

**IN THE SUPREME COURT OF PAKISTAN**

(Original Jurisdiction)

**PRESENT:**

**MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, C.J.**

**MR. JUSTICE JAWWAD S. KHAWAJA**

**MR. JUSTICE GHULAM RABBANI**

**Suo Motu Case No.10/2009**

(Complaint regarding establishment of Makro-Habib Store on playground)

For the applicant:	In person.
For Makro-Habib:	Mr. Khalid Anwar, Sr. ASC (on 7.7.09, 24.8.09, 31.8.09, 2.9.09, 3.9.09)
For A.W.T.:	Mr. Wasim Sajjad, Sr. ASC Mr. Fayyaz Ahmad Rana, ASC Ch. Akhtar Ali, AOR
For M/o Defence:	Sardar M. Latif Khan Khosa, Attorney General for Pakistan (on 31.8.09, 2.9.09, 1.10.09 &, 2.10.09) Mr. Shah Khawar, DAG Raja Abdul Ghafoor, AOR
For Citizens:	Dr. Muhammad Raza Gardezi
For KBCA:	Mr. Arshad Ali Chaudhry, AOR/ASC
For Mehfooz-un-Nabi:	Syed Mansoor Ali Shah, ASC (on 7.7.09, 24.8.09, 31.8.09, 1.9.09, 2.9.09, 3.9.09) Mr. M. S. Khattak, AOR
Date of hearing	20.10.2009

**JUDGMENT**

**JAWWAD S. KHAWAJA, J:-** This case was initiated by the Court under Article 184 (3) of the Constitution, on the basis of a column written by Mr. Ardeshir Cowasjee, appearing in the daily "Dawn" dated 14.6.2009 titled "*A plea to the Lord Chief Justice.*" The 'plea' in the column related to land which was earlier used as a playground, but has since been built up and is presently occupied by a commercial structure. Mr. Cowasjee is a senior columnist and is known for espousing causes in furtherance of the public interest. The contents of his column, *prima facie*, indicated denial of the fundamental rights of citizens guaranteed to them under the Constitution. The column also highlighted the manner in which Constitution Petition No. D-1740/07 touching upon this matter was dismissed by

the Sindh High Court, on 19.8.2008. As questions of public importance with reference to the enforcement of constitutionally guaranteed fundamental rights were raised, the record of the Sindh High Court in C.P. No. D-1740/07 was requisitioned and notices under Article 184(3) were issued to nine parties. These parties had been arrayed in C.P. D-1740/2007. Mr. Mehfooz-un-Nabi (respondent No.1) and Shehri (respondent No.2) were co-petitioners in C.P. D-1740/2007. The City District Government Karachi (CDGK), the Project Director, Lines Area Re-Development Project, the Chief Controller Buildings (KBCA), the Secretary Environment Department, Government of Sindh, the General Manager, Army Welfare Trust (AWT), the Secretary to the Government of Pakistan, Ministry of Defence (GoP) and Makro-Habib Pakistan Limited (Makro-Habib) were respondents in the aforesaid Constitution Petition. Of these parties, Mr. Mehfooz-un-Nabi, Shehri, CDGK, AWT, GoP and Makro-Habib are represented by counsel and have also filed paper books and/or concise statements which include correspondence and other documents in support of their respective positions in relation to the subject matter of this case. The Secretary, Environment Department, Government of Sindh appeared in person at two hearings and also submitted documents.

2. To give context to the discussion which follows, it will be useful to summarize what is entailed in the case. The matter, in short relates to land measuring 4.958 acres situated in the midst of a central and densely populated part of Karachi, just north of the Mubarak Shaheed Road. According to Shehri, Mr. Mehfooz-un-Nabi and CDGK, the land stands transferred to CDGK and is a designated amenity plot dedicated for use as a play ground and reserved for this purpose in the Master Plan prepared for the Lines Area Project of the CDGK. The GoP, AWT and Makro-Habib dispute this assertion. These three parties rely on a lease deed dated 19.12.2002 whereby the President, as lessor granted a lease of the land to AWT for 90 years at the yearly rent of Rs.6,020/- only. Thereafter, on 31.7.2006 AWT transferred the land to Makro-Habib by way of sub-lease for an initial term of 30 years. Upon execution of the sub-lease AWT received advance rent of Rs.100,000,000/- based on a variable annual amount of at least

Rs.17,500,000/- and a maximum equivalent to 1% of the annual turnover of Makro-Habib. According to AWT and Makro-Habib, the lease and sub-lease aforesaid have created exclusive leasehold rights in favour of Makro-Habib for at least 30 years. As a consequence, Makro-Habib has constructed, what it calls a wholesale centre, on the said land. In the circumstances, on account of the conflicting claims of Shehri/CDGK on the one hand and AWT/Makro-Habib on the other, a number of issues have arisen which require resolution.

3. A few words at this point may be said about the Lines Area Project. This is a scheme which has featured prominently in official attempts at the planned development of Karachi. Serious efforts towards this end (in the context of the present case) appear to have been made in the early, 1970s, as will be evident from official records discussed in a later part of this judgment. The Karachi Development Authority (KDA), which had been created as a body corporate under the Karachi Development Authority Order (President's Order No.5 of 1957) had conceived a development project variously known as KDA Scheme No.35 or the Lines Area Redevelopment Project or as the Jacob Lines Complex and by other titles, but is herein referred to as the Lines Area Project, for convenience. The Scheme was framed under Articles 32 and 35 of the said President's Order No.5 of 1957. The CDGK is the local government which is successor to KDA for the purposes of implementing the Lines Area Project. According to CDGK (and Shehri) the land subject matter of this case, is a playground included in and forming part of the said project. On this basis, CDGK claims that KDA was transferee of the ground and now CDGK exercises jurisdiction and zoning control over it. AWT/Makro-Habib, as noted above, dispute the jurisdiction of CDGK and assert, alongwith GoP, that the land falls outside the project area, and remains part of Karachi Cantonment, title to which remains vested in GoP. This contention between the parties constitutes the primary question requiring resolution in this case.

4. However, before embarking on a discussion of the issues which arise before us it is necessary to give brief particulars of the key contenders involved in the case and their respective pleas in the context of the case. Mr. Mehfooz-un-

Nabi is a resident of the locality which surrounds the playground. He is socially active in the community and has been elected previously by the residents of the locality as their representative in the local government. Shehri is an organization of citizens supporting a better environment and quality of life for citizens of Pakistan generally. The GoP asserts title to the said land and claims, apparently, an unfettered right to deal with it in any manner it chooses, including the right to lease it to AWT at an annual rent of Rs. 6,020/- only. AWT is a society established under the Societies Registration Act, 1860 and has been described in papers (considered below) as a Non-Government Organization. It claims to be lessee of the land in question, for a period of 90 years, on the basis of the above referred lease deed dated 19.12.2002. Makro-Habib, is an incorporated joint venture between SHV, a Dutch multi-national and the House of Habib, a Pakistani corporate group. SHV initially held 70% of the equity in Makro-Habib, but is no longer a shareholder, although it apparently allows the use of its brand name 'Makro' to Makro-Habib. Makro-Habib claims to be a sub-lessee of the said land, basing its rights and interest therein, on the sub-lease dated 31.7.2006 referred to above, executed in its favour for an 'initial term' of 30 years, by AWT.

5. With the above background given we can proceed to identify the issues and to address the same in the light of the facts and the law before us. The foremost and, in our opinion, decisive question which requires determination in the case relates to the status of the land. If, as asserted by Shehri and CDGK, the land was indeed transferred to KDA (predecessor of CDGK) and was reserved as an amenity plot falling within the bounds of the Lines Area Project, then the lease to AWT, the sub-lease in favour of Makro-Habib and the construction of a wholesale centre on it by Makro-Habib would be unlawful. A number of subsidiary questions are subsumed in the said primary question. These will be examined during the course of this judgment.

6. At this point, it is necessary to set out in some detail, the respective positions adopted by the parties in relation to the questions which arise in the case. AWT and Makro-Habib have a common stance. This is but logical because Makro-Habib (subject to considerations of equity argued on its behalf) can have

no better claim than the one asserted by AWT. In order to understand the position adopted by AWT and Makro-Habib, the most convenient means would be to examine the plaint which has jointly been filed by AWT and Makro-Habib in suit No. 926/2007. This suit is pending adjudication in the Sindh High Court. Shehri and its General Secretary, Mrs. Ambar Alibhai have been arrayed as defendants Nos.1 and 2 in the suit and Mr. Ardeshir Cowasjee is defendant No.3 therein. CDGK and GoP through the Secretary, Ministry of Defence, have been arrayed as defendants Nos.4 and 5 respectively.

7. In this suit, after giving a brief description of the two plaintiffs, the plaint asserts that Makro-Habib approached AWT with the object of setting up its Wholesale Centre *“upon assurance about clear title and vacant possession”* over the area measuring about 4.958 acres *‘with open space in front thereof upto Mubarak Shaheed Road.’* The existence of the Lines Area Project was acknowledged and it was conceded that by virtue of an arrangement reached between the GoP, Government of Sindh and KDA, an area measuring 191.713 acres was transferred by the GoP to the Government of Sindh while the *“rest of the area falling within the Karachi Cantonment Board limits was retained by the Government of Pakistan, Ministry of Defence.”* Reliance, for this assertion, was placed on the letter of 12<sup>th</sup> August, 1976 which has been reproduced, in extenso, in paragraph 10 below. A further averment has been made that the land in question (bearing Survey No. 148/1) which in 1976, was in occupation of the Karachi Grammer School *“for occasional use as playground”* had been retained by the GoP in the Ministry of Defence. It is evident from these averments that AWT and Makro-Habib do not dispute the position that Government land, as described in the letter dated 12.8.1976, was transferred by the Government of Pakistan to KDA. We have only to see, if the averment made by AWT and Makro-Habib that the aforesaid playground was excluded from such transfer, is tenable on the basis of the available record. Reliance was also placed by AWT and Makro-Habib, on various entries made in the General Land Register (GLR) of the Karachi Cantonment and the reclassification of the Ground from A-2 to B-4 category under the Cantonment Land Administration Rules (the ‘CLA Rules’).

