

HIGH COURT OF AZAD JAMMU & KASHMIR

Writ petition No.110/2017.
Date of institution 17.03.2017.
Date of decision 16.05.2023.

Shehnaz Begum widow of Ghulam Mohammad r/o Ban
Khurma Mirpur.

Petitioner

VERSUS

1. Revising Authority MDA through its Chairman Mirpur;
2. Secretary Revising Authority MDA Mirpur;
3. MDA through its Chairman/Director General Mirpur;
4. Estate Officer/Director Estate Management MDA Mirpur;
5. Deputy Director Estate Management MDA Mirpur;
6. Town Planner MDA Mirpur;
7. Azad Jammu & Kashmir Government through Chief Secretary Azad Govt. Muzaffarabad.

Respondents

WRIT PETITION

Before:- Justice Syed Shahid Bahar, J.

PRESENT:

Ch. Mohammad Afzal, Advocate for the Petitioner.
Raheela Kousar, Advocate for MDA.

JUDGMENT:

Locus Poenitentiae.

Doctrine of law denotes that power to issue includes power to amend, vary or rescind any order, enactment and rules by laws made by issuing authority, this power is embedded in **Section 21** of the **General Clauses Act, 1897**. Question is

whether the power to create includes the power of destroy is an absolute right and can be allowed to exercise randomly without application of mind? In legal parlance, question is very short and simple. No order can be destroyed subsequently if the same has been acted upon and creates certain legal and vested rights in favour of beneficiary and in such like eventuality, the authority who passed the favorable order becomes functus officio to vary or rescind its earlier order as law does not allow volta face to the authority in circumstances.

2. 16th of May, 2023. This is a petition under Article 44 of the Azad Jammu & Kashmir Interim Constitution, 1974 for writs in the nature of certiorari and mandamus in a manner stated as infra:-

“It is, therefore, most respectfully prayed that this writ petition may kindly be accepted and the impugned order of official respondents dated 19.03.2011 alongwith notices other orders may kindly be declared as null and void, illegal, perverse, ultra-vires bad in the eyes of law and the same was passed with mala-fide intention, without lawful authority, without hearing, and without jurisdiction competence, may kindly be set aside and the allotment of plot No.21-A/2 measuring 50x90 =4500 Sq. feet situated at Sector F/2 South Mirpur may kindly be ordered to be restored in the name of petitioner.”

3. The stance of the petitioner Shehnaz Begum is that she is 1st Class State Subject of Azad Jammu & Kashmir, thus, entitled for allotment of residential plot in Mirpur and in this connection, the petitioner applied for residential plot upon prescribed forum on 01.11.1993 by submitting an application to the office of MDA with draft of Rs.5,000/-. Subsequently, application of the petitioner was processed accordingly resultant of which plot No.21-A/2 measuring 50x90 situated in Sub Sector F/2 South was allotted to the petitioner on 16.11.1998. As being allottee of the said plot, the petitioner was asked to deposit remaining price of the said plot i.e. Rs.84,500/- which was also deposited by the petitioner on 14.10.1999 in Habib Bank Limited situated in the Bank Square Nangi Mirpur. After complying with all the requisites, the petitioner constructed house upon the aforesaid plot and at present she is residing there with her kids. The petition was admitted for regular hearing and the written statement offered by the respondents is on file.

4. Ch. Mohammad Afzal, learned advocate for petitioner staunchly contended that the order impugned herein is bad in law, without any lawful authority and colorable exercise of the powers. As per his estimation, no plausible reason has been assigned by the authority

regarding cancellation of the plot, reason whatever alleged in the impugned order is based upon hypothesis, conjectures and surmises.

5. Mrs. Raheela Kousar, learned counsel representing MDA while controverting the arguments advanced by learned counsel for petitioner contended that allotment claimed by the petitioner is bogus and non-existence in the eye of law as she has failed to produce the relevant record particularly, application form and allotment chit, therefore, she is an illegal occupant of the said plot. She further added that relevant authority vide order dated 19.03.2011 has rightly cancelled the allotment of plot No.21-A/2 measuring 50x90 situated in Sub Sector F/2, which requires no indulgence at all, thus, the petitioner is not an aggrieved person in order to assail the aforesaid order while invoking the extraordinary jurisdiction of this Court.

6. *I have heard the learned counsel for the parties at considerable length and perused the record appended with the writ petition.*

7. Grievance portrayed by the petitioner is that the revising authority vide order dated 19.03.2011 in an arbitrary and illegal manner cancelled her plot already

allotted in her favour without providing an opportunity of hearing and apprising the relevant record which was already lying before MDA. Be that as it may, it transpires from the record that upon the application of the petitioner, the aforesaid plot has been duly allotted to the petitioner and she deposited the requisite amount in the account of MDA. Facsimile of the security deposit receipt is appended and enlisted with the writ petition as Annexure "PI" and receipt of MDA enlisted as Annexure "PJ" which reveals that Rs.84,669/- has been deposited by the petitioner on 14th of October, 1999.

8. So far as the other objections raised in the impugned order pertaining to the non-production of State Subject and Identity Card are concerned, the petitioner in this regard appeared before this Court in person and on Court's query when she was asked to show her original Identity Card, she showed it before the Court, so, the supra objections of respondents pertaining to non-production of the original documents are preposterous as she also stated in the Court that at the time of cancellation of her plot, she was neither served with any notice for personal appearance before MDA nor she was heard, meaning thereby that she was not informed about the cancellation of her plot. It is

trite law that an individual cannot be penalized for inaction or loophole of the department or relevant authority. Proper maintenance of record and arrangement of the file was totally the responsibility rested upon the shoulders of MDA and the petitioner on account of non-availability of the record cannot be penalized.

