

IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE YAHYA AFRIDI

MR. JUSTICE JAMAL KHAN MANDOKHAIL

(AFR)

CIVIL APPEAL NO.401 of 2015

(Against the judgment dated 12.12.2014 passed by the Lahore High Court, Rawalpindi Bench, Rawalpindi in Civil Revision Petition No.437-D of 2001).

Province of Punjab through Secretary
Housing and Physical Planning Department,
Government of the Punjab, Lahore and others

.... **APPELLANTS**

VERSUS

Syed Zia Ul Hassan Zaidi and others

RESPONDENTS

For the Appellant(s):

Barrister Qasim Ali Chohan, Addl.AG, Pb.
Zaheer Ahmed, Dy. Director (PHATA)
Ismail Ch. Head Draftsman

For the Respondent(s):

Syed Moazam Ali Rizvi, ASC
Syed Rafaqat Hussain Shah, AOR

Date of Hearing:

19.01.2022

JUDGMENT

IJAZ UL AHSAN, J.- Through this appeal, the Appellants have challenged the judgment of the Lahore High Court, Lahore dated 12.12.2014 passed in Civil Revision No. 437-D of 2001 (hereinafter referred to as "**Impugned Judgment**"). The Respondents through their Civil Revision Petition had challenged the judgment and decree dated 03.05.2001 whereby the Appellate Court set-aside the judgment and decree dated 21.01.1998 passed by the learned trial Court and decreed the suit for declaration and consequential relief filed by the Respondents.

2. The brief facts giving rise to this *lis* are that the Respondents filed a suit for declaration challenging the acquisition of land measuring 09 Kanals 16 Marlas falling in *Khasra* No. 505/62 situated in Khawaspur, Jhelum (hereinafter referred to as the "**Disputed Land**"). The Respondents belonged to the *Shia* community and started using the Disputed Land as "*Karbala*". It was claimed by the Respondents that the Disputed Land was transferred to the predecessor-in-interest of the Respondents. After the death of the said predecessor-in-interest, Respondent No. 01 (*Syed Zia ul Hassan Zaidi*) was appointed as the Administrator of the Disputed Land. In 1973, the Appellants acquired the land for the purpose of Area Development Scheme-I for low-income housing at Jhelum (hereinafter referred to as the "**Scheme**"). This gave rise to protests by the *Shia* community of Jhelum. Resultantly, a revised layout plan for the Scheme was placed before the Director of Housing and Physical Planning, Rawalpindi on 17.10.1973. The said Director approved the revised layout plan on 09.01.1974. Ultimately, vide letter dated 29.03.1982, it was recommended that the Disputed Land should be kept as open space and not included in the Scheme and, vide letter dated 03.09.1986, it was approved that the Disputed Land would be excluded from the Scheme. On the contrary, the Disputed Land was transferred to the Education Department vide letter dated 15.09.1987 for the construction of a school. The letter dated 15.09.1987 was challenged by the Respondents by filing a suit for declaration along with consequential relief. The trial Court after framing

issues and recording evidence, dismissed the suit of the Respondents vide judgment and decree dated 21.01.1998. Aggrieved, the Respondents filed an appeal before the learned District Judge which was allowed vide judgment and decree dated 03.05.2001. The Appellants filed a Civil Revision Petition thereagainst which was dismissed vide the Impugned Judgment. Aggrieved thereof, the Appellants have approached this Court.

3. Leave to appeal was granted by this Court vide order dated 11.05.2015 in the following terms: -

"Learned Additional Advocate General has inter alia contended that the land in dispute was acquired with other land in the year 1973 for Area Development Scheme-I to provide houses to low income citizens and subsequently its possession was transferred to Education Department for establishment of Elementary College on 3.2.1990; that the claim of the respondents is that the land is being used by the Shia sect for the purpose of 'Karbala' etc and could not be transferred for establishment of College; that the land was 'Banjar Qadeem' and was never shown or entered as 'Karbala' in the revenue record at the time of acquisition; that in the present case the courts below have gone beyond the pleading that Khasra No. 505-62 was never acquired in the year 1973; that the learned Single Judge in Chambers of the High Court has not discussed the case and has erroneously reproduced the findings of the learned Appellate Court and affirmed that the suit was rightly dismissed by the learned trial Court."

4. The learned Additional Advocate General, Punjab has argued that the Disputed Land was acquired as part of the Scheme in respect of which compensation was paid to the Respondents and the possession of the land was subsequently delivered to the Education Department on 03.02.1990 for construction of Elementary College, Jhelum. He has further argued that the land was shown as 'Banjar Qadeem' and not as 'Karbala' in the revenue record. He has further argued that an amended notification was issued in supersession of the Notification issued under Section 4(1) of

the Punjab Acquisition of Land (Housing) Ordinance, 1973 dated 27.03.1973 (hereinafter referred to as the "**Notification**"). It has been argued that the purportedly, through the amended notification, the Disputed Land was acquired for the Scheme.