These aspects of the pleas of AWT and Makro-Habib will be considered shortly. For the present, it will suffice to focus on the issue of what land was transferred to KDA/Sindh Government and which areas were retained by the GoP.

8. We now advert to the stance taken by the GoP. This has been set out in the parawise comments submitted by it in the Sindh High Court in CP No. D-1740/07. The very first paragraph of the preliminary submissions can be usefully reproduced at this stage because it encapsulates the position of the GoP in so far as it relates to the land which was transferred to the Government of Sindh and the area which was retained. This paragraph runs as under:-

*“i. Government of Pakistan, Ministry of Defence, Rawalpindi vide letter No.18/170/L/AD(A)/ML &C/72, dated 12.8.1976 (annex-A) decided that all Defence land be transferred to the Government of Sindh except Fowler Lines, Bizrta Lines, and a small portion of North Iqbal Shaheed Road, in which Naval Elements and Institutional Area were located. In this regard Defence land measuring 194.043 acres comprising MEOs GLR Survey No.148 & 153 Karachi Cantt; was agreed to be made available for KDA/LARP for the purpose of improvement of Lines Area. The details of such land are given in MEO Karachi letter No. K-24/43/153/148/62 dated 11<sup>th</sup> June 1976 and MEO Karachi letter No.K-24/43/153/148/63 dated 13<sup>th</sup> June 1976 (annex-B&C).”*

(underlining for emphasis is ours)

9. From the extract of the parawise comments reproduced above, it is again clear that transfer of land by the GoP to the Sindh Government is not disputed. The only issue is, if the playground in contention was excepted from such transfer. To this extent, the position taken by the GoP is the same as that of AWT/Makro-Habib, viz. that the said ground had been retained by the GoP. Reclassification of the land from A-2 to B-4 category and entries in the GLR were also referred to by the GoP and will be dealt with later in this judgment.

10. In order to decide the key question of what was and what was not transferred by the GoP to the Sindh Government/KDA, we need only look at a few letters, some minutes of high-level meetings and certain other documents. The parties have relied on these and there is no dispute as to their authenticity. As

such, the question before us is reduced solely to a consideration of the conflicting interpretations placed by the parties on these papers. The first and most important document is the letter of 12<sup>th</sup> August, 1976, which has been addressed to the Military Estates Officer, Karachi Circle, Karachi Cantonment by the Deputy Director, Military Lands and Cantonments Department, Government of Pakistan. In view of its relevance, the said letter is reproduced in its entirety as under:-

“IMMEDIATE

No.18/170/L/AD(A)/ML&C/72

Government of Pakistan,  
Ministry of Defence,  
ML&C Deptt. Rawalpindi.  
Dated 12 August, 1976.

To

The Military Estates Officer,  
Karachi Circle,  
Karachi Cantonment.

Subject: TRANSFER OF DEFENCE LAND FOR JACOB  
LINES DEVELOPMENT COMPLEX KARACHI  
CANTT:

Reference correspondence resting with your letter  
No.K-24/43/153/148/62 dated 11<sup>th</sup> June, 1976.

2. Government has decided that all defence land be transferred to the Government of Sind excepting Fowler Lines, Bizerta Lines and a small portion north of Iqbal Shaheed Road in which Naval elements and Institutional Area are located. A copy of plan indicating demarcation of area to be transferred is enclosed. Please initiate a detailed proposal so that formal Government orders are issued. The proposal should indicate properties of the Cantt Board separately.
3. Govt. has also decided to make available Rs.30 crores inclusive of the cost of the construction of 1418 quarters, in three equal instalments to the Min. of Defence, over and above the normal budget allocation for construction of accommodation for Defence personnel. It is, therefore, not necessary to make recommendations on the financial aspect of the proposal.

This may be treated as 'immediate' .

(A.M. Khan)  
Addl. Director Mily. Lands & Cantts.  
Tele. 68465

Copy to:-

1. DD ML& C, *for information.*
2. CEO Karachi Cantt.”

(The underlining for emphasis, is ours)

11. The decision of the Government as set out and conveyed to the Military Estates Officer through the above letter was merely a communication between administrative functionaries of the Military Lands and Cantonments Department. Its importance, however, for the present case is that all contending parties before us accept that the letter correctly records the decision taken by the GoP in respect of the disputed playground. For a just and proper adjudication of this case, we also have, available with us on file, the record of relevant official proceedings which led to the decision reproduced in the above letter of 12.8.1976.

12. It is common ground between the contesting parties that the playground, at least until 1976, was vested in the Federal Government as part of Karachi Cantonment. Important deliberations, however, as to the future use and status of the ground, commenced at the highest levels in the Government sometime in 1975. It is important to make a note of these deliberations and the developments which followed, in order, firstly to provide the background which resulted in the decision of the GoP and, more importantly, to address the questions before us. Fortunately, for us and for the parties the documents placed on record for the period 1975-76 are not disputed, even though, as noted above, on the interpretation of such record the parties may not be in agreement. In our opinion, the disagreement between the parties, for reasons considered below, is not difficult to resolve.

13. We can conveniently start our review of events from the summary dated 18.7.1975 prepared by the Secretary, Ministry of Defence (Mr. Fazal Muqem Khan) on the subject of “*Transfer of Defence Land/Building in Karachi to KDA/Sindh Provincial Government.*” In the summary, mention was made of the surpluses of Defence assets in Karachi Cantonment which had earlier been

identified for disposal. Reference was also made to the option given to the Government of Sindh/KDA in July 1971, to state their requirements out of such surpluses “*before these were disposed of by public auction or private negotiation so as to fetch maximum money.*” A note appears in the summary, of an earlier discussion held on 30.4.1972, between the Director General, KDA, the then President of Pakistan (from the date we can infer the President was Mr. Zulfikar Ali Bhutto) and the Chief Minister of Sindh, relating to the developmental problems of Karachi. The President statedly took decisions on 30.4.1972 of which, the one relevant to the present case was reproduced in the summary as follows:-

*“(b) Area of Jacob Lines, Abyssinia Lines, Tunisia Lines, Bizerta Lines and Artillery Maidan which are owned by Central/Provincial Governments be taken over by KDA for undertaking a comprehensive re-development scheme for construction of multi-storeyed flats, where the present occupants would be given preference for rehabilitation on a minimum charge, and the flats will be permanently transferred to the residents.”*

(underlining for emphasis is ours)

However, on account of non-adherence to agreements by KDA/Government of Sindh, it was recommended (subject to conditions) that the “*Army should retain areas south of Mubarak Shaheed Road and on both sides of Iqbal Shaheed Road,*” and further that it “*should transfer land north of Mubarak Shaheed Road.....*”

14. We now briefly refer to relevant extracts from the minutes of a meeting held on 13.10.1975, chaired by Mr. A.G.N. Kazi, Secretary General, Finance and Economic Co-ordination. The meeting was attended, among others, by the Quarter Master General, GHQ, who gave the Army’s point of view, stressing that the Fowler Lines area should remain with the Army but the land comprising the Jutland, Abyssinia, Tunisia and Bizerta Lines may be released for the purpose of transferring it to KDA/Sindh Government. The minutes also record the QMG’s statement that the Lines Area Project was “*in the heart of Karachi and is most valuable.*” It is also noted in these minutes that the total compensation according

to the Army's estimate worked out to Rs. 29 crore approximately, for the land it could spare.

15. The above meeting was followed by another meeting held on 16.6.1976. It was chaired, again, by Mr. A.G.N. Kazi and for historical interest, we note, was attended, *inter alia*, by two persons who later occupied the office of President of the country, namely, Mr. Ghulam Ishaq Khan, Secretary General, Ministry of Defence at the time and General Zia-ul-Haq, the then Chief of Army Staff. The purpose of the meeting, as stated by the Chair, was *"to settle the outstanding matter relating to the determination of the area to be transferred... to the Jacob Lines Complex and the compensation to be paid for the land so transferred."*

16. It is recorded in the minutes that the Chief of Army Staff indicated that even the area retained by the GoP, Ministry of Defence will be developed in accordance with the Master Plan for the area. The decision taken at the meeting was as under:-