9. It also transpires from the very face of impugned order Annexure "PE" that before passing the impugned order and recording adverse findings against the petitioner, an opportunity of hearing had not been provided to the petitioner neither any notice was issued to the petitioner nor it was inserted in the impugned order that why the proceedings were initiated against the petitioner, despite fact she had already deposited the requisite price of the plot in the account of MDA? **Doctrine of "Audi Alteram Partem" is universally accepted and golden principle of law that no adverse order can be passed against any person without providing him an opportunity of hearing despite fact if right of hearing is not provided in any Statute or law even then it is to be read as a part and parcel of every Statute and piece of legislation. The concept of the same is basically derived from Islamic law as "Allah Almighty" did not pass sentence upon Devil**

(Shaitan) without providing him an opportunity of hearing. Hon'ble Supreme Court of Azad Jammu & Kashmir in the case of "Khalid Mehmood Vs. Abdul Majeed Butt ¹ held as infra:-

"Allotment had created a valuable right in favour of the petitioner. Once a valuable right come to be vested in any person's favour it cannot be taken away."

In the case of "Messers Ahmed Clinic Vs. Govt. of Sindh ² while dilating upon identical proposition, it was held as infra:-

"Principle of fair play in action was explained by Lord Denning by stating where a public officer has power to deprive a person of his liberty or his property, the general principle is that it has not to be done without being given opportunity of hearing."

In parlance of fundamental right No.19 read with right No.1 & principles of policy, the order impugned is not sustainable requiring **Kowtow**. Fundamental Right No.19 is reproduced as infra:-

19. Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and due process."

¹. 1998 SCR 38 @ caption "A"

². 2003 CLC 1196

Another aspect of the matter is that under Section 24-A of the General Clauses Act, every authority and functionary is burdened with heavy duty to assign plausible reasons in orders at the time of issuance of the same which is meant for specifying a legal condition regarding transparency and fairness in such like orders.

10. After obtaining allotment, vested legal right created in favor of the petitioner cannot be snatched in an arbitrary fashion. After taking final and decisive steps, the authority is not clothed with power to embark upon the same in a way to cancel the said order. Validly acquired right in pursuance of an order cannot be destroyed in garb of power to undo, as no *locus poenitentiae* is available to the authority concerned in this situation. **Power of going back on a decision or order requires to be viewed and audited with close eye, if the matter came up before the Courts of law, particularly when such like order has carried into effect** ³.

Allotment made in favour of the petitioner cannot be undone as the same has taken legal effect. Impugned order qua cancellation of allotment is not sustainable in the eye of law ⁴.

³. PLD 1970 SC 439, PLD 1969 SC 407 & PLD 1960 SC 310.

⁴. 1994 MLD 338 and 2003 CLC 1196.

Competent authority who passed the order or taken a decision subsequently loses the right to go back on the decision and becomes functus officio in the matter if;

- (i) Order/decision passed has completely been acted upon and decisive steps regarding the matter have already stood taken;
- (ii) Order/decision is completely in accordance with law (having legal backing);
- (iii) Any other person or individuals are not likely being affected by the same;
- (iv) Order/decision is qualifying the test of fairness and transparency.

In supra eventualities, the authority in guise of powers available under Section 21 of General Clauses Act, cannot undo the implemented order, as exercise of discretionary powers in unguided and un-coached manner amounts to colourable exercise of powers and offends the Fundamental Right No.9 read with right No.1 and additionally mocks the concept of better government and principles of policies enshrined in the Interim Constitution.

(Underlining is ours)

Usually vulnerable segments of society become prey of the high handedness of the functionaries (at the helm of affairs) and they use to decry and denounce their vested rights, thus, in such like state of affairs, remedy of writ of certiorari

and mandamus is like fragrance of flower of paradise for them and in such state of forlorn, power of issuance of high prerogative command will definitely come into play in order to undo the wrong and redress the grievance of the aggrieved one.

Issuance of Helter Skelter orders by the authorities destroys the quietdue of people and drag them in unnecessary litigation. A poor widow who is living on a shoestring faced mental agony, besides financial loss in the litigation.

The former Chief Justice of Lahore High Court Justice Cornelius while commenting upon writ jurisdiction of the High Court at the eve of his elevation as Chief Justice in 1958 said mandamus and certiorari are flowers of paradise and the whole length and breadth of Pakistan is not wide enough to contain their perfume. His lordship further stated that the God fulfils himself in many ways and that we (Judges) are the humble instruments of his fulfilment. The writ jurisdiction is modern manifestation of God's pleasure and that God's pleasure dwells in the High Court ⁵.

11. All sort of powers particularly discretionary powers cannot be exercised in an arbitrary and

⁵. Chief Justice Cornelius of Pakistan by Ralph Branbiti –P-42-43 published by Oxford in 1999+ Khurram Khan Vs. Govt. of Punjab PLD 2009 Lahore 22.

unguided manner, therefore, conscious of the Court is attracted and the order issued by the respondent/authority seems to be passed in colorable exercise of powers sans providing an opportunity of hearing to the petitioner (a widow).

12. Therefore, in light of what has been discussed above, the instant writ petition is accepted and the impugned order dated 19.03.2011 is illegal; thus the same does not hold water, consequently stands set-aside.

(Writ petition accepted with costs.)

Circuit Mirpur.

16.05.2023 (Saleem)

JUDGE

(APPROVED FOR REPORTING)

JUDGE

Note:- Judgment is written and duly signed. The office is directed to transmit the instant file in a sealed envelope to Circuit bench Mirpur and Deputy Registrar of circuit bench Mirpur is also directed to intimate the parties or their counsel accordingly.

JUDGE