

JUDGEMENT SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Writ Petition No.3074 of 2011.

Hamida Farhat Burki
Vs.
Capital Development Authority & three (3) others.

Petitioner's by: **Barrister Afan Khan, Dr. Muhammad Aslam Khaki, Advocates for petitioners in their respective petitions.**
Respondents by: **Mr. Tariq Mehmood Jahangiri, Advocate for respondents**
Date of Decision: **18.02.2015.**

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Aamer Farooq, J.- Through this judgement, I, intend to decide the instant writ petition as well as writ petition No.2535/2011, 3157/2011, 3164/2011 and 136/2012, as common question of law is involved.

2. The petitioners are ex-lessees and presently licensees of plot No.6, 7, 8 and 21 situated at National Park Road Area, Islamabad. In all the cases the petitioners were granted lease by Capital Development Authority (CDA) with respect to their respective, above referred, plots for the purposes of developing nurseries. After expiry of the lease periods the status of lessees was converted into licensees and they were allowed to retain the property on the referred terms. The licenses were on annual basis and were for consideration. In 2009, CDA granted leases to some of the lessees of the nursery plots located at National Park Road Area, Islamabad, however, in case of the petitioners, their status continued as licensees. In this regard, respondent No.1 took the referred decision through its meeting held on 16.09.2009. Subsequently, on 31.10.2011, respondent No.1 terminated the licenses of the petitioners on the ground that licenses of all the occupants at National Part Road Area, Islamabad

are being cancelled so that fresh licenses could be granted through open auction/bidding. The petitioners are aggrieved of the letter dated 31.10.2011.

3. Learned counsel for the petitioners, inter alia, submitted that they occupied the properties initially as lessees and now as licensees for a considerable period of time and have acquired interest in the same. It was further submitted that respondent No.1 has discriminated inasmuch as leases of some of the occupants have been renewed whereas the petitioners are not being allowed even to continue as licensees. It was further submitted that respondent No.1 is not acting in a fair and transparent manner as no intimation for the auction/bidding of the properties was ever intimated to the petitioners; that the petitioners have vested rights in the properties which cannot be taken away by the respondents. Reliance was placed on case titled "Pakistan etc. vs. Hussain Ali Shah" (*PLD 1960 SC 310*).

4. Learned counsel for the respondents vehemently opposed claim of the petitioners and submitted that the licenses of all the occupants at National Park Road Area, Islamabad have been cancelled and in pursuance of the policy of CDA the properties are being put to auction through open bidding, for allocation of licenses. The petitioners are at liberty to participate in the bidding process. Learned counsel for respondents placed reliance on case titled "Mega Sign and others Vs. CDA & others" (*2014 CLC 516*), in the matter of Human Rights case No.4668/2006 (*PLD 2010 SC 759*), in the cases titled "Tariq Aziz Ud Din & others" (*2010 SCMR 1301*), "Zafar Ali Vs. The State" (2008 YLR 2071) and "Rehmat Ullah Khan Vs. GOP" (*2003 SCMR 50*).

5. The petitioners hold the above mentioned properties on license. License is defined in section 52 of the *Easements Act, 1882*, and reads as follows:

52. "License" defined.—Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a license."

The plain reading of the above section shows that definition of license is grant of permission to do something which otherwise would be unlawful. However, a license does not amount to an easement or an interest in the property. The nature of license was elucidated in the case titled "Rehmat Ullah Khan & others Vs. GOP" (2003 SCMR 50) as follows:

5. The second idea that comes to one's mind can be of a licence. Licence is defined in the easements Act which we believe is not a case of the petitioners/plaintiffs. Coming to the dictionary meaning of the word "licence" we may refer to Fifth Edition of Black's Law Dictionary, page 829. It defines licence as:

"The permission by competent Authority to do an act which, without such permission, would be illegal, a trespass, or a tort. Leave to do things which licensor could prevent. Permission to do a particular thing to exercise a certain privilege or to carry on a particular business or to pursue a certain occupation. Permission to do something which without the licence would not be allowable. A licence is not a contract between the State and the licensee, but is a mere personal permit. Licence with respect to real property is a privilege to go on premises for a certain purpose, but does not operate to confer on, or vest in, licensee any title, interest, or estate in such property."

6. Similarly, in case titled "Zafar Ali Vs. The State" (2008 YLR 2071), licensee was elucidated as follows:

"Under the law "license" is a personal privilege to do some particular act or series of acts on the land without possessing any estate or interest therein, and is ordinarily revocable at the will of the licensor and is not assignable. Thus a license is not a contract between the licensor and licensee but a mere personal permit therefore a license is distinguishable from an "easement", which implies an interest in the land and a "lease" or right to take the profits of land. Whereas a legal right in its strict sense is one which is an ascertainable claim, enforceable before Courts and administrative agencies. In its widest sense, a legal right has to be understood as any advantage or benefit conferred upon the person by a rule of law. Thus it is a right of a party recognized and protected by a rule of law, the violation of which would be a legal wrong done to his interest and respect for which is a legal duty even though no action may actually lie."