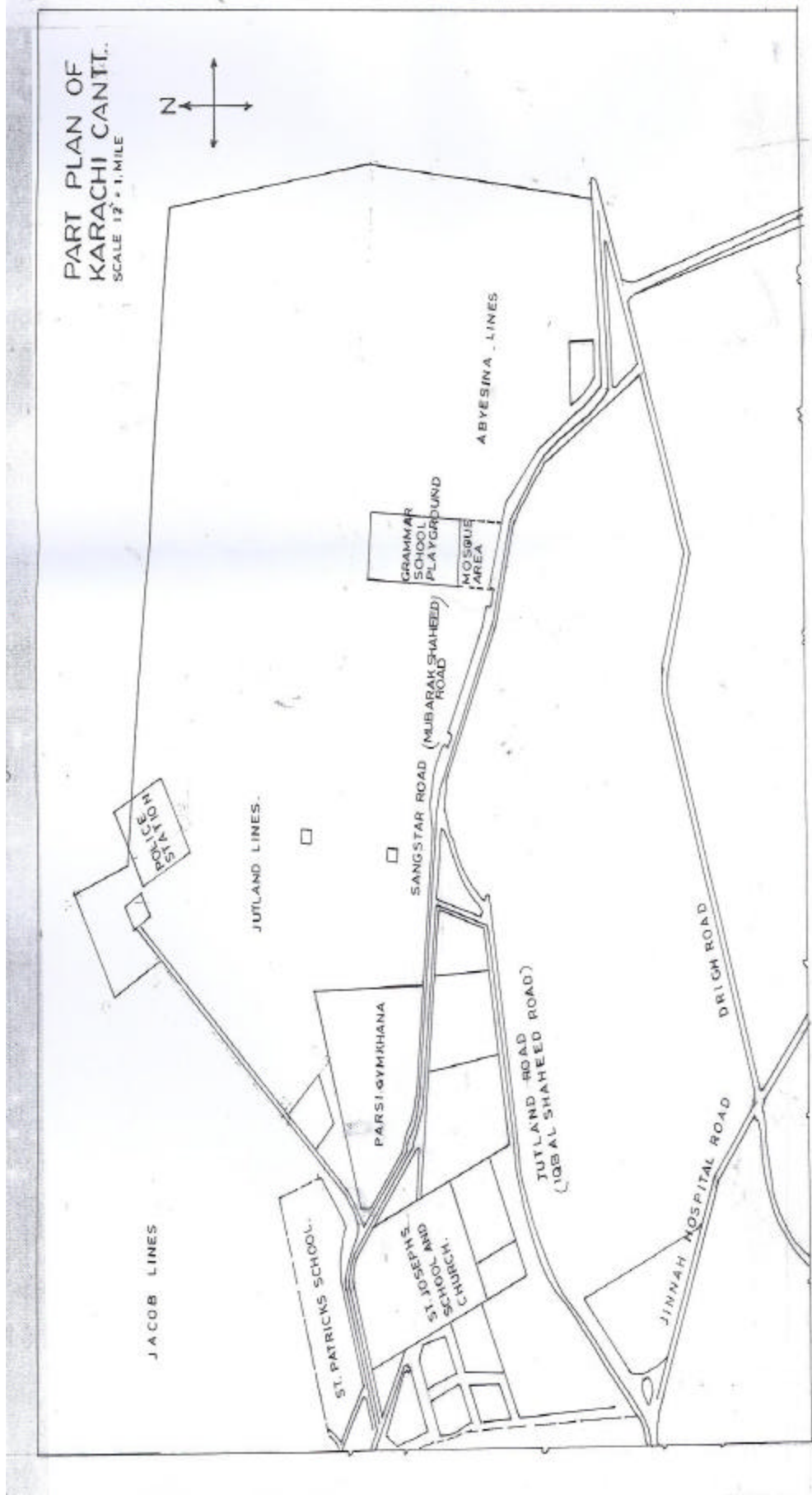
*"DECISION*

6. *It was decided that the area contiguous to the Karachi Cantt. comprising Fowler Lines, Bizerta Lines and the area north of Iqbal Shaheed Road in which naval elements and institutional area are located should be excluded from the Jacob Lines Complex. The said area should, however, be developed by the Cantonment Board Authorities on the lines of the Master Plan prepared by the K.D.A. The Defence land that will be included in the Jacob Lines Complex would come to about 200 acres. The demarcation of the land included in the Jacob Lines Complex is shown in the attached plan."*

The area covered by the aforesaid decision is well defined although the plan referred to therein has not been placed on record by any of the parties. However, based on the description reproduced above, it is not difficult to determine the areas which were to be retained by the Army and those which were to form part of the Lines Area Project which has been referred to in the above extract as the Jacob Lines Complex. It is also significant that the Chief of Army Staff endorsed the decision that the Cantonment Board Authorities were to ensure the development of even those areas which were retained by the Army, on the lines of the master plan prepared by the KDA. It is this decision, taken in the meeting of

16.6.1976 which, in our view, finally determined the matter of the area transferred to KDA/Sindh Government. The decision, as noted earlier, was not only communicated to concerned administrative functionaries for the purpose of its implementation but was also accepted and acted upon respectively by the Federal and Provincial Governments and their concerned agencies and departments.

17. Furthermore, as noted above, all parties before us base their respective pleas on the aforesaid decision of the GoP as set out in the letter dated 12.8.1976 and specifically relied upon by the GoP, AWT and Makro-Habib in their respective pleadings and parawise comments in suit No. 926/2007 and C.P. No. D-1740/2007 referred to above. It is evident from the express wording of the decision taken, that the Government of Pakistan was quite clear about the area which had to be transferred to KDA/Sindh Government. It had decided to transfer “*all defence lands*” to the Government of Sindh with the exception of two specific areas identified by name viz. Fowler Lines and Bizerta Lines and a third area comprising of a small portion north of Iqbal Shaheed Road in which Naval elements and Institutional Areas are located. In order to understand the extent of the land which was to be transferred to the KDA/Government of Sindh in accordance with the aforesaid decision, we have examined the plan of Karachi which includes the areas referred to in the letter of August 12<sup>th</sup> 1976. For the purpose of identifying these ‘*defence lands*’, we have taken note of the document filed by the GoP bearing the heading ‘*Part Plan of Karachi Cantonment Scale: 12 inch equal to one mile.*’ There is no disagreement amongst the parties as to the geographical location of the land in question and the two Lines Areas mentioned therein namely, Fowler and Bizerta Lines. This plan corresponds to the satellite image placed on file by Shehri. It was confirmed to us by the representatives of the parties before us that Sangster Road in the aforesaid plan is now known as Mubarak Shaheed Road while Jutland Road in the plan is now called Iqbal Shaheed Road. To facilitate understanding of the location of the playground in contention, a reduced image of the above referred plan is given below.



18. As stated earlier, there is complete agreement between the parties as to the contents of the various letters, minutes, decisions and the plan which has been reproduced above. The dispute between the parties arises on account of the interpretation placed on the contents of the decision taken at the high level meeting of 16.6.1976, as subsequently reproduced in the letter of 12.8.1976. The stance adopted by Shehri and CDGK is that the playground was included in the area which was transferred by the GoP to the KDA/Sindh Government. This assertion is not accepted by AWT and Makro-Habib. The learned Attorney General also construed the aforesaid documents in a manner which excluded the disputed area from the land to be transferred to KDA/Sindh Government. We, therefore, take up for consideration the basis on which AWT, Makro-Habib and the GoP contend that the playground was not transferred to the KDA/Sindh Government. These three parties have advanced the argument that ALL “*Institutional Areas*” were excluded from the land which was transferred by the GoP. According to them, the land in contention being an Institutional Area, therefore, stood excluded from the transfer.

19. This contention, we find to be wholly untenable. Not all Institutional Areas were excluded from the transfer. Only those Institutional Areas which fell within the “*small portion north of Iqbal Shaheed Road*”, were to be excluded from the land agreed to be transferred. Even a cursory glance at the plan reproduced above, is sufficient to show that the playground is not to the north of Iqbal Shaheed Road. The Naval elements and Institutional Areas referred to in the letter of 12<sup>th</sup> August, 1976 and excepted from transfer, are those which are located to the north of Iqbal Shaheed Road. The disputed area which has been identified in the above plan as the Grammar School Playground is nowhere near Iqbal Shaheed Road and is certainly not to the north of the said road. We are, therefore, quite clear that the defence land which was transferred to the Government of Sindh did not exclude the playground from its ambit. The emphasis placed by the learned Attorney General on the copy of the plan referred to in the letter of 12.8.1976 is misplaced and is also erroneous as will be seen from the discussion below.

20. To give support to their argument, the learned Attorney General and the learned counsel respectively representing AWT and Makro-Habib referred to a letter dated 11.6.1976 addressed by the Military Estates Officer, Karachi Circle to the Director, Military Lands and Cantonments. The relevant extracts from the letter are reproduced as under:-

*“Karachi Cantonment, dated 11<sup>th</sup> June, 1976*

*The Director,  
Military Lands and Cantonments,  
Ministry of Defence,  
Rawalpindi.*

*Subject:- JACOB LINES RE-DEVELOPMENT KARACHI CANTONMENT.*

*Reference telephonic conversation held on 9.6.1976, between the Additional Director, Military Lands and Cantonments, Ministry of Defence, Rawalpindi and the Military Estates Officer Karachi Circle.*

*2. The following is the break-up of lands comprising Jutland Lines, Tunisia Lines, Abyssinia Lines and Institutional areas in the vicinity:-*

- (a) Area of Jutland Lines,  
Tunisia Lines, Abyssinia Lines      194.043 acres  
...*
- (b) Institutional Area comprising  
educational and allied institutions  
(details attached as annexure 'A') 60.086 acres  
..."*

21. A break-up of the Institutional Area of 60.086 acres mentioned in the letter of 11.6.1976, alongwith respective classifications has been filed by Makro-Habib with its CMA 4001/09. For convenience, it is reproduced below:-

*“ LIST OF EDUCATIONAL AND ALLIED INSTITUTIONS*

<u>SURVEY NO.</u>	<u>CLASSIFICATION.</u>	<u>DESCRIPTION.</u>	<u>AREA IN ACRES</u>
122	B-3	Zoroastrian Club & Hall Bungalow No. 122 with compound.	1.61 acres.
122/1	B-3	Zoroastrian Club & Hall Bungalow No. 122/1 with compound.	0.54
122/2	B-3	Zoroastrian Club & Hall Bungalow No. 122/2 with compound.	1.38
142	B-3	St. Patricks High School and play ground.	8.14
156	B-3	Parsi Gymkhana.	11.40
158	B-3	Play ground	4.58
159	B-3	NWR Recreation Ground.	7.46
160	B-3	St. Patricks Parish School	1.06
161	B-3	Roman Catholic Ghurch St. Joseph Convent & St. Patricks Vicarage.	11.22

