environmental Protection Agency (“EPA”); that the respondent no. 4 has also become the owner in shamilat-i-deh by the dint of sale but since the proposed construction is carried in the private ownership the arguments addressed at the bar by the petitioner have least bearing on its case. Even wajib-ul-Arz of village Manga, the learned ASC maintained, does not restrict partition of property nor does it recognize any right of the government in the shamilat-i-deh, therefore, his case has to be looked at differently. Learned ASC by referring to clause 4B of the notification dated 21 January 1941 issued under section 76(c) of the Forest Act 1927 contended that it does not tend to impose any restriction on the construction raised by respondent no. 4 when it has neither broken up any area of shamilat-i-deh nor sought partition thereof.

5. We have gone through the record and considered the submissions for the learned ASCs for the parties.

6. Before we deal with the questions raised in these petitions it is worthwhile to see what is wajib-ul-arz, how does it come to being, what role does it play in the administration of shamilat-i-deh, what rights does it confer and what restriction does it place on the village proprietary body and what interest the government of the

province has in shamilat-i-deh, are the questions to be addressed before any owner of shamilat-i-deh or vendee therefrom can be allowed to go ahead with the breaking up of the land for construction etc. Wajib-ul-arz is a village administration document describing existing customs regarding rights and liabilities of the village proprietary body and the government. This document is an outcome of consensus of the village proprietary body and the government reached at the time of settlement of the village. In the case of **Haji Qudrat Ali v. Government of N.W.F.P., through Secretary, Law Department, Peshawar (1993 SCMR 381)** this Court in paragraph 10 of the judgement quoted with approval the judgement rendered in the case of **Mst. Bhag Bhari v. Mst. Bhagan (PLD 1954 Lah. 356 at 360)** dealing with the entries in a wajib-ul-arz held as under:

“Entries in a Wajibul Arz may be of two kinds. They may be statements of local custom or usage or they may be recitals of agreements. As statements of custom or usage they are strong evidence of the existence of such custom or usage but they have only an evidentiary value. Agreements incorporated in the Wajib-ul-Arz are however binding but only on the parties to the agreements, and even in such cases it is open to a party to prove that in fact no such agreement was entered into though the task would be difficult.”

Before we go ahead, let us examine the relevant clauses of the wajib-ul-arz of each of the villages forming subject matter of the controversy in this case. The first in the sequence is the wajib-ul-arz of village Manga which reads as under:

تفصیل اندراجات واجب العرض

(الف) نسبت کرنے نو توڑ و غیرہ شملات دیہہ جو وقتاً فوقتاً سرکار سے مشترک ہوں گے ان کے مطابق عمل کریں گے۔ ہمارے گاؤں میں تعدادی-4-15226 کنال رقبہ شملات دیہہ حسب حصص جدی ہے اس میں مزروعہ 981 ک 6 مرلہ بنجر قدیم 132 ک 12 م غیر ممکن 14112 ک 6 م ہے۔ اس رقبہ میں درختاں خوردو کلاں اگیں گے۔ وہ ملکیت سرکار تصور ہوں گے اور تقسیم اس رقبہ کی بغیر اجازت

سرکار نہیں کریں گے۔

ب۔ کھاتہ ہائے مشترکہ۔۔ کھاتہ ہائے مشترکہ کی تقسیم عموماً خانگی طور پر ہو جاتی ہے ہر ایک حصے دار کو اختیار ہے کہ جب چاہے اپنے حصہ کی زمین کی تقسیم کروالے اور تقسیم خانگی ہو کر جب قبضہ الگ الگ ہو جائے تو تقسیم بحال رہے گی۔ قبل از تقسیم اگر کاشت حصہ داران کی الگ الگ ہو جائے تو غلہ ڈیر تقسیم ہوتا ہے۔ یا نسبت کثیر التعداد ہونے رقبہ کی ہر ایک حصہ دار نے پیش قبضہ کیا ہو اور بکج رقبہ قابل تقسیم باقی بھی ہو تو وقت تقسیم قبضہ کاشت ہر حصہ دار کا بمقدار حصہ بحال رکھا جائے گا اور کمی بیشی باقی ماندہ رقبہ سے پوری کی جائے گی۔ اس کا طریقہ یہ ہو گا کہ پیش والا قبضہ سے جو زمین بخشی خود دینی چاہیے تو وہ دے گا اور کمی والے کا حصہ شملات سے پورا کیا جائے اور کمی والا حسب پسند خود لے گا۔