5. The learned ASC for the Respondents has argued that the Disputed Land was mentioned as '*Karbala*' in the revenue record and that *Moharram* processions were taken to the said land for the past many years. He has further argued that the Director of Housing and Physical Planning specifically excluded the Disputed Land from the Scheme. As such, it could not have been transferred to the Education Department because the Disputed Land belonged to the Respondents and not to the Appellants. The learned ASC has relied upon the notification dated 29.03.1982 whereby the Disputed Land was declared as 'open space' by the A.C (D) acting on behalf of the Commissioner, Rawalpindi. He has further relied upon the notification dated 03.09.1986 whereby the Chief Minister Punjab excluded the Disputed Land from the Scheme. The learned ASC has argued that the Disputed Land was not mentioned in the Notification under Section 4 of the Land Acquisition Act, 1894. He has argued that if the Disputed Land was to be mentioned in the Notification, the prescribed procedure starting from the notification, inviting objections, providing a hearing and then issuing an award ought to have been followed, which was not done in the case at hand. The learned Counsel has further argued that the fact

that the Disputed Land was not mentioned in the Notification is admitted by witnesses/revenue officials.

6. We have heard the learned Counsel for the parties and have perused the record. The issues which fall before this Court for determination are as follows: -

- (i) Was the Disputed Land mentioned in the Notification?
- (ii) Could an Award transferring the Disputed Land in favour of the Education Department be made?

WAS THE DISPUTED LAND MENTIONED IN THE NOTIFICATION?

7. We have on record the Notification issued by the Office of the Deputy Commissioner, Jhelum which reads as follows:-

"No. 3401-G/DRA – Whereas it appears to the undersigned that the land is needed by the Government for a housing scheme known as Area Development Scheme for Low Income Housing at Jhelum. It is hereby notified under Section 4(1) of the Punjab Acquisition of Land (Housing) Ordinance, 1973 for information of the public that the Land in the locality in the schedule below is to be required for this purpose...."

The Notification was issued under Section 4(1) of the Punjab Acquisition of Land (Housing) Ordinance, 1973 (since repealed) (hereinafter referred to as the "**Act of 1973**"), which reads as under: -

"Publication of preliminary notification and power of officers thereupon. - (1) Whenever it appears to the Deputy Commissioner that land in any locality is needed or is likely to be needed for any housing scheme a notification to that effect shall be publish in the Official Gazette and the collector shall cause public notice of the substance of such notification to be given at convenient places in the said locality."

It is mentioned in the Notification that the Land in the locality mentioned in the schedule to the Notification was being acquired for the development of the Scheme. We have

gone through the said schedule and are unable to agree with the argument that the Disputed Land was mentioned therein. The said schedule mentions various *khasra* numbers which were acquired in the locality of Khawaspur. However, the Disputed Land is not mentioned anywhere in the said schedule. The entire acquisition for the Scheme was carried out based on the Notification which has no mention of the Disputed Land. When confronted with this, the learned AAG submitted that an amended notification was issued in supersession of the Notification whereby, the land in question was acquired for the Scheme. We have repeatedly asked the learned AAG to show us any such notification from the record. He has been unable to do so.

8. On the contrary, there is a notification dated 21.05.1973 on the record issued by the Office of the Deputy Commissioner, Jhelum which reads as follows: -

"No. 4696-4/DRA – Whereas the land measuring about 100 acres which was required for housing scheme known as Area Development Scheme for Low Income Housing at Jhelum in the revenue estates of Rajipur, Khawaspur and Shahpur is no longer required for the said purpose. Now therefore, I, Mr. Muhammad Parvez Masood, C.S.P, Deputy Commissioner, Jhelum hereby withdraw notification No. 3401-G/DRA issued under Section 4(1) of the Punjab Acquisition of Land (Housing) Ordinance, 1973 in the EXTRAORDINARY GAZETTE Punjab Gazette of 27th March 1973 at pages 533 to 538" (Underlining is ours)

The aforementioned notification establishes two facts; that the land mentioned in the Notification was no longer required for the purpose mentioned in the Notification, and, that the Notification was withdrawn by the competent authority i.e., the Deputy Commissioner, Jhelum as provided in Section 4(1) of the Act of 1973. There is nothing on the

record to show that the aforementioned notification was ever challenged by the Appellants or, that a subsequent notification was issued in supersession of the *ibid* notification. The learned High Court has correctly held that since the Disputed Land was purportedly acquired by the Appellants, it was for them to positively prove through cogent evidence that it was included in the Notification. The learned High Court has further held that the revised map of the locality was issued without approval and notification of the competent authority. The Notification was issued for a specific purpose. The said purpose was that land was required by the Government for a Scheme. The fact that the said Notification has been withdrawn shows that the Government changed its intention and decided that the land in question measuring 800 acres was no longer required.