163	A-2	Hockey Ground.	1.196
167	B-3	Rustamji Parsi Poor House	1.05
168	B-3	Vacant plot West of Roman Catholic Church.	0.66
173/1	B-3	Women's College and play ground.	2.06
162/1	B-3	School and play ground.	2.77
148/1	A-2	Play ground.	<u>4.96</u>
		Total:-	<u>60.086 acres</u> "

22. According to learned counsel for Makro-Habib, this list is the Annexure 'A' referred to in the letter of 11.6.1976 and provides details of the 'institutional area comprising educational and allied institutions.' Although the list does not bear any indication that it is an annexure to the letter of 11.6.1976, we can, for the present, accept his submission that the list was annexed with the letter of 11.6.1976. Shehri questioned the authenticity of this list on the grounds firstly, that the Survey No.148/1 is at the very end of the list and is out of sequence, while the other fourteen Survey numbers listed before Survey No.148/1 are all in sequence in ascending order. Secondly, it was submitted that out of the fifteen properties included in the list, Survey No.148/1 is the only one which is part of the Lines Area Project. These submissions made by Shehri may or may not be correct. We find no reason to embark on a factual assessment of this controversy as in our opinion, nothing turns on the letter of 11.6.1976 or any list attached with it. All that is set out in the letter is 'the break-up of lands....and Institutional areas in the vicinity.' It would be quite extraordinary and in our opinion, wholly unjustified to rely on the break-up of lands, to conclude that all institutional areas were excluded from the transfer made in favour of the Sindh Government/KDA. We do not see any logical connection between the given break-up of Institutional Areas and the suggested conclusion canvassed by the learned Attorney General and by learned counsel representing AWT and Makro-Habib.

23. On the other hand, a plain reading of the undisputed letter of 12.8.1976 shows quite clearly that only "a small portion north of Iqbal Shaheed Road in which...Institutional Areas are located," was to be retained by the GoP. This makes it obvious that out of the listed Institutional Areas in Karachi Cantonment,

only those were to be excepted from the transfer favouring KDA/Sindh Government, which fell to the north of Iqbal Shaheed Road. Any Institutional Areas other than these, comprising part of Government lands in Karachi Cantonment, and in particular those areas which were north of Mubarak Shaheed Road, were quite clearly, to be part of and included in the transferred land.

24. Learned counsel for Makro-Habib also placed a great deal of stress on a letter dated 13.7.1976 and a plan annexed therewith, to urge that the playground (Survey No.148/1) was excluded from the area transferred to the Sindh Government/KDA. In our opinion, for reasons discussed below, this emphasis is entirely misplaced. On the contrary, the aforesaid letter and plan, make it abundantly clear (notwithstanding a slight misdescription considered below) that the same are consistent with and corroborate our opinion expressed above that the land was transferred to the KDA/Sindh Government. The letter of 13.7.1977 reads as under:-

*“No.K-24/43/153/148/5  
Military Estates Office, Karachi Circle  
Karachi Cantonment, 13<sup>th</sup> July, 1977*

*To*

*The Cantonment Executive Officer,  
Karachi Cantonment.*

*Subject:- TRANSFER OF DEFENCE LAND FOR JACOB LINES  
DEVELOPMENT COMPLEX, KARACHI CANTONMENT*

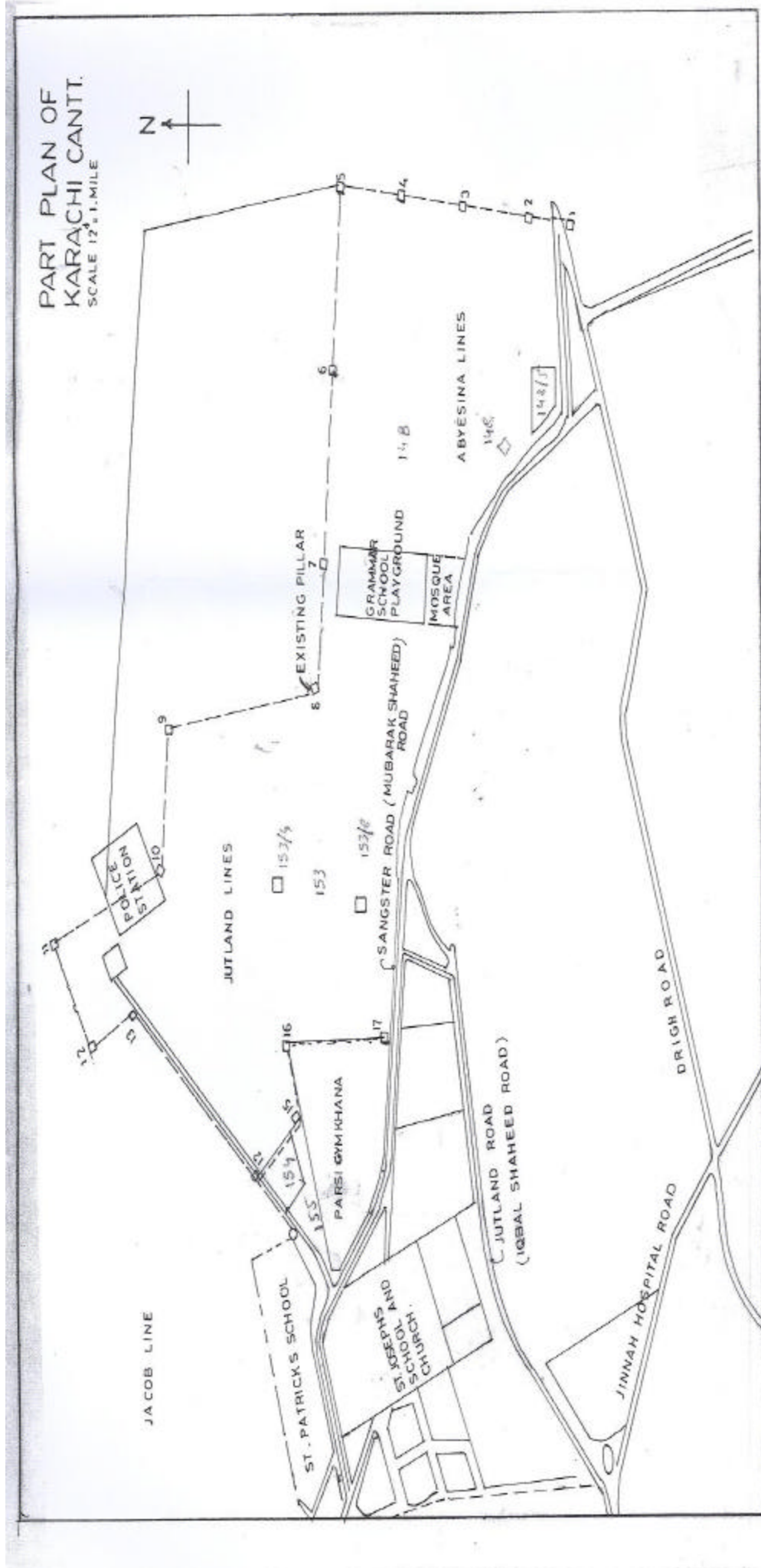
*Reference your letter No.163/L.B./P-212/364, dated 21<sup>st</sup> March,  
1977*

*A copy of the plan showing the area of the proposed  
boundary pillars which are to be erected and total number of  
pillars mentioned in the said plan is forwarded herewith as  
desired.*

*(M. A. Saleem Mufty)  
Military Estates Officer, Karachi Cir.  
Ph. No.512464.”*

A reduced copy of the plan showing the boundary pillars is reproduced as under:-

[ ]



25. At the very outset, it will be noted that the letter of 17.7.1977 only reflects some measures being taken by the concerned administrative functionaries to implement on ground, the decision taken by the GoP which later was recorded in the letter of 12.8.1976. Secondly, it was only meant to mark the pillars which, according to these administrative functionaries, would reflect the decision taken by the GoP. Thirdly, the plan with the letter gives the location of seventeen boundary pillars. These pillars show quite clearly that Institutional Areas north of Iqbal Shaheed Road were outside the encircling line connecting the pillars while the playground (Survey No.148/1) was within the said line. This boundary line connecting the seventeen pillars, is consistent with the decision of the GoP. The slight misdescription adverted to above, is in the reference and colour coding which appears on the plan. In relevant part, this mentions “*Educational and Allied Institutions not to be transferred shown in yellow colour.*” In the plan, the area which has been shaded in yellow includes Institutional Areas north of Iqbal Shaheed Road. The playground, which undeniably, is situated north of Mubarak Shaheed Road and NOT to the north of Iqbal Shaheed Road, has been shown within the boundary line formed by connecting the seventeen pillars located on the plan, to show the land transferred by the GoP. This boundary line also marks the excluded Institutional Areas north of Iqbal Shaheed Road, and thus provides proof, if any was needed, to give graphic backing to the decision reproduced in the letter of 12.8.1976. Therefore, quite apart from the fact that the letter of 13.7.1976 and the site plan annexed with it have no bearing on the decision of the GoP, even the boundary pillars earmarked on it, enclose the playground within the area encircled thereby.

26. There is yet another reason why the letter of 13.7.1976 and the plan annexed with it, have no relevance to the outcome of this case. The decision to transfer defence land to the Sindh government/KDA was taken at the highest decision-making levels in the GoP. This is apparent from the discussion above, of the material on record and, in particular, the minutes of the meeting dated 16.6.1976. It is this decision which has relevance. Any correspondence or plans which are not consistent with the said decision, particularly those exchanged

between lower level administrative functionaries, cannot possibly have the effect of varying the decision itself.