ج۔ ہمارے گاؤں پہاڑی میں آبادی متفرق ہے ۔ مہماں آبادی کوئی نہیں ہے ہر ایک مالک کی آبادی گھر اپنی ہی ملکیت میں جدا گانہ واقعہ جو بوقت پیش ہر ایک مالک کے نام اس کی ملکیت اراضی میں شامل ہو کر ملکیت کا اندراج چھ گیارہ اگر کوئی کوہڑیا آبادی چند ماکان مشترکہ ہے تو وہ بھی بصورت بالا شامل اراضی یا علیحدہ نمبر پر پیوود ہو کر ملکیت مشترکہ درج کاغذات ہو گئی ہے۔

د۔ جو حصہ داران بلا کر نے انتظام کاشت داروئے ماگرا۔ اری اپنی اراضی کے چلا جائے تو اس کی اراضی کا انتظام کاٹھت۔ اری اس کا قریبی یک جدی کرے گا۔ اگر یک جدی نہ کرے تو شملات تصور ہو کر جملہ مالکان طرف انتظام کریں گے اور وہ ہی ذمہ دار ماگرا۔ اری ہوں گے۔

Wajib-ul-arz of village Sulkether has identical content which reads as under:

"الف۔ شملات دیہہ۔ ہماری گاؤں میں پانچ سو گیارہ ایکڑ چار کنال چار مرلہ گماون اراضی بدین تفصیل ہے۔ مزروعہ اکیس ایکڑ چار کنال دس مرلہ بنجر قدیم چار کنال آٹھ مرلہ غیر ممکن تین سو 89 ایکڑ پانچ کنال چھ مرلہ جو کاغذات میں شملات دیہہ درج ہے۔ اس رقبہ مذکور میں جو درختاں خوردو کلان آگیاں گے وہ ملکیت سرکار ہوں گے اور اس رقبہ کی تقسیم بغیر اجازت سرکار نہیں ہوگی۔

ب۔ کھاتہ مشترکہ۔ کھاتہ ہائے مشترکہ کی تقسیم عموماً خانگی طور پر ہوتی ہے۔ اور ہر ایک حصہ دار کا اختیار ہے کہ جب چاہے اپنے حصہ کی زمین تقسیم کرادے اور تقسیم خانگی ہو کر جب قبضہ الگ الگ ہو جائے تو تقسیم بحال رہے گی اور اگر قبل از تقسیم کاشت حصہ داران کی الگ الگ ہو جائے یا بسبب کثیر التعداد ہونے رقبہ کے ہر ایک حصہ دار نے کم بیش قبضہ کیا ہو اور کچھ زمین قابل تقسیم باقی ہوئی ہو تو بوقت تقسیم قبضہ کاشت ہر ایک حصہ دار کا بمقدار حصہ بحال رکھا جائے گا۔ اور کمی بیشی باقی ماندہ رقبہ سے پوری کی جائے گی۔ اور زائد از حصہ قبضہ سی نکالی جاوے گی اس کا طریقہ یہ ہو گا کہ پیشی والہ اپنی قبضہ سے جو زمین دینا چاہے دیوگا اور کمی والے کا حصہ شملات سے پورا کیا جائے گا۔ وہ حسب پسند خود لیوے گا۔

تفصیل اندراجات واجب العرض

1- الف۔ نسبت نا توڑ کرنے شاملات کے جو قواعد و تقاضا فوقاً سرکار سے مشترک ہوں گے اس کے مطابق عمل کریں گے۔ شاملات دیہہ

| ہمارے | گاؤں | میں | ارضی | بدیں | تفصیل |
|-------|-----------|-----------|--------|---------|---------|
| مرلہ | کنال | ایکڑ (کل) | لپاڑہ | میرا | رکڑ |
| قدیم | غیر ممکن | | | | بنجر |
| 5- | 0- | 2405 | 10-6-1 | 143-1-4 | 12-0-12 |
| 8-7 | 2230-0-14 | | | | |