7. A license can be revoked under section 60, however, if it is coupled with the transfer of property and such transfer is in force or the licensee acting upon the license has executed work of a permanent character then the same cannot be done.

8. The case of the respondents is that all nurseries situated at National Park Road Area, Chakshazad, Islamabad are being transferred on licenses through open auction/bidding process as a matter of policy and the petitioners are not being discriminated. This Court in case titled “M/s MEGA SIGN & others Vs. CDA & others” (2014 CLC 516) observed as follows:

11. “The license in question ostensibly confers a right in favour of its holder, but at the same time, it cannot lost sight that the right which was alienated in favour of the petitioners originally belong to the state and the State being a virtual entity exercised it authority through the public functionary, therefore, whenever a right belonging to the State is going to be alienated, the inventor/public functionary is under obligation to protect at preserve the transparency and to ensure the maximum gain for the public exchequer. In order to achieve the goal, legislature by way of principle as well as delegated legislation has settled the procedure. The pivotal aspect of the said exercise remains that equal opportunity shall be extended to all the potential aspirant, who intend to acquire the State Property, which is being alienated and for achieving this objective it is mandatory for public functionary to invoke such provisions of the statute, which ensure maximum participation of competitors with an object to gain maximum advantage.

12. Inspection of the procedure adopted for grant of licenses in question on the above touch stone reflects that the very fundamental exercise of public notice was not followed, rendering the whole exercise superfluous.

13. At the same time, while dealing with the State Property, it is also the duty of the public functionary to ensure transparency and where a right has been accrued without adhering to the parameters highlighted above, the principles of locus poenitentiae would not be applicable.

14. Admittedly, the licenses were granted to the petitioners without any competitive process under the prescribed rules, therefore, the petitioner cannot claim to have a vested right to continue for the license period. There was also violation of Article 18 of the Constitution as no other competitor except the petitioner as individuals were

invited for bidding. The action has been taken across the board against all the licenses which were issued without any competitive process so there arises no question of discrimination.

15. Under the principle of locus poenitentiae, the competent authority is vested with powers to repeal an illegal order. In case of “Raunaq Ali Vs. Chief Settlement Commissioner” (PLD 1973 SC 236) the Hon’ble Apex Court held that the High Court was within its powers to refuse relief in writ jurisdiction, where the impugned order the effect of fostering justice and righting a wrong, even though the authority concerned had acted clearly without jurisdiction. Relief under writ jurisdiction cannot be extended in aid of injustice. See 1998 SCMR 516.

9. Likewise Hon’ble Supreme Court of Pakistan in the case of “Tariq Aziz ud Din & others” reported as (2010 SCMR 1301) and in the case of Human Rights Petition No.4668 of 2006 (PLD 2010 SC 759) emphasized that the Public Functionaries are supposed to act in a fair and transparent manner.

10. The petitioners have no vested right in the properties which is being taken away by respondent No.1 through impugned order dated 31.10.2011. Their status, as mentioned above, is that of licensees and by virtue of section 60 ibid as well as case law, mentioned above, a license is a personal right which can always be revoked. The case law titled “Pakistan & the Chief Controller of Imports & Exports Vs. S. Hussain Ali Shah A. Fazlani” reported as (PLD 1960 Sc 310) is not relevant in the instant case as it pertains to grant of import license. The policy of CDA to convert all leases to licenses and grant a license through process of open auction/bidding is not exceptionable as it is an established principle of law that the courts do not interfere in the policy matters. Learned counsel for the respondents has made a categorical statement that the petitioners are not being discriminated in any way and the policy to grant licenses, with respect to the nurseries situated at National Park Road Area, Chakshazad, Islamabad, applies across the board. The petitioners have not placed on record anything subsequent to impugned letter dated 31.10.2011 to show that some of the occupants of plots of nurseries located at National Park Road Area, Chakshazad, Islamabad are retaining the nurseries or continuing with the same on lease.

11. The petitioners as licensees are entitled to protection provided under sections 63 & 64 of the Easements Act, 1882.

12. In view of above, the instant writ petition as well as writ petition Nos.2535/2011, 3157/2011, 3164/2011 and 136/2012 are dismissed, however, the petitioners are entitled to protection under sections 63 and 64 of the Easements Act, 1882.

Altar Malik

Approved For Reporting

(AAMER FAROOQ)
JUDGE