IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE MUNIB AKHTAR
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

AFR

Civil Appeal No.639 of 2014
(On appeal against judgment of the High Court of Sindh at Karachi dated 04.12.2013 and 04-02-2014 in C.P.No.1143 of 2011)

Mall Development (Pvt) Ltd — ***Appellant(s)***

Versus

Waleed Khanzada & others — ***Respondent(s)***

For the Petitioner(s) : Syed Ali Zafar, ASC

For the Respondent(s) : Mr. Khalid Javed, ASC For R.3
Malik Naeem Iqbal, ASC - For R.4.
In Person. R.1 (via V.L Karachi)
Ex Parte ___ R.2.

Date of Hearing: 12.05.2022.

JUDGMENT

IJAZ UL AHSAN-. By way of this Appeal, the Appellants have challenged a judgment of the High Court of Sindh, Karachi dated 04.02.2014 passed in Constitutional Petition No. 1143 of 2011 (hereinafter referred to as "**Impugned Judgment**"). Through the Constitutional Petition, the Respondent (*Barrister Waleed Khanzada)* challenged the merger by the Appellants of a plot of land measuring 3600 Square Yard plot (hereinafter referred to as "**Adjacent Plot**") with an 8000 Square Yard commercial plot titled as "Zam-1" (hereinafter referred to as "**Commercial Plot**"). The case of the Respondent was that the 3600 Square Yard plot, being an amenity plot by nature, could not have been merged with the 8000 Square Yard commercial plot. The learned High Court,

through the Impugned Judgment, allowed the Constitutional Petition filed by the Respondent.

2. The necessary facts giving rise to this *lis* are that, on the basis of an agreement dated 17.07.1987 between the Appellants and DHA (*Respondent No. 04*); DHA sold a plot measuring 8000 Sq. Yards (hereinafter referred to as "**Agreement with DHA**") to the Appellants. Admittedly, Clause 02 of the Agreement with DHA stipulated that only 70% of the area of the Commercial Plot could be constructed upon whereas, 30% of the area of the Commercial Plot *shall* be utilized for providing amenities. Since leasehold rights of the Commercial Plot vested in DHA, therefore, a C-lease was executed on 16.09.1998 whereby, leasehold rights of the Commercial Plot were transferred in favour of the Appellants by DHA. On 14.12.2005, an Amending Deed was executed, through which, the Appellants purportedly acquired the adjacent plot measuring 3600 Sq. Yards, located on the western side of the original 8000 Sq. Yard plot. Resultantly, as averred by the Appellants, the area of the Commercial Plot increased from 8000 Sq. Yards to 11,600 Sq. Yards. The Respondent, after learning that the Adjacent Plot had been acquired by the Appellants and, that they were undertaking construction on it, filed a Constitutional Petition. They took the stance that, since the Adjacent Plot was an amenity plot on which DHA Park existed, therefore, the Appellants could not have raised any construction on it. The Petition of the Respondent was allowed vide the Impugned Judgment.

Aggrieved, the Appellants filed a CPLA before this Court against the Impugned Judgment.

3. Leave to appeal was granted by this Court vide order dated 17.04.2014 in the following terms: -

> *"Leave is granted, inter alia, to consider whether the High Court has decided the main issues involved in the matter without looking at the relevant record, in that, the master lease of the year 1972 in favour of DHA and the master plan; whether the learned High Court has overlooked the key fact of the case that according to the master plan of the year 1973, the plot i.e., 3600 square yards in question is part of a commercial plot and there has never been any change for its use from the commercial to that of public amenity; whether, as per the record, before the learned High Court and also before us, the plot in question has been or was ever converted as public amenity plot before its lease to the Petitioner and, therefore, neither it could be validly allotted to the petitioner for any commercial activity for it can be put to such a use. On the basis of the agreements of the respondent, leave is also granted on the points whether the master plan was never part of the record before the High Court and thus it was incumbent upon the learned High Court for deciding such crucial issue after first having requisition the master plan and then to decide about the nature of the plot (Note: Mr. Makhdoom Ali Khan though has submitted that master plan was requisitioned by the High Court vide order dated 15.08.2012 and was part of the record); and whether the lease in favour of the Petitioner with regard to 3600 square yards plot is a colourable transaction, non-transparent; and was granted to the Petitioner with mala fide intention as the Chief Executive of the Company, at the relevant point in time, was the employee of DHA and member of the Auction Committee, this would vitiate the entire transaction."*