27. Based on the clear and incontrovertible evidence available on file discussed above, we are left in no manner of doubt that the playground was included in the transfer made by GoP in favour of KDA/Sindh Government. Even though this conclusion is established on record, there is in addition, abundant material before us which shows, that the contending parties acted upon and ordered their actions consistently with this conclusion. It is apparent that post 1976, the Sindh Government and KDA had taken charge of the land and had started exercising planning and regulatory control over the same. At this point it is worth reiterating that AWT or Makro-Habib, or indeed even the GoP acknowledge that areas owned by the GoP in Karachi Cantonment, were transferred and handed over to KDA/Sindh Government. Their specific plea merely is that this parcel of 4.958 acres comprising the playground had been excluded from the area so transferred. This plea has been rejected by us for reasons recorded above.

28. We now advert to other material available on file which, in our opinion, demonstrates that all official agencies (Federal and Provincial) had unequivocally accepted this transfer and were acting consistently with such transfer in their dealings with each other. From this additional material, we take up first a Notice dated 8.2.1982 which was published in the Sindh Government Gazette by the Chairman, KDA. In our opinion, this document and those which immediately followed, present a record of the conduct of the contending parties demonstrating clearly that the land was NOT excluded from the area which was transferred to the KDA/Sindh Government. The initial recital and first operative paragraph of the Notice being relevant, are reproduced as under:-

*“No. F. 1-16/Reg/KDA/72—Whereas the Karachi Development Authority has revised the boundaries of their Scheme No. 35, known as General improvement-cum-Street Scheme “lines Area”, framed under Article 32 and 35 of the “Karachi Development Authority Order” (President’s Order No.*

*5 of 1957), notified under Article 45 of KDA Order 1957 in the Sind Government Gazette, dated 13<sup>th</sup> December, 1973.*

*Now, therefore, in supersession of the said Notice published in the said Gazette, it is re-Notified under Article 45, of KDA Order 1957 (President's Order No. 5 of 1957), for the public information. The Scheme is located in the heart of the City of Karachi, between M.A. Jinnah Road to Sharea Faisal on North South axis and from Empress market to P.E.C.H.S. Block '2' on West-East axis. Gross Area of Scheme is measuring 700 acres be the same a little more or less bounded as follows in detail."*

(A detailed description identifying and demarcating the boundaries of the Scheme then follows)

29. It is also evident from the above extract that the boundaries of the Lines Area Project, as originally notified in 1973 were revised. This was done in order to include within the project, those areas which were transferred to KDA/Sindh Government by the GoP. The Gazetted notice gave the boundaries of the Lines Area Project in detail and also informed the general public that a "*blue print Drawing No. JL/LARP/35/2 dated 20<sup>th</sup> January, 1982, showing the above mentioned boundaries should be referred to*" for details and also that the said Drawing was available for inspection in the office of the Director (Planning and Engineering) Lines Area Project during office hours on any working day. Finally, objections to the boundaries were invited from the public in writing, to be sent to the Land Acquisition Collector, KDA.

30. We have examined, in detail, the boundaries of the project given in the above referred notice and have also seen the Drawing dated 20.1.1982 referred to therein. It is apparent therefrom that the playground was included within the boundaries of the project. However, there were also other areas which had been included within these boundaries, including some land south of Mubarak Shaheed Road which was not covered by the decision of the GoP in respect of the area transferred to KDA. As a consequence, the military authorities, justifiably, raised objections to the boundaries notified in the Gazette as delineated in the Drawing dated 20.1.1982. These objections are instructive as they show contemporaneous official conduct as to the status of the land and the claims thereto *inter se* KDA,

the military authorities and the GoP. The Military Estates Officer, Karachi Circle, very promptly protested and threw a challenge to the boundaries notified by KDA. He did this by addressing a letter dated 16.2.1982 to the KDA. In view of its importance to the matter before us, the letter is reproduced below, *in extenso*:-

“ Registered A/D.

No: K-24/43/153/148/105.

Office of the Military Estates Officer, Karachi Circle,  
252, Sarwar Shaheed Road, Karachi Cantonment,

Dated the 16<sup>th</sup> February, 1982.

To

The Land Acquisition Officer,  
Karachi development Authority,  
K.D.A's Head Office Building,  
Shahrah-e-Kamal Atatürk, Karachi.

**Subject:- OBJECTIONS TO THE REVISED BOUNDARIES OF KARACHI DEVELOPMENT AUTHORITY SCHEME NUMBER 35, KARACHI**

*Reference Notice Published in the Local News Papers on 12<sup>th</sup> February, 1982, and blue print drawing No. JL/LARP/35/2 dated 20.1.1982.*

2. *The Works Division have only been transferred an area of 191.713 Acres comprising, Abbysinia, Tunisia and Jutland Lines, bearing Survey Nos. 148 and 153, Karachi cantonment, situated to the north of Mubarak Shaheed Road. As such the Karachi Development Authority can plan manage and include the said area only, in their Scheme No. 35 (also called Lines Area Re-development Project). All other lands situated in the Cantonment limits and included by Karachi Development Authority in the limits of K.D.A's Scheme No. 35 as per their drawing No. JL/LARP/35/2 dated 20<sup>th</sup> January, 1982 and as notified in the notice under reference, neither belong to Provincial Government nor have been transferred either to Works Division or Karachi Development Authority and as such their inclusion in this Scheme is neither lawful nor binding on the Federal Government in the Ministry of Defence.*

3. *The Karachi Development Authority are as such required to delete the defence Lands which have not been transferred to them, from their Scheme No. 35 and revise the boundaries of this Scheme accordingly. A plan indicating the land, agreed to be transferred to Works Division, is forwarded herewith. The boundaries of Karachi Development Authority Scheme No. 35 may, therefore, be revised according to this plan.*

(QAZI NAEEM AHMAD)  
MILITARY ESTATES OFFICER,  
KARACHI CIRCLE, KARACHI  
(PHONE No. 512464).

Copy to:-

1. *The Director, Military Lands and cantonments,  
Government of Pakistan, Ministry of Defence (ML&C Deptt);  
Pakistan Secretariat Number 11, Rawalpindi*
2. *The Deputy Director, Military Lands and Cantonments,  
Karachi Region, Karachi*
3. *The Commissioner, Karachi Division, Karachi*

4. *Station Headquarters, Karachi.* ”

(Underlining for emphasis is ours)

The significance of this letter is twofold. The right and entitlement of KDA to plan and manage the area north of Mubarak Shaheed Road was acknowledged. Secondly, it was conceded that the area in Survey No.148, north of Mubarak Shaheed Road was part of the Lines Area Project. The submission made on behalf of AWT/Makro-Habib that the playground is comprised in Survey No.148/1 and not in Survey No.148 will be considered shortly.

31. The Pakistan Navy also acted in response to the KDA notice of 20.1.1982 which appears also to have been published in the daily ‘Dawn’ and the daily ‘Jang’ of 12.2.1982. An officer of the Naval Headquarters, Commander Karachi was even more explicit in his objection to the boundaries of the Lines Area Project as notified by KDA. He detailed all those areas by name which, according to him, belonged to the Pakistan Navy or Army but had been erroneously included in the Lines Area Project by KDA. This letter also needs to be seen *in extenso*, in view of its relevance to the matter in hand. It reads as under:-

“HEADQUARTERS  
COMMANDER KARACHI  
9, LIAQUAT BARRACKS  
KARACHI

CS-133-1/716

*The Land Acquisition Officer  
KDA Head Office  
Shahrah-e-Kamal Attaturk,  
KARACHI*

18<sup>th</sup> Feb. 82

RE-NOTIFICATION REGARDING SCHEME OF LINE AREA UNDER  
KDA ORDER (PRESIDENT’S ORDER NO. 5 OF 1957)

*Reference:- Your notice published in Daily Dawn & Jang on  
12.2.1982.*

1. *It is observed from the above notice that following areas which  
either belong to Pakistan Navy or Army have also been included in the  
Scheme:*

- a. 602 Combined Workshop.
- b. Cantonment General Hospital.
- c. Fowler Lines.
- d. Fleet Club.
- e. PNS DILAWAR
- f. STATION HEADQUARTERS.
- g. CAN & IW & CE OFFICE.
- h. MES Residential quarters MP’s HQ etc.

2. *It is therefore requested that an amendment may be issued immediately and due care may please be exercised in future.*

*S H KHALID  
CAPT PN  
CSO*

*Copy to:*

*The Director of Work (Plane)  
Naval Headquarters  
Islamabad*

*Station Headquarters Karachi*

*The Chairman  
Karachi Development Authority  
KARACHI*

(Underlining for emphasis is ours)

32. The above two letters written by the concerned functionaries of the Army and Navy respectively, are consistent with the decision of the GoP in respect of the area transferred to KDA/Sindh Government. It will be seen from the contents of both letters that the playground was unambiguously acknowledged to be included in the Lines Area Project. Not only was there no objection to the said inclusion, the military authorities stamped their approval to the boundaries of the said project, subject only to their objections communicated to KDA through the letters reproduced above.

33. At this point, it may be observed that KDA took note of and accepted the objections raised by the military authorities. As a result the boundaries of the Lines Area Project were redrawn and the areas objected to by the military authorities were excluded from the scheme. A Master Plan showing the revised boundaries which acknowledges the validity of the objections of the military authorities is available on record. The redrawn boundary of the Lines Area Project, to the extent relevant for our purposes, runs along Mubarak Shaheed Road and therefore, rightly shows the playground as part of the Lines Area Project, located to the North of Mubarak Shaheed Road. The fact that no objection was made to the revised boundaries by the military authorities further shows that there was complete acceptance of the transfer of the said land to KDA.