9. The subsequent notification was issued by the Deputy Commissioner who, as per Section 19 of the Act of 1973 was perfectly empowered to do so. Section 19 of the *ibid* Act reads as under: -

"The Deputy Commissioner, shall be at liberty to withdraw from the acquisition proceedings of any land, notified under this Act, of which possession has not been taken:

Provided that Government or an Official Development Agency, as the case may be, has informed the Deputy Commissioner in this behalf in writing:

Provided further that in case of non-acceptance of the award even as a result of the appeal made to the Commissioner the right of withdrawal from the acquisition may be exercised by the Government or an Official Development Agency, as the case may be."

The first part of Section 19 of the Act of 1973 establishes that the Deputy Commissioner was at liberty to withdraw from the acquisition proceedings. The fact that a

subsequent notification withdrawing the earlier Notification was issued further shows that possession of the land sought to be acquired was not taken by the Appellants. It is worth mentioning that, in the absence of any material suggesting that the subsequent notification was challenged, this Court under Article 129(e) of the Qanun-e-Shahadat Order, 1984 may presume the existence of the fact that the Disputed Land was not required by the Appellants. Article 129(e) of the *ibid* Order reads as follows: -

"129. Court may presume existence of certain facts: The Court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct and public and private business, in their relation to the facts of the particular case."

The allegedly amended notification through which the land was statedly acquired or transferred to the Education Department has neither been brought on the record nor has it been shown to us that the said purported notification was published in the Official Gazette. Section 4(1) of the Act of 1973 uses the word "*shall*" making it obligatory upon the Appellants to publish any and all notifications in respect of acquisition under Section 4(1) of the Act of 1973. The requirement of publication of a notification under Section 4 is an essential requirement in acquisition proceedings because it is likely that the rights and interests of landowners will be adversely affected. Reliance in this respect is placed on **Saghir Ahmed through Legal Heirs v. Province of Punjab through Secretary, Housing and Physical Planning Lahore and others (PLD 2004 Supreme Court 261)** wherein, this Court held as follows: -

"However, a notification under section 4 of the Act specifically requires its publication in the official Gazette, if it appears to the Deputy' Commissioner that a particular land of a particular locality is needed or is likely to be needed for any housing-scheme. This is followed by another legal requirement of a public notice of the substance of such notification to be given at convenient places in that locality. The publication of notification under section 4 in the official Gazette has been made necessary as the rights and interests of the land owners are likely to be adversely affected by the acquisition proceedings. According to definition of word "notification" as given in section 2(41) of West Pakistan General Clauses Act, 1956, "it shall mean a notification published under the proper authority in the official Gazette" in the absence of anything repugnant in the subject or context."

The fact that no such notification has been shown from the record leaves no doubt in our minds to hold that the said subsequent notification, as per the record, was never issued by the Appellants. In the absence of such documentary evidence, this argument of the learned AAG fails and is accordingly held to be unsustainable. On the contrary, we have on record two other notifications, the effect of which is that acquisition of the Disputed Land was withdrawn by the Appellants.

COULD AN AWARD TRANSFERRING THE DISPUTED LAND IN FAVOUR OF THE EDUCATION DEPARTMENT BE MADE?

10. The learned Counsel for the Respondents has argued that the Disputed Land was transferred to the Education Department through the impugned Award whereby, *inter alia*, the entire *Khasra* No. 62 was transferred to the Education Department for the construction of a school. It has been argued that the Award made in favour of the Education Department was illegal because there was no notification published in the official gazette to support the transfer as required by Section 4 of the Act of 1973. It has

further been argued that even if it is assumed that the land was acquired, the Disputed Land could not have been used for any other purpose other than the one which is mentioned in the Notification. The learned High Court in this respect has held that the Assistant Director of the Appellant-Department appeared as DW-3 and admitted that the Disputed Land was not mentioned in the Notification. The learned High Court has held that this fact has been admitted by other DWs as well and these admissions were not taken into consideration by the trial Court. As such, the Respondents could not have been compelled to receive compensation through notice tendered in evidence as Exh.PW-9/11.