4. The learned Counsel for the Appellants has argued that the High Court relied upon a 1975 Master Lease which does not relate to the Plot. He has further argued that the 1975 Master Lease relates to areas in Gizri and Korangi,

therefore, it has no connection with the dispute in hand. The learned ASC for the Appellant has further submitted that consideration in the sum of Rs.18 Million was paid to DHA for the Adjacent Plot. In this respect, he has relied upon a letter by DHA for grant of lease, dated 19.02.2003 and, counter affidavits filed by the Appellants and DHA. Learned Counsel for the Appellants has further argued that, nowhere does the Master Plan of 1972 mention that the plot in question is an amenity plot. Rather, the 1972 Master Plan clearly provides that it is a commercial plot. The learned Counsel for the Appellants has also argued that through the Impugned Judgment, the learned High Court has effectively made Clause 3 of the Agreement with DHA redundant. It has further been argued that the Appellants have not constructed any commercial building on the Adjacent Plot and, will follow and comply with the terms of the Agreement with DHA. The learned Counsel for the Appellants has additionally argued that the Second Building Plan submitted by the Appellants was tacitly approved by this Court while hearing CPLAs 297-K and 298-K of 1996, since the Second Building Plan was not struck down.

5. The Respondent-in-Person, on the other hand has supported the Impugned Judgment.

6. Learned Counsel for Respondent No. 03 has argued on similar lines, as argued by the Learned Counsel for the Appellants. He has mainly argued that the Impugned Judgment proceeds on an incorrect appreciation of the facts

and record. He has further argued that the Military Estates Officer was not made a party in the matter and, his point of view was not considered while passing the Impugned Judgment. He has further argued that the Adjacent Plot was validly added in the lease with the Appellants and, the learned High Court failed to consider this fact while passing the Impugned Judgment.

7. We have heard the learned Counsel for the parties and perused the record. Essentially, this Court has two issues before it for adjudication, namely: -

(i) Did DHA *"inadvertently"* mention the Adjacent Plot as DHA Park whereas it was part of the Commercial Plot?

(ii) Could the Adjacent Plot be utilized in any manner it deemed fit by the Appellant, if consideration was paid for it?

DID DHA *"INADVERTENTLY"* MENTION THE ADJACENT PLOT AS DHA PARK WHEREAS IT WAS PART OF THE COMMERCIAL PLOT?

8. The learned High Court in the Impugned Judgment has held that as per the Agreement with DHA dated 17.07.1987, the area of the Commercial Plot is 8000 Sq. Yards. The learned High Court has also concluded that, the C-Lease dated 16.09.1998 also mentions the area of the Commercial Plot to be 8000 Sq. Yards. We have examined the Agreement with DHA and also the C-Lease. Both of these documents admittedly mention the area of the Commercial Plot as 8000 Square Yards. The said documents are the foundation on which the transaction between the Appellants and the Respondent Nos. 3 and 4 is based. Nowhere in the

said documents is it mentioned that the Appellant is being allotted the Adjacent Plot. In this respect, Counsel for the Appellants has placed reliance on an Amending "Deed" dated 14.12.2005 to argue that subsequently, the Appellants acquired the Adjacent Plot by paying valuable consideration. As such, the Adjacent Plot was acquired validly and lawfully.

9. We are unable to agree with the learned Counsel for the Appellants. It is pertinent to mention that, in the Agreement with DHA, it has been mentioned that the Appellants *"in response to an Advertisement"* made an offer to buy the Commercial Plot which was accepted by the Respondent-Authority. Since leasehold rights of the Commercial Plot vested with the Respondent-Authority, therefore, a C-Lease to this effect was executed. Clause 5(b) of the C-Lease states that the lessee shall comply with and observe all the rules and by-laws of CBC *and* DHA. In the Amending "Deed" dated 14.12.2005, it has nowhere been mentioned, whether the Adjacent Plot *(if it is assumed that it was a commercial plot)* was advertised/auctioned and therefore, available to the general public. It has simply been mentioned in the Amending "Deed" that the area of the Commercial Plot has been "increased" to 11,600 Sq. Yards. There is nothing on the record to show that the said Adjacent Plot was advertised to be sold/transferred or, that objections were called from the general public when it was purportedly being sold by converting it into a commercial plot. This casts a shadow on the entire transaction and, goes to suggest that