34. The above referred documents and discussion thereon make it abundantly clear that the playground came to fall within the jurisdictional ambit and

regulatory/building control of the KDA initially, and now is within the jurisdiction of its successor body namely the CDGK. Though these documents are, in themselves, conclusive on this score, there is even more material available with us to show that such jurisdiction vested in and, to the knowledge of Makro-Habib, was exercised by the CDGK. In this context, reference must be made to a meeting held on 12.11.2006, between Syed Mustafa Kamal, City Nazim, Karachi and Mr. Merek Minkiewicz, Managing Director, Makro-Habib. The meeting was also attended by Mr. Farhad Zulficar, Vice Chairman, House of Habib, Karachi and Mr. Gulsher Khan, Director Public Affairs, House of Habib, Karachi. Minutes of the meeting are available on record. It is interesting to note from the minutes that Mr. Minkiewicz *‘requested the City Nazim for his support to resolve the jurisdictional issue of the land situated at Mubarak Shaheed Road for establishment of store.’* Makro-Habib, as such, was fully aware of the claim of CDGK over the land in contention, but went ahead with full awareness of this claim, to construct and open its store. The jurisdictional authority of the CDGK was also later asserted over the said land in unqualified terms. The Project Director, Lines Area Project, CDGK stated in his letter dated 17.2.2007, addressed to the Secretary General of Shehri that the land use of the area had not been changed and it remained a play round in the approved Master Plan of the Lines Area Project. These documents are, of course, in addition to the letter (reproduced below) written by Mr. Nāmatullah Khan, City Nazim CDGK in 2003, wherein the title and jurisdiction of CDGK over the playground has been asserted most emphatically and for sound reasons.

35. There is yet another aspect of the case which should be noted, because it adds weight to the plea of Shehri/CDGK that the decision of the GoP stood fully implemented. There is on record, an Office Memorandum dated 30.8.1978 sent by the Works Division of GoP to the Defence Division. In this memorandum, it has been recorded that a sum of Rs.30 crore had been paid as compensation for the transferred land. Significantly, the payment of the sum of Rs.30 crore was also reiterated in a letter dated 1.9.2003 addressed to AWT by Mr. Niamatullah Khan, City Nazim, CDGK. The contents of this letter also shed light on the claim

asserted on the playground, by CDGK. The letter can usefully be reproduced here, keeping in view its relevance to the controversy in the case. It reads as under:-

*“The General Manager  
Army Welfare Trust, AWT Plaza,  
I.I. Chundrigar Road,  
Karachi.*

*Subject:           CONSTRUCTION OF BOUNDARY WALL ON LARP LAND*

*Nazims of UC-8 & 9, Jamshed Town have intimated that Army Welfare Trust has constructed a boundary wall over a piece of land measuring 4.87 Acres known as Grammar School Ground (Tunisia Lines), Lines Area Re-Development Project, Karachi.*

*In this connection I would like to bring to your notice that the land in question was handed over [sic] the Lines Areas Development Project by the Ministry of Defence in the year 1982 after receiving compensation amounting to Rs. 30 Crores (Copy enclosed).*

*The decision was taken in a series of meeting [sic] held on 18.07.1975, 12.10.1975 & 16.6.1976 under the Chairmanship of Secretary General Ministry of (Finance) & Economic Coordination attended by Secretary General Ministry of Defence, Chief of Army Staff and others. In the said meeting it was decided to handover 200 acres of land to (LARP)/KDA. The Land agreed for handing over includes Absyinia Lines – 102 acres, Tunisia Lines-43 acres and Jutland Lines-50 acres land, against 200 acres land.*

*On the basis of the above Defence land and 270 acres belonging to Ministry of Works a Master Plan was prepared for Lines Area Re-Development Project and presented to the LARP Board for approval. The Master Plan was approved by the Board in its meeting chaired by the then Governor Sindh and MLA Zone “C” on 13.04.1983.*

*In view of the facts mentioned above, it is crystal clear that the land in question is the property of LARP, City District Government Karachi as the Army has already received the compensation and it will be unfair to re-occupy the same at this stage.*

*With regards.*

*Yours*

*Sd/-  
[NIAMATULLAH KHAN]  
City Nazim, Karachi ”*

(Underlining for emphasis is ours)

This letter spells out, in clear terms, the claim of the CDGK which is consistent with the conclusions drawn above.

36. The foregoing discussion and documentary evidence conclusively establishes that the playground stood transferred to the KDA/Sindh Government, leaving no dispositive power in the GoP to grant a lease of the said land to the AWT. As a necessary consequence, it follows that the lease favouring AWT, and also, therefore, the sub-lease in favour of Makro-Habib are not lawful and do not create any rights in favour of these parties. This conclusion is, by itself, sufficient for the purpose of disposing of this case. However, for ensuring completeness of this judgment, we need to consider the pleas and arguments advanced on behalf of AWT and Makro-Habib.

37. Learned counsel respectively representing these two parties placed a great deal of stress on the question of ownership of the playground. According to them, the ground, being part of Karachi Cantonment, was 'Army land', title to which was vested in the President who could lawfully and, according to their argument, freely transfer leasehold rights in favour of AWT for 90 years. We have commented on this aspect of the case in a later part of this judgment. For the present, however, we note that the submissions of learned counsel are posited on the premise that there is no conveyance deed transferring title to KDA/Sindh Government and that the GLR of Karachi Cantonment in respect of Survey No.148/1, continues to show the playground as the property of GoP.

38. The GLR, it should be stated at the outset, does not create or determine questions of title. It merely maintains a record of transactions between parties, including the GoP, relating to rights in, or in respect of lands situated within Cantonment areas. At most, the GLR, taken on its own, can raise a presumption that its contents are a correct record of the status and interests of lessees, occupants etc. in such lands. The fact, therefore, that the GLR continues to show the playground (Survey No.148/1) as owned by the GoP does not advance the case of AWT/Makro-Habib, particularly, in light of the material documentary evidence considered above.

39. There is another and even more formidable objection to the reliance placed by AWT and Makro-Habib on the GLR. It is true that the GLR has allocated a separate survey number to the playground. This fact, however, bears no relevance to the controversy before us. The decision taken by the GoP and unequivocally accepted and acted upon by the concerned Governments and their respective agencies, was made in accordance with identifiable and well defined boundaries. It was not made with reference to Survey Numbers in the GLR. If land owned by GoP in Karachi Cantonment fell within the said boundaries - as in the present case it clearly does - it was covered in the transfer, regardless of the Survey Numbers allotted to such land. We are unable to accept the argument (advanced on behalf of AWT/Makro-Habib) that even though Survey No.148 was included in the transfer made by GoP, this did not cover the playground which bore the separate Survey No.148/1. Mere Survey Numbers in the GLR cannot be accorded any special significance in the present controversy. We fail to see the logic of the non-sequitor submission that solely because the playground bears Survey Number 148/1, it must be excluded from the transfer made in favour of KDA regardless of the fact that it falls squarely within the boundaries described in the decision taken by the GoP.

40. The second argument in respect of title was based on the fact that the absence of a conveyance deed in favour of KDA/Sindh Government necessarily meant that title continued to vest in the GoP. This submission also, in our opinion, does not advance the case of AWT/Makro-Habib. We have already reproduced above, the common stance of AWT/Makro-Habib as expressly set out in their joint plaint in Suit No.926/2007 pending in the Sindh High Court. This stance has been supported by GoP through its para-wise comments in Constitution Petition No. D-1740/07. It has been categorically conceded by all three viz. GoP, AWT and Macro-Habib, that the GoP has transferred lands which were previously comprised in Karachi Cantonment, to KDA/Sindh Government. The absence of a conveyance deed was never pleaded in the suit and appears to have been taken up for the first time in these proceedings. These parties cannot be allowed to set up a plea which contradicts their stance in the plaint.

41. It is quite obvious to us, for reasons already noted, that land was transferred to KDA/Sindh Government followed by actual, on ground, acceptance of the same by all relevant departments and agencies of the Federal and Provincial governments. The absence of a registered conveyance deed in the present case cannot effect the possessory, proprietary and beneficial interests of the KDA/Sindh Government nor was the lack of such deed sufficient to put the disputed playground outside the jurisdiction and regulatory control of the CDGK. At most, a bona fide transferee, of any interest in the land, could have set up legal rights pleading ignorance of the transfer made in favour of KDA/Sindh Government. Such plea, however, is not available to Makro-Habib, which, quite obviously was fully aware of the jurisdictional disputes in relation to the land when its Managing Director, Mr. Minkiewicz met the City Nazim, Syed Mustafa Kamal. Secondly, Makro-Habib cannot claim to be a bona fide sub-lessee of the disputed land. It is implicit in the contents of the plaint in suit No. 926/2007, jointly filed by AWT and Makro-Habib that Makro-Habib did not undertake any inquiry or due-diligence as to title and instead relied upon AWT's "*assurance of clear title*". Makro-Habib alone should bear the consequences of this misplaced reliance. Had it probed the question of title even slightly, it would have come across the Notification dated 8.2.1982 which appeared in the Sindh Government Gazette and would also have uncovered the Master Plan and boundaries of the Lines Area Project. This circumstance, however, may be of lesser significance considering that Makro-Habib had actual notice of the claim which CDGK had over the playground.

42. It was contended by Mr. Khalid Anwar, learned Sr. ASC for Makro-Habib that substantial foreign investment had been brought into Pakistan and poured into the wholesale store by a Dutch Company after negotiating a sub-lease with AWT which sub-lease was, in turn, based on a lease by the President of Pakistan. His argument, *inter alia*, was that foreign investment would suffer because the confidence of investors would be undermined, particularly, in view of the fact that the grant of leasehold rights originated from the highest Office in the country. This argument, however, does not take into account, the material

circumstance that Makro-Habib is the author of its own woes as discussed above. In this view of the matter, there exists no equity in favour of Makro-Habib, sufficient to save its rights under the sub-lease dated 31.7.2006. We are not in any doubt that Makro-Habib went ahead with its business venture with open eyes, even though it knew that the playground stood transferred to KDA/Sindh Government, or at the very least, it had knowledge of the claim of CDGK.

