

Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 1003 of 2015

Yasmin Haider

Vs

CDA, etc

PETITIONER BY: Dr. Muhammad Aslam Khaki, Advocate.
Ms Yasmin Haider, Advocate.
Respondents By: Mr Amir Latif Gill, Advocate for CDA.
Mr M. Saif Ullah Gondal, Asstt. Attorney General.
Kh. Muhammad Imtiaz, Assttt. Attorney General.

DATE OF HEARING: 16-05-2019.

ATHAR MINALLAH, CJ.- The petitioners have invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 challenging conversion of a plot earmarked as a park since decades for the extension of a hospital.

2. Pakistan was created as an independent sovereign State in 1947 after a long drawn struggle. The first task of the Government was to select a suitable site for establishing the Capital of the State. After extensive deliberations, research and consultations, involving reputable internationally renowned town planners and consultants, it was decided to establish a planned and developed city as the Capital of Pakistan at the foothills of the Margalla mountain range. It was named as the Islamabad Capital Territory and it has been described in Article 1(2)(b) of the Constitution as the "Federal Capital". After the selection of the site an onerous exercise was undertaken through experts and town

planners of international fame to prepare a master plan. The master plan prepared for the Federal Capital was a work of art and it was acknowledged as an enviable achievement internationally. As part of the master plan and to enable its execution, the Capital Development Authority (hereinafter referred to as the **"Authority"**) was established, pursuant to the promulgation of the Capital Development Authority Ordinance, 1960 (hereinafter referred to as the **"Ordinance of 1960"**). Sector G-6 is amongst the earliest of the sectors that were planned and developed and has existed since the foundation of the Federal Capital was laid in 1960. At that time the population was sparse and in order to meet the medical requirements the Polyclinic Hospital was constructed in 1967 in Sector of G-6 (hereinafter referred to as the "Hospital") . Adjacent to the Hospital was an open space earmarked for establishing a park. During the war between Pakistan and India in 1971 the Government of the Argentine Republic (hereinafter referred to as **"Argentine"**) had stood out for its support to Pakistan and its people at the United Nations Security Council and the United Nations General Assembly. In order to recognize, acknowledge and remember for times to come the resolute and distinct support of the Government and people of Argentine, the then President of Pakistan, Zulfikar Ali Bhutto, inaugurated the adjacent open space covering an area spread over 2.5 acres as a park which was named as "Argentine Park". When the Hospital was established and Argentine Park was inaugurated, not more than four residential sectors had been developed in the Islamabad Capital Territory, which is spread over an area of 1400 squares miles. The Argentine Park has, therefore, offered recreational facilities to the inhabitants of the Federal Capital and simultaneously reminded the nation regarding the historic role played by the people and Government of Argentine during challenging times. With the

passage of time a phenomenal increase in the population of the Federal Capital was witnessed. Instead of establishing more hospitals to serve the inhabitants of the Federal Capital, the Federal Government directed the Capital Development Authority to convert the use of the plot known as Argentine Park so that it could be used for the extension of the Hospital. The Authority, in disregard of its statutory obligations, blindly accepted the dictation of the Federal Government and thus purportedly converted the category of the plot from a park to enable it to be used for construction of buildings as part of the extension of the Hospital. It is noted that the Member (Planning) of the Authority had appeared on 12-05-2017 and had candidly conceded that the decision was taken solely pursuant to the direction of the Federal Government and that other options had not been examined or considered on the basis of sound principle of town planning to save the 'Argentine Park'. While this petition was pending, the august Supreme Court, vide order dated 15.01.2019, passed in H.R.C No.46028-G of 2018, observed that all orders passed in this petition, which may not have been in consonance with the law and did not fall within the purview of the case titled "Ms. Shehla Zia etc vs. WAPDA", **PLD 1994 SC 693** would not be an impediment in the way of the extension and expansion of the hospital. However, the apex Court had directed for early disposal of the instant petition.