the transfer of the Adjacent Plot in favour of the Appellants lacked transparency and adherence to the law. Land and valuable property, the rights of which vest in the Government, cannot be sold off arbitrarily. It is settled law that an amenity plot or public park cannot be converted for commercial use, nor can its land use be changed to one which affects the rights of other residents of the locality to enjoy the public park or amenity. Any transaction in this respect cannot be deemed to be legal because, one of the stakeholders in such a transaction is the general public.

10. One of the responsibilities of the Military Estates Officer is to ascertain whether any construction etc., is adverse to the interest of the Government or violates any rules or regulations which are meant to safeguard the interest of the public. The Military Estates Officer cannot, as per his own wishes and whims declare that a plot is a Park or a Commercial Plot. We have on record a letter of the Military Estates Officer dated 22.07.2003 which mentions the Adjacent Plot as a "Park". The learned Counsel for the Appellants, while placing reliance on the letter dated 22.07.2003 has argued that the Military Estates Officer provided a "clarification" about the nature of the Adjacent Plot by stating that it was *to be maintained* as a Park as per Clause 3 of the Agreement of DHA and, that the Adjacent Plot was not "DHA Park" as argued by the Respondent-in-Person. We are unable to agree with the learned Counsel for the Appellants. The fact that the Military Estates Officer

mentioned the word "Park" in his letter establishes that the Adjacent Plot was not to be used for a commercial purpose.

11. Further and more importantly, Clause 3 of the Agreement with DHA only allows the Appellant to "develop" the Adjacent Plot with "amenities". As such, the mode and manner in which the Adjacent Plot could be used, has been restricted. The Agreement with DHA was executed in 1987, which means that it has held the field for 35 years. The Appellants cannot at this stage, request the Court to absolve the Appellants of their responsibility to abide by the terms of the Agreement dated 17.07.1987. It is pertinent to mention here that, as per Clause 2 of the Agreement with DHA, the Appellants were only allowed to construct over 70% of the total area of the plot and, 30% of the area of the plot was to be utilized for "amenities". The fact that the Agreement itself mentions the words "amenities" and that too, in the clause relied upon by the Counsel of the Appellants, goes to show that the Adjacent Plot was not merely mentioned as DHA Park by inadvertence. We have seen in the record the Minutes of the Executive Board of DHA dated 06.05.1995. The said minutes too, incorporate a decision taken on Item No.37, that construction could not be made on the "park area".

12. Learned Counsel for the Appellants has argued that, the Minute Sheet dated 14.12.1999 wherein, the Adjacent Plot has been ear-marked as a park for the general public, is fabricated. There is nothing on the record to suggest any fabrication. On the contrary, DHA in a letter dated

30.07.2007 clarified that no construction was allowed in the area mentioned in the Amending Deed. In another letter dated 02.07.2007, DHA has stated that the Adjacent Plot is to be utilized as a leisure park for the general public. The fact that the Adjacent Plot is mentioned as a "Park" in various letters and other documents establishes the fact that the Adjacent Plot was meant and intended to be a public park and not a commercial plot. It is clear from the record that the Adjacent Plot had always been a Park and, a letter issued by the Military Estates Officer could not change the nature of the Adjacent Plot or, allow the Respondents to construct or use it however they pleased. We have also found on the record a letter dated 27.05.2003, issued by the Additional Director General (Lands) to the Military Estates Officer, Karachi Circle, Karachi Cantt. It has been categorically mentioned in the said letter that plots reserved for amenities cannot be used for any other purpose.

13. Even otherwise, the Second Building Plan, relied upon by the Appellant's Counsel, specifically mentions an "Allowable Covered Area". This further establishes that the Appellants could only construct over the area approved for construction and, not more. In the presence of material available on the record, discussed above, we are of the opinion that that the learned High Court was correct to hold that the Adjacent Plot was unlawfully annexed to the Commercial Plot.