جو ملکیت شاملات دیہہ درج کاغذات ہے۔ لیکن ان اراضیات جو درختاں خورد کلاں آگیاں گے وہ ملکیت سرکار ہوگی۔
 ب۔ نسبت کھاتہ مشترکہ۔ کھاتہ جات مشترکہ کی تقسیم عموماً ناگنی طور پر ہو جاتی ہے۔ اگر کسی وجہ سے تقسیم ناگنی نہ ہو سکے تو پھر شریک کھاتہ کو تقسیم بعدالت کرنے کا حق حاصل ہے۔ تقسیم کے قسم وار قبضہ بحال رکھ کر کی جاوے گی۔ حتیٰ الوسع کی والے شخص ملتا جلتا ہو ارقبہ دیا جاوے گا۔

2۔ مویشی ہم جملہ مالکن و کاشتکاران کا رقبہ غیر مزدور شاملات میں چرتا ہے۔ اور بعد دور فصل اراضیات مزدور میں بھی چرتا ہے اور جملہ باشندگان خشک لکڑی جلانے کے لیے رقبہ مذکورہ سے بقدر گزارہ کرتے ہیں۔ کوئی روک نہیں ہے نہ اس کی بابت کوئی حق غیر مالکان سے لیا جائے گا اور کسی موضع کا مویشی ہمارے موضع کی حد میں نہیں آتا ہے۔
 3۔ ہمارے گاؤں میں کوئی آمدنی متفرق نہیں ہے۔

4۔ ہمارے موضع میں ایک چوکیدار مقرر ہے جس کو 120 روپے فی ششماہی تنخواہ دی جاتی ہے جو گھروں پر باچہ ہو کر وصول ہوتی ہے اس باچہ سے خانہ بیوگان جس کی اراضی نہیں ہے امام مسجد، نمبرداران متبختی ہیں۔ جو جرمانہ کل گاؤں پر عائد ہو وہ بھی گھروں پر باچہ ہو کر ادا ہوتا ہے۔

5۔ ہمارے گاؤں میں کوئی چاہ نہیں ہے اور نہ لگ سکتا ہے۔

6۔ اس وقت کوئی چندر دیہہ ہذا میں نہیں ہے۔ اگر آئندہ کوئی چندر لگائے تو بغیر رضامندی مالکان نہیں لگا سکتا ہے۔ جب حسب رضامندی چندر لگاوے تو غمی شادی پر غلہ مفت پئیں کر دیوے گا۔ جس کی اجرت نہ دی جاوے گی۔

7۔ ہمارے گاؤں میں کوئی زمین برآمد نہیں ہوتی ہے۔ نہ کوئی ندی کسی قسم کی ہے۔

A perusal of the relevant clauses of the wajib-ul-arz of each of the villages reproduced above shows that the rights of the proprietary body of the village in shamilat-e-deh are neither exclusive nor unlimited. Their rights in shamilat-e-deh are confined to grazing their cattle etc. and not beyond that. Sale of the property comprised in shamilat-i-deh is not restricted but it cannot be lost sight of that the vendee under no circumstances can acquire a title better than the

one the vendor himself has. As wajib-ul-arz of each village provides that any tree small or big growing in ups and downs of the property would vest in the government, such right cannot not be extinguished with the sale of the property. Nor can the vendee be allowed to act in derogation of such clauses while dealing with the property. It is in view of this essential aspect that it has been provided in the wajib-ul-arz that shamlat-i-deh could neither be broken up for cultivation nor partitioned without the permission of the government. The rationale behind this recital is to protect the rights of the government on the one hand and those of the owners on the other. This is what has been provided under Rule 4A framed under section 76 (c) of Forest Act 1927; that no person shall clear or breakup for cultivation or any other purpose any land in the area reserved as charagaha (Forest and pasture Land) and this is what is provided in rule 4B that no person or persons in any estate shall partition jointly owned lands (shamilat-i-deh) without the sanction of the provincial government. If this property is allowed to be broken up for cultivation or partitioned without the permission of the government, quite obviously, the government would be at the losing end. We do not understand how suitable chunks of land were chosen and taken possession of without having recourse to the legal proceedings and without the permission of the government in gross, grave and glaring violation of the law governing the partition of such land. We do not understand how the trees and bushes running in millions were cut from the shamlat-i-deh and how was it converted into a building site. We also do not understand how the government slept over its rights and sat around like an idle spectator when everything was ruined and run amuck by the Bahria Town or for that matter any other builder without realizing