3. The learned counsels and the learned Deputy Attorney General have been heard at length. As already noted above, on 12-05-2017 the Member (Planning) of the Authority had unequivocally stated that no effort was made on the basis of sound principles of town planning to save an open space i.e the Argentine Park. He could also not give a plausible explanation for sacrificing the Argentine Park

instead of considering other options for extension of the Hospital or its relocation. It is alarming that during the course of proceedings in the instant petition, the Director General of Pakistan Environmental Protection Agency had appeared and she seemed to be visibly helpless in enforcing the mandate of the statute under which her office has been created. The Federal Government appears to have been bulldozing its plans for extension of the Hospital in violation of the provisions of the Ordinance of 1960, the regulations made there under and also the Pakistan Environmental Protection Act 1997 (hereinafter referred to as the Act of 1997")

4. The learned counsels have been heard and the record perused with their able assistance.

5. The controversy in the instant case is regarding the conversion of a public park, which has existed since the foundation was laid to establish the Federal Capital. The Argentine Park is not just an open space used for recreational purposes. It has a historical importance because and it is a symbol of the bond between the people of Argentine and Pakistan. Its inauguration in 1973 and naming it as "Argentine Park" was to commemorate the unforgettable stance of the Government of Argentine in favour of Pakistan at the United Nations Security Council and the United Nations General Assembly during the challenging times related to the events of 1971. It is an admitted position that "Argentine Park" is situated in a residential sector, which was amongst the first to be established in the Federal Capital. The Hospital was also the first medical institution established for providing medical facilities to the citizens of the capital. The conversion of the 2.5 acres of area of "Argentine Park" for the extension of the Hospital is definitely in violation of the fundamental rights guaranteed under the

Constitution, particularly under Article 9 besides being in violation of the Ordinance of 1960, the Act of 1997 and the regulations made under both the statutes.

6. The august Supreme Court in the case titled 'Ardeshir Cowasjee and 10 others vs. Karachi Building Control Authority (KMC), Karachi and 4 others', **1999 SCMR 2883** has observed and held as follows:-

"The use of the Park involves enjoyment of life which is covered by the word life employed in Article 9 of the Constitution as interpreted by this Court in the above quoted extract from the judgment in the case of Ms. Shehla Zia and others v. WAPDA (supra). The appellants, therefore, have the right to ensure that the official respondents do not grant approval of a plan in respect of the Plot which may be violative of the provision of the Order and the Regulations and which may impinge on their right of enjoyment of life."

7. The august Supreme Court, in the above judgment, has declared that the use of a Park by the citizens is inextricably linked to enjoyment of life and thus is covered under the right to life guaranteed under Article 9 of the Constitution. It was held, therefore, that the law enunciated by the august Supreme Court in the case of 'Ms. Shehla Zia and others (supra)' is attracted. In the case titled "Mansoor Sharif Hamid and others vs. Shafique Rehman and others", **2015 SCMR 1172**, the august Supreme Court has observed and held that law restricting the conversion of land usage in housing schemes is not to be

applied rigidly and pedantically but it was meant to protect the public interest and public convenience. It has been further held that public interest suffers when amenity plots are converted to other use. In the case titled "Moulvi Iqbal Haider vs. Capital Development Authority and others", **PLD 2006 Supreme Court 394** has observed and held as follows:-

"What we have understood from above documents is that in the Capital territory, a master plan was prepared at the time of its inception and subsequently under different schemes, different sectors were set up. In this behalf, reference to the preamble and sections 11 and 12 of the Ordinance, 1960 may be made. In the scheme of a sector, some of the areas have been earmarked as a Public Park to attract general public. According to Article 12(3) of the Regulation, the public parks, playing fields and graveyards are to be developed and maintained by the CDA. Thus the conclusion is that during the classification of the plots, under Article 3 of the Regulation, if a piece of land has been earmarked for purpose of Public Park, same cannot be leased out and CDA itself is bound to develop the same."