COULD THE ADJACENT PLOT BE UTILIZED IN ANY MANNER DEEMED FIT BY THE APPELLANT, IF CONSIDERATION WAS PAID FOR IT?

14. The learned Counsel for the Appellants has argued that, the Appellants paid valuable consideration for the Adjacent Plot and have a right to use it in any manner deemed appropriate by them. The High Court in this respect has held that By-Laws 125 and 126 of the Cantonment Board Clifton (Building) By-Laws, 2007 clearly stipulate a procedure which must be followed if the nature of a plot is to be changed. There is nothing on the record that may show that the Appellants applied for the Adjacent Plot to be converted into a commercial plot. The only argument advanced by the Counsel for the Appellants in this respect is that they paid valid consideration for the Adjacent Plot. We do not agree with this argument for the reason that, payment of consideration does not *ipso facto* absolve the Appellants of their responsibility to follow proper procedure of the law. Merely paying consideration did not mean that the Appellants could do whatever they wanted with the Adjacent Plot. In the 1972 Master Lease, it has been clearly stated that "Amenity Plots" could only be used for the purpose for which they were ear-marked. Mere payment of consideration does not mean that anything done illegally would get protection of the law. It is settled law that, when the law provides a particular manner of doing things, they must be done in that manner or not at all. Anything done to the contrary would be illegal, *ex-facie* erroneous and unsustainable in law.

15. It has been specifically mentioned in the Agreement with DHA and in the C-Lease that the Appellants shall abide by the by-laws of Cantonment Board Clifton ***and*** DHA. When the Respondent-Authority has repeatedly informed the Appellants that the Adjacent Plot could not be used for any other purpose; they were bound by such declarations made by DHA. The Appellants cannot at this stage, wriggle out of their part of the Agreement with DHA. This is because they chose to bind themselves by the conditions in the Agreement with DHA and, in the C-Lease. Learned Counsel for the Appellants has stated that this Court *"impliedly approved"* the Second Building Plan since this Court did not reject it outright. We do not agree with this argument. Merely because this Court did not struck down the Second Building Plan, does not, by any stretch of the language, mean that the Second Building Plan was *"approved"* by this Court. This Court, in its judgment handed down in CPLAs No. 297-K and 298-K, has nowhere used the word "approved" for the Second Building Plan. This Court, in various judgments, has held that an amenity plot cannot be used for commercial activities and by now it is settled law. Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973 protects the fundamental right of life of every citizen of this Country. Right to life has been given an expansive interpretation by this Court. The right to life inter alia includes the right to enjoy public spaces such as parks. This Court is empowered to do complete justice and, nobody can be allowed to take fundamental rights guaranteed to the

citizens from the citizens, which are protected by the Constitution of the Islamic Republic of Pakistan, 1973. No doubt, commercial activities support the economy. However, commercial activities cannot be a made a basis to deprive citizens of basic amenities such as parks. There is sufficient material on the record to support the proposition that the Adjacent Plot was in fact, an amenity plot by its nature and use, which could not be allotted to the Appellants in an arbitrary and non-transparent manner, as done in the present case. As such, the learned High Court was correct to hold that the adjacent plot was illegally and unlawfully amalgamated with the Commercial plot and that nature and land use of the adjacent plot could not be changed, altered or modified in violation of the rights of public at large which are guaranteed by the Constitution of the country.

16. We find that the learned High Court has proceeded on correct factual and legal grounds in the impugned judgment. The learned ASC for the Petitioners has been unable to point out any misreading or non-reading of evidence by the High Court while passing the Impugned Judgment. Further, no jurisdictional defect, error or flaw in the Impugned Judgment has been found that may warrant interference of this Court. On hearing the learned ASCs for the parties and carefully perusing the record, we have arrived at the same conclusion as the High Court and find no valid ground, reason or basis to take a view different from the one taken by the High Court.

17. In view of the foregoing, this Appeal is found to be without merit. It is accordingly dismissed. The Impugned Judgment dated 04.02.2014 passed by the High Court of Sindh at Karachi is affirmed and upheld.

ISLAMABAD, THE
12.05.2022
Haris Ishtiaq LC/*
'Not Approved For Reporting'