that fauna and flora are better served by the natural growth of trees than the mountains of iron, cement and concrete. Why such sights did not boil the blood of the officials working in the revenue hierarchy, right from the patwari up to the Senior Member Board of Revenue? Why did the officials of the Forest Department, right from the Forest Guard to the Chief Conservator and the Secretary collude with the Bahria Town in its predacious motives and piratical designs? What elevated the Bahria Town and its managers to a level where the nabbing hands of the law enforcers could not reach them notwithstanding all these excesses and atrocities were reported to the NAB. Government land was aggressively taken possession of and lavishly enjoyed by a cabal of land grabbers but those sitting in the chambers of power at every level aided and abetted them as if it is not for them to prevent such acts and that some force from above or abroad would land in to prevent them. It is something terrible because official collusion of this magnitude may not have been experienced even in the nightmare. We against this backdrop would be rather callous and even cruel to see the landgrabbers grab the property and destroy fauna and flora of the area and do nothing to stop, if not break, the hand behind it.

7. Now the question arises how far section 3 of The West Pakistan Land Disposition (Saving of Shamlat) Ordinance 1959 neutralizes the effect of the wajib-ul-arz as was contended by the learned Sr. ASC for Bahria Town. Before we appreciate this aspect of the case it is worthwhile to reproduce section 3 of the Ordinance which reads as under:

“3. Shamlat not included in disposition of land unless specifically mentioned as subject matter of the disposition.— (1) 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 therein the Shamilat or any portion thereof appurtenant to such land, unless such Shamilat or a portion thereof has been specifically mentioned as the subject matter of the disposition.

(2) This section shall not affect any decision of a competent court or authority given before the commencement of this Ordinance:-

(a) if it is not open to review, appeal or revision, or

(b) if it is so open, no such proceedings have been taken, and the decision has consequently become conclusive between the parties.”

A perusal of the provision reproduced above shows that the disposition of any land effected by the owner by means of a writing or orally made before or after the commencement of the Ordinance, words or phrase of general nature, purporting to convey rights and interest incidental, contingent or collateral to that land shall not be so construed as to include therein shamilat or any portion thereof appurtenant to such land unless shamilat or portion thereof has been specifically mentioned as the subject matter of the disposition. This section by no stretch of imagination neutralizes the effect of any of the clauses of wajib-ul-arz dealing with shamilat-i-deh nor does it override or extinguish rights of the government in shamilat-i-deh. We, therefore, do not agree with the argument of the learned Sr. ASC for the Bahria Town. The argument that such restriction being inconsistent with the fundamental rights shall be void is devoid of force when the wajib-ul-arz is an outcome of the consensus between the village proprietary body and the government of the province, therefore, neither the village proprietary body nor the government can resile therefrom. This Court in the case of **Ghulam Hussain v. Allah Baksh** (1991 SCMR 1386) while interpreting section 3 of the Ordinance, has already held as under:

“As regards the three last cases, it maybe noted that these related to share in the shamilat. In the first one it was held that since plaintiffs did not base their claim upon any right as proprietors of any land assessed to land revenue, they were not entitled to the share in the shamilat. This was in view of the fact that only land holders had/have any right in shamilat. The Ordinance I of 1959, however, envisaged that even if land- holding is sold it will not be taken that Shamilat rights

have also been sold unless specifically so stated: The right in Shamilat was no more contingent on land holding. The reasons maybe that the legislature took into account the fact that because of drought or famine, a landholder may sell his land, go away to any other place or in the neighbourhood for livelihood and still retain his cattle and graze them in the old pasture of shamilat, or, that he was not to be ousted from the community by depriving him of his share in the shamilat. Reasons maybe diverse but it is clear that the ordinance recognized two rights independently of each other and not contingent, i.e. right in the land proprietorially held a right in the shamilat land. The second case too, is based on contingency of land holding for share in shamilat and if the former is lost by adverse possession the latter is also lost. But this too is prior to the Ordinance. In the third case, the right was lost because from cause of action suit was not filed within limitation."