8. The august Supreme Court, in the aforementioned judgment, has also observed that if a public park is earmarked in a housing scheme then it creates a right amongst the public and that right includes their entry in the park without any obstacle and such a right has been declared as a fundamental right enshrined in Article 26 read with Article 9 of the Constitution. The learned Lahore High Court

in the case titled "Manzoor Bhatti vs. Executive Officer, Cantonment Board, Multan and another", **PLD 2002 Lahore 412** declared the conversion of a park to another use as illegal and having been done without lawful authority. The learned Lahore High Court, in the case titled "Shehri-CBE through General Secretary and 15 others vs. Lahore Development Authority through Chairman and 6 others", **PLD 2012 Lahore 362** rendered by a full bench has held that the existence of parks and playgrounds has become an integral and necessary part of modern urban life and that the right of inhabitants of a locality to demand non-conversion of park/playground to any other use was a fundamental right emanating from Article 9 of the Constitution. It is, therefore, obvious that the existence of open spaces and parks in urban areas is a fundamental right guaranteed under the Constitution and its conversion or putting to another use is a violation thereof.

9. Before proceeding further it would be pertinent to discuss another most crucial dimension relating to the dispute in the petition in hand and that is the impact of ignoring the environmental concerns while sacrificing open spaces and parks for other purposes. In an earlier judgment it was emphasised and it is reiterated that 'it is an undeniable fact that unregulated human activities such as illegal construction, urbanization and violation of the master plan have serious consequences which inevitably leads to irreversible environmental degradation and climatic changes. Pakistan is ranked amongst the top ten countries of the world which has been declared as most vulnerable to the life threatening outcome of climate change. It has been assessed as amongst those countries which have the highest rate of deforestation.

Experts have classified Pakistan as a prime target of global warming. Unregulated human activities, particularly illegal construction and urban sprawl are prime causes for global warming, air pollution, water scarcity, loss of forests, extinction of agricultural land and wild life. The Islamabad Capital Territory already faces a serious water crisis and it would definitely be exacerbated if effective environmental management is not implemented on an urgent basis. According to a report compiled by the Asian Development Bank, "Climatic changes are expected to have wide ranging impact on Pakistan, affecting agricultural productivity, water availability and increased frequency of extreme climatic events". Floods, long spells of drought, heat waves etc experienced in various parts of Pakistan raises a red flag for the policy makers and every citizen to declare an environmental emergency before the damage becomes irreversible. Availability of clean water and keeping the environment free from pollution has a direct nexus with the fundamental right guaranteed to every person under Article 9 of the Constitution. Life is inextricably dependent on safeguarding atmospheric green house. Environmental degradation and adverse impacts of climatic changes inevitably cause loss of lives, diseases and increase in poverty. A World Bank study carried out in 2015 has estimated that environmental degradation is costing Pakistan almost nine per cent of its GDP. The challenges of environmental degradation and adverse climatic changes have become too obvious in Pakistan to be ignored. Pakistan has

international commitments which ought to be implemented in letter and spirit. What is required at this critical juncture is strict implementation of the precautionary principle in order to check irreversible damage to the environment. The principle of precautionary principle was given recognition by incorporating Principle 15 in the United Nations Rio Declaration on Environment and Development (1992) which reads as:" In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation". In this context it would be beneficial to refer to the report of a Commission which was constituted by this Court exclusively to investigate and make recommendations regarding environmental degradation and failure of regulatory framework in the Islamabad Capital Territory.' In view of the critical situation regarding climate changes and environmental degradation, there is an urgent and greater need to protect and safeguard open spaces, play grounds and parks rather than converting them to buildings made from brick and mortar. Parks and urban green spaces have multiple benefits besides providing areas for recreational facilities. The existence of parks in urban areas inevitably impacts positively on human health and well being. It helps in social cohesion and promoting tourism. It promotes biodiversity, reduces urban heat and protects ecosystems. The elimination or extinction of a park thus violates the

fundamental right guaranteed under Article 9 of the Constitution and thus attracts the law enunciated by the august Supreme Court in Ms Shehla Zia case supra.