11. We have on the record various letters from the revenue authorities and the Director of the Appellant-Department, one of which is a letter issued by the A.C (D) for the Commissioner, Rawalpindi Division dated 29.03.1982 paragraph 2 of which reads as follows: -

"The proposal of the Deputy Commissioner, Jhelum, referred to in your office memorandum No. SOD-I-7-4/79 dated 8th July 1979 to keep the area as an open space after excluding the same from the Scheme is supported by this office with the condition that it does not lead to the impression that any community has got the license to make any construction on it." (underlining is ours)

Another letter in this respect is dated 18.10.1973 undersigned by the Director of the Appellant-Department which reads as follows: -

"The side pointed out by the petitioner as being used as 'Karbala' has been adjusted in the recently revised layout plan. A copy of the layout plan had already been submitted to you for approval vide this office memo No. 2332 dated 17/x/73." (Underlining is ours)

The aforementioned letters establish that the Disputed Land was in possession of the Respondents and, that the Appellant-Department itself excluded it from the Scheme. This is further supported by the letter dated 06.11.1978 issued to the Deputy Director of the Appellant Department by the Director-General of the Appellant Department wherein it was stated that the Disputed Land may be kept as an open space and, the viewpoint of the Deputy Commissioner, Jhelum may be obtained as well. The fact that the Disputed Area was excluded from the Scheme is also mentioned in the letter of the Section Officer (D-II) dated 03.09.1986 stating that the Chief Minister had excluded the Disputed Land from the Scheme.

12. The fact that the Disputed Land was included in the Award despite the availability of various letters including the letter of the Chief Minister stating that the Disputed Land was excluded from the Scheme leaves us in no manner of doubt that the inclusion of the Disputed Land in the Award was illegal and could not have been done, especially without issuing any notification under Section 4 of the Act of 1973.

13. The Notification mentions that the Disputed Land was being acquired for the Scheme. Subsequently, the Disputed Land was transferred to the Education Department for the construction of a school. The learned Counsel for the Respondents has argued that the Appellant-Department, even in a best-case scenario, could not have transferred/used the land for any other purpose except that which is mentioned in

the Notification. The intent and purpose of the Government were unambiguous as seen from the Notification. There was no room for the Appellant Department to read something into the Notification, which was not there. Reliance in this regard is placed on **Province of KP through Chief Secretary, Peshawar and others v. Farasatullah and others (2020 SCMR 1629)**.

14. The Notification is specific in its purpose and object and any interpretation of the Notification which is not in line with its terms would be violative of the law. The purpose for which the land has been transferred to the Education Department is entirely different from that which is mentioned in the Notification. A notification issued by the Government essentially reveals its intention. One of the purposes of publishing a notification is so that those who may be affected by it can know the intention of the Government as mentioned in the notification itself. Essentially, a notification is a means used by the Government to communicate with the general public regarding *inter alia*, any projects et cetera that it might prospectively undertake. The intent behind the notification or, the purpose for issuing the same must be mentioned because, as noted above, the rights of different stakeholders are involved. This is one of the reasons that there are various safeguards provided in the Act of 1973 such as Section 6 which requires, by using the words "*Shall*", the publication of a notice to make the intention of the Government to possess a certain piece of land clear.

15. If the said intention of the Government or the area sought to be acquired changes after the Notification under Section 4 has been issued; a fresh notification or an addendum to the earlier notification can be issued to enable the parties affected by it to avail remedies provided by the law. Further, the acquisition of the land does not *ipso facto* mean that the Appellant-Department could use the acquired land for any purpose that it considered appropriate. The acquiring agency/department/entity is restricted in its use of the land to the purpose mentioned in the notification and for no other purpose. Further, no additional land can be included in the award which was not mentioned in the Notification under Section 4 or any addendum or fresh notification after fulfilling all legal and procedural formalities required to be fulfilled in this regard. That being so, and land comprised in *Khasra* No. 505/62 having not been included in the Notification under Section 4 or any subsequent notification for addendum issued thereto, the Award could not include *Khasra* No. 505/62. The Appellant-Authority exceeded its jurisdiction in doing so and it is therefore held that the Award was, to the extent of the inclusion of *Khasra* No. 505/62, illegal. There is nothing in the Act of 1973 to the effect that the Deputy Commissioner/Collector had the authority to add a *Khasra* number to either a notification or the Award of his own volition without following proper rules and procedure. As such, the Award could not have been issued without first complying with the mandatory provisions of the law.

16. The Impugned Judgment of the learned High Court dated 12.12.2014 is well reasoned, proceeds on the correct factual and legal premises and has correctly applied the relevant law, rules and regulations to the facts and circumstances of the cases before us. No legal, or jurisdictional defect, error or flaw in the Impugned Judgment has been pointed out to us that may furnish a valid basis or lawful justification to interfere in the same. The Learned AAG has not been able to persuade us to take a view different from the High Court in the facts and circumstances of the instant Appeal. We accordingly affirm and uphold the Impugned Judgment of the Learned High Court.

17. For the reasons recorded above, this appeal is found to be without merit. It is accordingly dismissed.

Islamabad, the

19th January 2022

Haris Ishtiaq LC/ *

Not Approved For Reporting