43. We should also add at this stage, that the GoP, even without executing a formal conveyance can allocate or re-allocate its assets such as the playground, towards its legitimate objectives, including the provision of amenities such as grounds and open spaces for citizens. This is precisely what the GoP has chosen to do as per decision taken and duly recorded in the minutes of the meeting dated 16.6.1976. In doing so, the GoP has only fulfilled the obligation imposed on it by Article 29 read with Article 38 of the Constitution. To remind ourselves and to reinforce our commitment that these provisions are not mere vacuous and hollow expressions of pious intent, we reproduce both Articles below:-

Article 29

“(1) The Principles set out in this Chapter shall be known as the Principles of Policy, and it is the responsibility of each organ and authority of the State, and of each person performing functions on behalf of an organ or authority of the State, to act in accordance with those Principles in so far as they relate to the functions of the organ or authority.

(2) In so far as the observance of any particular Principle of Policy may be dependent upon resources being available for the purpose, the Principle shall be regarded as being subject to the availability of resources.

(3) In respect of each year, the President in relation to the affairs of the Federation, and the Governor of each Province in relation to the affairs of his Province, shall cause to be prepared and laid before the National Assembly or, as the case may be, the Provincial Assembly, a report on the observance and implementation of the Principles of Policy, and provision shall be made in the rules of procedure of the National Assembly or, as the case may be, the Provincial Assembly, for discussion on such report.

Article 38

The State shall—

- (a) secure the well-being of the people, irrespective of sex, caste, creed or race, by raising their standard of living, by preventing the concentration of wealth and means of production and distribution in the hands of a few to the detriment of general interest and by ensuring equitable adjustment of rights between employers and employees, and landlords and tenants;
- (b) provide for all citizens, within the available resources of the country, facilities for work and adequate livelihood with reasonable rest and leisure;
- (c) provide for all persons employed in the service of Pakistan or otherwise, social security by compulsory social insurance or other means;
- (d) provide basic necessities of life, such as food, clothing, housing, education and medical relief, for all such citizens, irrespective of sex, caste, creed or race, as are permanently or temporarily unable to earn their livelihood on account of infirmity, sickness or unemployment;
- (e) reduce disparity in the income and earnings of individuals, including persons in the various classes of the service of Pakistan; and
- (f) eliminate *riba* as early as possible.”

44. Having considered and rejected the pleas advanced on behalf of Makro-Habib, we now examine the submissions of learned counsel for AWT. He has referred to a number of documents including a letter dated 5.1.2007 addressed to it by the Nazim of Jamshed Town, Karachi to asset that Survey No.148/1 comprising of the playground, was not falling within the jurisdiction of Jamshed Town. A reference has also been made by AWT to a letter dated 1.12.2006 issued by the Nazim, CDGK. We have examined these letters. The letter of the Nazim, Jamshed Town has little relevance considering that the transfer of the land had been made initially to KDA and is now vesting in CDGK. In any case, it is against the position earlier taken by the CDGK on the initiative of the Nazims of UC 8 and 9 of Jamshed Town.

45. A sentence in the letter of the Nazim, CDGK has also been taken out of context. The Nazim had categorically stated at the start of his letter that the title of the subject Survey No.148/1, was in dispute between the Army authorities

and the CDGK. The letter went on to mention that a joint survey through the Survey of Pakistan was agreed upon and all requisite formalities were completed including the payment of 100% survey fee by CDGK to the Survey of Pakistan. However, on the date fixed for the joint survey i.e. 19.10.2006, no one from the office of the Military Estates Officer or other Defence authorities attended for the purpose of the survey. The Nazim has also stated that the survey was postponed to 7.11.2006 but once again no one from the office of the Military Estates Officer/Defence authorities turned up. This letter can, therefore, hardly be taken as an admission that the CDGK has no claim over the playground. Furthermore, even the sentence relied upon by AWT was “without prejudice” to the claim of CDGK.

46. In addition to the above, reference has been made to other documents including a letter dated 9.12.1985 issued by an officer of the Military Lands and Cantonment Department stating that the proposal for the disposal of Survey No.148/1 has been dropped. It has been averred by AWT that this decision was in line with the summary prepared for the meeting of 18.7.1975, wherein the Ministry of Defence was accepted as the sole Judge for determining if any land was required for Military purposes. This averment is not tenable firstly, because subsequent to 1975, as discussed above, a clear and unambiguous decision was taken. We have already concluded that according to the said decision, the playground fell within the area which was transferred. In these circumstances, a functionary of the Military Lands and Cantonment Department had no authority to vary such decision. Moreover, as noted earlier, the aforesaid decision was actually acted upon and the playground was included in the Master Plan for the Lines Area Project.

47. The AWT in CMA 4000/2009 has also taken the plea that the Ground is “owned by the Ministry of Defence.” This assertion is patently misconceived. Even if it is for a moment accepted that it was not transferred to the Government of Sindh/KDA, it would be evident that title vests in the Federal Government and not in the Ministry of Defence. The GoP, in the ‘70s, acted very properly and in

accordance with the ACR Rules, 1944 when it transferred its lands to KDA/Sindh Government. This aspect of the case will be further discussed shortly.

48. Another argument which was premised on the continued subsistence of title in the GoP, appeared to imply that because of such title, the GoP was free to deal with the land in question in any manner it chose, unfettered by any constraints. This issue came into sharp focus when we questioned the learned Attorney General and the learned counsel respectively representing AWT and Makro-Habib, as to the rent and other terms of the lease in favour of AWT. They defended the right of the GoP to grant the said lease. It must, however, be said that Mr. Khalid Anwar, learned Sr. ASC for Makro-Habib suggested that Makro-Habib could, if allowed to continue the operation of its wholesale store, start paying the agreed rent directly to the GoP instead of AWT. But the learned Attorney General and learned counsel for AWT remained insistent that there was nothing wrong with the terms of the lease. The paltry amount received by AWT as rent was also justified by them on the ground that AWT was controlled by, and its accounts were maintained and monitored in the GHQ. We must note at this point, the fallacy of these submissions, both in respect of the nature of GoP's title and the status of AWT and the privilege which it claims on the basis of such status. This aspect of the case is further elaborated below.

49. The submission on behalf of AWT based on legal title, is founded on private law concepts of right to property but ignores completely, the notion of public ownership of the land, stemming from the Constitution. It also overlooks the fiduciary nature of the responsibilities of the Government and its functionaries while dealing with valuable assets such as the playground. Land which is privately owned can be dealt with by the owner in any manner he chooses. The owner may, therefore, legitimately decide to grant a lease of the most valuable land owned by him, in consideration of a 'peppercorn' rent. Or, he may even decide to make an outright gift of the same on the basis of the unfettered title vested in him. However, where land is owned publically, that is, by the people of Pakistan, legal title may vest in the Government, but such title, and the exercise of

powers based thereon, are to be exercised in the public interest, in accordance with the Constitution and the laws framed thereunder.

50. We have already noted in an earlier part of this judgment that the lease was granted to AWT at an annual rent of Rs.6020/- only. A premium of Rs.200,640/- (rupees two hundred thousand six hundred and forty only) was also paid by AWT to the GoP at the time the lease was granted to it. Before elaborating on the constitutional imperatives constraining governmental actions, we consider it appropriate to examine the Cantonment Land Administration Rules, 1937 (the 'CLA Rules'). These Rules contain detailed instructions, *inter alia*, relating to the grant of leases, re-classification of lands within the cantonment areas and other matters. The CLA Rules are accompanied by official notes containing a commentary thereon. The commentary, as set out in the notes, is intended as a guide to the interpretation of the CLA Rules and supplements the same. Note No. (ii)(b) to Rule 1, is in the following words:-

*“(ii) The salient features of the Cantonment Land Administration Rules, 1937, are as follows:-*

*(b) They are designed to safeguard the financial interests of the Government.....”*

(The underlining for emphasis is ours)

As such, it is apparent that while acting under the CLA Rules, the functionaries of the State and those responsible for administering land within the cantonment areas, are not free agents. They are obliged to make sure no loss is caused to the Government in respect of valuable assets owned by it. This is particularly so, when such assets, as in this case, are intended to be put to commercial use and are proposed to be transferred to a non-government organization for business purposes or for generating un-earned income.