10. In the case in hand, the record has been carefully perused and this Court has no hesitation in declaring that the decision to convert the use and purpose of 2.5 acres of the Argentine Park for the extension of the Hospital is ultra vires the Ordinance of 1960, the Act of 1997 and in blatant violation of the fundamental rights of the public guaranteed under the Constitution, particularly Article 9. Subsection (2) of Section 5 of the Ordinance of 1960 explicitly provides that it is the duty of the Authority to act on the sound principles of development, town planning and housing and while discharging its functions that it shall only be guided to the extent of questions of policy by such directions as the Federal Government may give from time to time. In the instant case the direction for conversion was not a question of policy, in fact it related to town planning. The autonomy of the Authority has been guaranteed under the Ordinance of 1960 in matters relating to town planning and development. The Authority, by acting on the dictation of the Federal Government, has definitely violated the legislative intent of the Ordinance of 1960. Even otherwise the Argentine Park could not have been converted for any other purpose let alone extension of the Hospital. The decision was contrary to the principles and law enunciated by the apex Court in the above mentioned judgments. The purported conversion of Argentine Park is, therefore, declared as illegal, without lawful authority and jurisdiction. This petition is thus accordingly allowed and disposed of by directing the Authority and the Federal Government to restore the Argentine Park for the use of the general public.

11. Before parting this Court would like to reiterate what has been consistently observed in several other judgments regarding the alarming and abysmal state of the rule of law in the Islamabad Capital Territory, which is the Capital of Pakistan. Several laws, despite being on the statute books, are not being enforced. The Master Plan which had taken care of all the essential factors, particularly preservation of the landscape and protection of the environment, has been ruthlessly damaged and destroyed by the public functionaries entrusted with the onerous task to hold it as a trust on behalf of the people of Pakistan. So much so that the Authority, which was its custodian, most definitely has abdicated its statutory obligations, as is obvious from the petition in hand. The Federal Capital Territory is spread over more than 1400 sq miles and this entire area was to be planned and developed as the Federal Capital. The Hospital was built in 1967 when the urban population of the Federal Capital was not more than a few thousand. It was the duty of the Authority to plan and construct more hospitals in the area spread over 1400 square miles rather than destroying a park having historical importance. It is an irony that the Authority itself has a major role in destroying the Master Plan. The victims of this destruction have been none other than the lower income groups and, most serious of all, the landscape and environment. It is an inexcusable failure of the State and its institutions to fulfill its fiduciary duties and obligations to ensure that the larger public interest prevails. This Court has been consistently observing and reiterating that Islamabad, the Capital of Pakistan, has become a classic example of the rule of men rather than the rule of law. The looming imminent environmental crisis on account of lack of planning, particularly failure

and neglect of the Authority in having regard to sound principles of town planning and respect for observing the environmental laws, such as the Act of 1997, can neither be taken lightly nor ignored. The Authority, its Board members and every official is responsible for failing to fulfil obligations and duties under the Ordinance of 1960 and they need to be held accountable because they have endangered lives and have not been fair to the future generations. Saving parks and urban green spaces means safeguarding the environment and indeed saving the environment from further destruction and degradation should be a top priority and must take precedence over the interests of a few. It is the larger public interest that must prevail and protecting the environment is definitely the most important public interest. If urgent steps are not taken then posterity will never forgive those who today are in a position to enforce and implement the spirit and essence of laws which have been flagrantly and mercilessly violated for more than seven decades. Laws which were supposed to protect the rights of the citizens have been used as tools to abuse those very rights. Justice delayed is justice denied but it is never too late to put an end to the perpetuation of injustice. "Fiat justitia ruat caelum; Let justice be done though the heavens fall". The Federal Government is directed to safeguard the historical and environmental importance of the Argentine Park. The Authority, having regard to its statutory obligations, is directed to consider, on the basis of sound principles of town planning, other options for the expansion of the Hospital or its relocation within the Islamabad Capital Territory which is spread over an area of 1400 square miles because the 2.5 acres land of Argentine Park cannot be put to any other use on the

touchstone of the law enunciated by the august Supreme Court in the case of Ms Shehla Zia supra.

CHIEF JUSTICE

Announced in the open Court on 05-07-2019.

CHIEF JUSTICE

Approved for reporting.

*Asif Mughal**

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