



Thereafter, the Applicant being aggrieved preferred High Court Appeal bearing HCA No. 255/2019 and the Appellate Court on 18.10.2019 was pleased to set aside order dated 20.5.2019 and the operative part of the order reads as under:-

“We are of the view that the matter involves highly disputed facts of the case which could only be considered after physical verification of the property under question. We, therefore, under the circumstances, set aside the impugned order and remand this case to the learned Single Judge with the directions that Nazir be appointed to ascertain the factual aspects available on the site at the cost of the respondents and also direct the appellant to decide the application moved by the respondents in accordance with law within a period of 15 days from the date of receipt of this order. With these directions the instant HCA stands disposed of along with the listed applications.”

Thereafter, Nazir was directed to make compliance of the order passed by the Appellate Court regarding inspection as above and he has placed his inspection report dated 18.11.2019 along with photographs. Learned DAG appearing on behalf of the Applicant submits that the construction of the underground tank is not permissible in terms of Clause 1(c) of SRO No. 706(I)/2003 dated 8.7.2003 as the distance of the place of construction owned by Respondents from the Applicant's premises is 446 meters, whereas, according to the said SRO the minimum distance of 461 meters is to be maintained. He submits that the application of Respondents also stands regretted vide letter dated 6.11.2019 and has prayed for dismissal of the application. According to him if any such permission is granted it will set a wrong precedent and others will also seek the same relief, whereas, there are serious security concerns of the Applicant.

On the other hand, learned Counsel for Respondents submits that instant case has a checkered history inasmuch as time and again possession of the Suit premises was encroached upon and taken over by various land grabbers including Respondent No. 14 [Major (Retd.) Tariq

Naveed] by misusing his connections with officials, and finally it was handed over to Respondents by the Nazir of this Court pursuant to Judgment and Decree dated 27.4.2018 in Suit No.1095/2013. She further submits that when the property was in possession of Respondent No. 14, two rooms were constructed by him and at that point of time no objection was raised by the Applicant, whereas, presently the Respondents in order to run and preserve the farm / cattle farm are constructing an underground water reservoir / storage tank which is a necessity and must not be objected by the Applicant. She further submits that the Respondents are the undisputed owners of the land in question and their rights are otherwise protected under Article 4 & 24 of the Constitution of Pakistan 1973. According to her in view of these facts, the objection of the Applicant is misconceived, whereas, earlier this J.M. was disposed of on 23.11.2017 by consent and on a joint statement of the Applicant and Respondents. In support of her contention that the bar is not absolute she has relied upon judgment dated 1.12.2014 passed by a learned Single Judge of this Court in Suit No.694 of 2008 (***Barret Hodgson Pakistan (Pvt.) Ltd., Pakistan Refinery Limited***)

I have heard the Deputy Attorney General as well as the learned Counsel for Respondents and perused the record. Insofar as applicability of SRO No. 706(I)/2003 dated 8.7.2003 is concerned, the relevant clause 1(c) relied upon on behalf of the Applicant reads as under:-

- “(c) Within a third boundary which shall extend to a distance of 461 meters from the crest of the outer parapet of the work, the restrictions enumerated in paragraphs (a) and (b) shall apply with the following additional limitation, namely:-

No building or other construction of the surface, and no excavation, building or other construction below the surface, shall be maintained or erected:

Provided that with the written approval of the Commanding Officer and on such conditions as he may prescribe, a building or other construction on the surface may be maintained and open railings and dry brush-wood fences shall be exempted from this prohibition.”

Perusal of the above reflects that certain restrictions shall be attached to the land in the vicinity of works of defence mentioned in the Schedule to the said SRO, which shall extend to a distance of 461 meters from the crest of the outer parapet of the work and the restrictions as provided in paragraphs 1(a) and 1(b) shall apply with certain additional limitation, and no building or other construction of the surface, and no excavation, building or other construction below the surface, shall be maintained or erected. However, there is a proviso to the said provision which states that with the written approval of the Commanding Officer and on such conditions as he may prescribe, a building or other construction on the surface may be maintained and open railings and dry brush-wood fences shall be exempted from this prohibition. From the above it is clear that notwithstanding the fact and without prejudice as to whether the said prohibition apply on the land of Respondents or not, there is an exception and the Commanding Officer can still permit construction, and therefore, the bar in the SRO as above is not absolute. It further appears that pursuant to order dated 18.10.2019 passed by the Appellate Court, the Applicant has refused to entertain the application of Respondents; however, perusal of the refusal letter reflects that it has been done only by placing reliance on the SRO, whereas, no justifiable reason has been recorded in the refusal letter, and it is also not provided that as to why the above exception as per the proviso is not applicable and the discretion conferred upon by law was not exercised in favor of Respondents, considering the peculiar facts and circumstances of this case. It may be

of relevance to observe that admittedly at the most, the difference in distance is hardly 15 meters as according to the Applicants case itself, the proposed underground tank is at a distance of 446 meters, whereas, it ought to have been at a distance of 461 meters. I am of the view that perhaps, for this kind of circumstances and situations, the law makers have provided this exception and I am of the view that this exception and the proviso ought to have been exercised in favour of the Respondents, considering the peculiar facts of this case. It is needless to observe that this case has a checkered history and perusal of the Judgment and Decree dated 24.7.2018 passed in Suit No. 1095/2013 reflects that the Respondents have been deprived possession and fruitful enjoyment of their property for many years by various land grabbers including Respondent No.14, whereas, time and again orders were passed restraining the said Respondents from entering and or taking over possession; but such orders were flouted and ultimately Nazir was appointed as the receiver. Finally, after Judgment and Decree possession was handed over to Respondents and now once again when they have started construction of an underground water tank, the Applicants have come forward opposing the said construction. It is also needless to mention that to run a farm / cattle farm water is a basic necessity which unfortunately is not provided by the concerned Government Departments and the Respondents have no other choice but to construct an underground water tank for storage of water. Such storage tanks are ordinarily required to be constructed in the front sides of the property, so that the water could be conveniently discharged and stored after purchasing the same through commercial mobile water tankers.

Para 3 of the Inspection report of Nazir states that;

3. The subject land was found in possession of Respondents Nos.1 to 3 and was within the boundary wall having Main entrance gate facing 100 ft. main road. The subject land was being used as cattle farm and farming of vegetable, where underground water tank was being constructed at front side right corner of land. It has been noted that entire floor of such underground tank has been casted with RCC Floor (iron and cement) complete, but some of the side walls of said water tank was yet to be casted in RCC manner, as the shuttering woods with iron bars were fixed in its surroundings.

4..... "However, the surrounding area of the subject land where water tank is being constructed has been noted, where 100 ft. main road found at front side, an open plot in acres at right side, SOS Orphanage Village Foundation at left side, while other different open lands situated at its back/rear sides.

The aforesaid report is of evidential value that after grant of applications of Respondents and permission by the Court vide order dated 20.5.2019, substantial construction work has been completed and it would be highly unjustified if at this stage the permission is refused.

In view of hereinabove facts and circumstances of this case, I am of the view that both applications (CMA No.18210/2018 & 7730/2019) merits consideration and are accordingly allowed as prayed. However, it may be clarified that owing to the peculiarity of this case, it is not to be cited as a binding precedent in other cases of like nature which are to be decided on their own merits. Moreover, after construction is completed, the Respondents shall inform the Nazir who shall once again carry out an inspection and furnish his report to the effect that the construction carried out is as per his earlier report dated 18.11.2019 read with Structural map annexed as Annexure A.

**J U D G E**

ARSHAD/