8. The argument that where wajib-ul-arz of village Manga does not restrict partition of property nor does it recognize any right of the government in the shamilat-i-deh, therefore, the case of respondent No. 4 has to be looked at differently is not correct as the wajib-ur-arz of village Manga clearly provides that the property comprised in shamilat-i-deh would not be broken up for cultivation or any other purpose nor would it be partitioned without the permission of the government. Rule 4A and 4B of the Rules of Guzara lands or forest and waste lands of Murree and Kahuta Tahsils, other than Reserved and Protected Forests under section 76 (c) of the Act XVI of 1927 as mentioned-above also provide similar restrictions. The argument that where a great deal of construction work has been done, many plots have been transferred and superstructure has been raised thereon following the previous practice, right or wrong, any order of this Court undoing all that has been done would not only create complications but also deprive the persons investing in the project of a right accrued which is not in conformity with the dictum of this Court rendered in the case of **Government of Pakistan v Manzoor Brothers** (supra) has not impressed us as the departure from the rules has its origin in collusion rather than practice. Needless to say the one or any number of wrongs cannot make a right. The

case of **Government of Pakistan v Manzoor Brothers** (supra) being distinguishable on facts and law has no relevance to the case in hand. The argument that if this Court comes to the conclusion that Shamilat land could not be partitioned, broken-up for construction or any other purpose, any declaration given by this Court cannot operate retrospectively has also not impressed us when everything in this case appears to have been done collusively. The judgement rendered in the case of **Application by Abdul Rehman Farooq Pirzada versus Begum Nusrat Ali Gonda v. Federation of Pakistan** (PLD 2013 SC 829), too, has no relevance to the case in hand when the controversy as to the rights of the owners in shamilat-i-deh has already been set at rest by this Court as back as 1991 in the case of **Ghulam Hussain v. Allah Baksh** (supra). The argument that no exception could be taken to the sale and partition of the property where none of the co-owners in shamilat-i-deh has raised even a whisper in this behalf is also devoid of force because the interest of the co-owner in shamilat-i-deh is not exclusive and unlimited as held-above and that no property comprised in shamilat-i-deh could be partitioned without the permission of the government and without having recourse to the legal proceedings under the relevant law.

9. As a sequel to what has been discussed above, we have no hesitation to hold that any area of shamilat-i-deh broken up for cultivation or any other purpose, partitioned, taken possession of or constructed in violation of the wajib-ul-arz and rule 4A and 4B of the Rules mentioned-above, being illegal and unlawful is of no effect. The area thus broken up, partitioned, taken possession of or constructed be retrieved by the government forthwith. All construction work in shamilat-i-deh be stopped forthwith. The

construction work carried in private ownership would continue only if it is okayed by the RDA and EPA. The persons and officials of the revenue department be proceeded against. The NAB is directed to investigate the case and file references against all those who are found responsible for committing, aiding and abetting the crime at any level or in any form.

10. If at all a great deal of construction work has been done on the property comprised in shamilat-i-deh, plots have been transferred, superstructure has been raised thereon and third-party interest has been created therein, a spade would remain a spade and an illegal act would remain illegal. However, the questions what to do with the allottees, how to deal with their cases and what remedial measures could be taken in this behalf shall be dealt with by the implementation Bench. We, therefore, request the Honourable Chief Justice of Pakistan to constitute an implementation bench in this behalf to deal with the questions mentioned above. It is, however, added that the Provincial Government and the Forest Department would take care of the areas of the Shamilat-i-deh to develop it by afforestation and reforestation.

11. For the reasons discussed above, Criminal Original Petitions No. 57 of 2015 and 42 of 2017 in Suo Motu Case No. 10 of 2005 as well as Criminal Misc. Applications No. 1879 of 2016, 1292 to 1293 and 1926 of 2017 in Criminal Original Petition No. 57 of 2015 and CMA. No. 6998 of 2017 are disposed of in the terms mentioned above.

JUDGE

I had the privilege of going through the judgement authored by my learned brother Justice Ejaz Afzal Khan, but have not able to persuade myself to agree with the same and would therefore respectfully add my dissenting note.

JUDGE

JUDGE

Announced in open court at Islamabad on _____

JUDGE

Approved for reporting

Barrister Sohaib Shahid

ORDER OF THE COURT

With the majority of two by one, the final order of this Court is recorded in paragraphs 9 and 10 of the majority judgement.

JUDGE

JUDGE

JUDGE

Islamabad

04 May 2018

Barrister Sohaib Shahid