51. Rule 16 is also relevant in this context. We have noted that at least since 1937, the playground was categorized as A-2 land. This required that it be maintained as an unbuilt area, always remaining available for Army use. It is for this reason, it was leased to the Karachi Grammar School for use as a playground

starting from 1937. Even when this arrangement expired, the playground remained A-2 land until in 2002 it was categorized as B-4 'building site'. There are serious questions as to the re-classification, which will be discussed below. For the present, we can examine the manner in which the ground was leased in the light of the CLA Rules. Rule 16, provides, *inter alia*, that *'building sites shall ordinarily be disposed of by lease'*. Sub-rule (2) of Rule 16 stipulates that *"the initial premium shall be charged on the lease and the lease shall be put up to public auction for sale to the person who agrees to pay the highest amount as premium."* Rule 19 sub-rule(2) stipulates that *"in no case shall....annual rent be charged at a lower rate than that fixed by the standard table of rents."* The table of rents has been prescribed in Rule 8. It provides as under:-

*"8. Standard table of rents.-- The Military Estates Officer, in consultation with the Collector, shall from time to time compile, in the form prescribed in Schedule II, standard tables of rent suitable for application to sites for agricultural and non-agricultural purposes in the cantonment, having regard to the situation of the site, the nature of the soil, and the rates charged for adjacent agricultural land or for building sites in the neighbourhood."*

52. Here, it is important to take into account an aspect of the case which is of obvious relevance but appears to have been ignored by all concerned functionaries while dealing with the disputed land and when changing its classification from A2 to B-4 category. The validity of the lease aside, despite our repeated questioning, we were not shown any deliberations or reasoning which went behind the change of classification from category A-2 to category B-4. It may, perhaps be acceptable that rent for an open ground required to be maintained as such could be nominal. However, when the land was reclassified as a building site, in the heart of Karachi, having a high commercial value, the determination of market rent ought to have been ascertained from the Collector as prescribed. We are now aware that the land, reclassified as B-4 'building site' commands a minimum rent of Rs.17.5 million per annum. A substantial increase in rent in line with market rates as a condition for reclassifying the land as

building site was, in our view, essential. Upon our query, we were informed that this had not happened. As a consequence, AWT, which is a non-government organization, registered as a private society, is receiving at least Rs.17.5 million as annual rent from Makro-Habib, while continuing to pay the lowly sum of Rs.6020/- only as annual rent to the GoP. According to figures of current annual turn-over of Makro-Habib provided to us, the annual rent being received by AWT (as a percentage of turn-over) would be much higher than Rs.17.5 million. We have commented on some additional aspects of this matter, in a later part of the judgment.

53. The obligation of State functionaries is to ensure that the financial interests of the Government are adequately taken care of. It has been reiterated in Rule 22 that the *“Military Estates Officer shall proceed to sell the lease by auction to the person who agrees to pay the highest amount as premium.”* Lease premiums and rentals are required to be benchmarked against market value to ensure that no loss is caused to the State exchequer. While estimating the market value *“actual sales of unoccupied land for building purposes in the locality”* wherever possible, are required to be used.

54. Rule 26 provides that *“in exceptional cases for exceptional reasons to be recorded in writing, and subject to the approval of the Central Government or such other authority as the Central Government may appoint for this purpose,”* the Military Estates Officer may dispense with the auction of the lease as prescribed by Rule 22 and may lease any site by private agreement at such rate of rent and on payment of such premium as the Central Government or the appointed authority may approve in each case. It would appear that the lease in favour of AWT was purportedly made pursuant to Rule 26. However, the proviso to the Rule requires that *“the concurrence of the Collector and the approval by the Officer Commanding the Station shall be obtained before application is made for the approval of the Central Government or the appointed authority.”* The record does not show that Rule 26 has been complied with.

55. Rule 31 also has a significant bearing on the present case and was read out by Mr. Khalid Anwar, Sr. ASC. It was argued on behalf of AWT and Makro-

Habib that the lease dated 19.12.2002 in favour of AWT had been granted under this Rule. The Rule as originally framed provided, in relevant part, as under:-

**“31. Leases for special period and on special terms.—(1) A lease for a building site for a period not exceeding 30 years or a lease in perpetuity, may be granted by the Military Estates Officer in the forms prescribed in Schedules IX and X, where for special reasons such a course appears to be advantageous to the Central Government:**

**Provided that no such lease shall be granted without previous consultation with the Collector and the previous sanction of the Central Government”:**

The aforesaid Rule was amended through Notification No. SRO 140(I)/98 dated 24.12.1998. Sub-Rules (1) and (2) of the amended Rule read as under:-

**“31. Leases for special periods and on special terms.—(1) A lease for a building site for a period not exceeding thirty years, or ninety years or ninety-nine years or a lease in perpetuity may be granted by the Military Estates Officers in the forms set out in Schedule VIII, IX, IX-A, IX-B, IX-C, X, X (Modified), XI and XI-A and Forms A, B and C of the Defence Officers Housing Authority, Karachi, where for special reasons such a course appears to be advantageous to the Federal Government.**  
**(2) A lease under sub-rule (1) shall be granted after obtaining the rates from the revenue Authorities and with the previous sanction of the Federal Government”.**

56. It is obvious from the wording of Rule 31 that a lease thereunder may be granted only “where for special reasons such a course appears to be advantageous to the Federal Government.” Even this course of action is to be adopted after obtaining rates from the Revenue Authorities and with the previous sanction of the Federal Government. Learned counsel for AWT and Makro-Habib and the learned Attorney General were unable to explain how the above arrangement of granting a lease, practically rent free, for prime commercial land, could be considered ‘advantageous’ to the GoP. We are, in the circumstances led to the inescapable conclusion that Government land was virtually thrown away at great financial loss to the Government and in utter disregard of the CLA Rules. This Court has been particularly conscious of, and has endeavoured to ensure that State functionaries fulfil their duty to protect the

public interest. In the case titled Pervaiz Oliver Vs. St. Gabriel School (PLD 1999 SC 26) it was held that no public property, big or small, tangible or intangible, can be disposed of except in accordance with law. This principle, with full force and vigour is applicable in the present case also.

57. This brings us to a consideration of certain Constitutional dimensions of the case. We are fully conscious that the jurisdiction being exercised by us is vested in this Court under Article 184 (3) of the Constitution. We have also noted and agree with Mr. Khalid Anwar's submission that the scope of this special constitutional jurisdiction needs to be spelt out and defined for the sake of certainty, to enable parties to foresee the consequences of their actions. The extent of this jurisdiction, we should mention (in relation to "*access to places of public entertainment or resort*") has already been defined quite adequately in the case titled Iqbal Haider Vs. Capital Development Authority (PLD 2006 SC 394). In particular, paragraphs 31 onwards, of the cited judgment have settled the rule firstly, that the fundamental right to access as aforesaid guaranteed under Article 26 of the Constitution, includes within its scope, parks, playgrounds and other recreational facilities provided for the public and secondly, that such amenities cannot be taken away through change of land use or otherwise to the disadvantage of the public. In the precedent case, the facts, in material particulars, were similar to the circumstances which exist in this case. A public park known as Jubilee Park, had been earmarked in the original scheme for a locality in Islamabad, but it was converted into a commercially driven amusement park which created restraints on the free access to the park, by segments of the public who were not financially well off. The Court held as under:-

*"31. Now we will examine whether in view of the given facts and circumstance of the case, any of the fundamental rights guaranteed to the citizens of Pakistan have been denied. Islamabad, being a capital city, attracts representation from all over Pakistan in different capacities. Thus it is their right to enjoy access to the places of entertainment like the Jubilee Park, etc. under Article 26 of the Constitution. The same is position of the inhabitants of the area where the Park is situated. As it has been stated herein above that necessary documents have been withheld by the C.D.A. from the Court for which, observations have been*

*made herein above. Thus, it is held that Jubilee Park was earmarked in the original scheme of Section F-7, as it was meant for low income group, who are deprived of the benefits of having their own private gardens, comparing to higher income groups, therefore, converting such Parks for commercial activity with the collaboration of multinational companies, would deny the rights guaranteed to them.”*

58. The playground which is subject matter of this case is surrounded by houses occupied by low income and underprivileged segments of society. This appears from photographs of slum-like dwellings in the locality, placed on file. We have also seen the Summary dated 18.7.1975 prepared by the Secretary, Ministry of Defence relating to the Lines Area Project. It records an earlier decision that multi-storey flats would be constructed in the project area *“where the present occupants would be given preference for rehabilitation on a minimum charge and the flats will be permanently transferred to the residents.”* The playground, as is evident from the Master Plan, was to be an open space for the benefit of such residents in need of rehabilitation. It is unfortunate that this decision has not been implemented. But what is even more egregious is that the playground has been taken over, converted into a building site and handed over to a multi-national joint venture for commercial exploitation. The residents of the area have thus been deprived of access to an open public space to which they are entitled.

59. It is through the use of precedent that the contours of the law are constantly defined. The Constitution of Pakistan, through Article 189 recognizes the significance of judicial precedent in the acknowledged tradition of a Common Law jurisdiction. The scope of Article 184 (3) of the Constitution has by now, been reasonably well articulated in cases involving parks, playgrounds and other places of public entertainment and resort. These precedents, which have been cited and discussed in the case of Iqbal Haider *supra*, are sufficient for the present, to support our conclusion that the playground was required to be maintained for public access and use. We, therefore, do not consider it necessary to elaborate on a tentative view formed by us, that the rights of the public,

guaranteed under Article 9 and Article 24 may also have been infringed. This tentative view can be expounded at a later date, in an appropriate case.

60. However, this is an appropriate stage in the judgment to say a few words about the manner in which the playground, which is public property was dealt with by the executive functionaries of the GoP. We have already considered the extraordinary favour shown to AWT in the matter of rent payable by it. We have now examined two documents which were placed on record on behalf of GoP at the conclusion of the case, only after we had repeatedly asked for the reasons and basis for the decision behind the disadvantageous (for GoP) terms of the lease and the justification for reclassification of the playground (Survey No.148/1) from category A-2 to category B-4. Since these documents, taken in their totality, reflect a mindset which appears to have been operating in the Ministry of Defence at the time and which was driving the decision-making process of the GoP, we are reproducing below, both documents *in extenso*. The first is a Summary dated 20.9.2002 for the Chief Executive (General Musharaf), by the Secretary of the Ministry of Defence, Lt. Gen. (Retd.) Hamid Nawaz Khan. It goes as under:-

**“ GOVERNMENT OF PAKISTAN  
MINISTRY OF DEFENCE  
(DEFENCE DIVISION)**

**SUMMARY FOR THE CHIEF EXECUTIVE**

*Subject:- Transfer on Lease of Defence Land (A-1/A-2 Class) to the Army Welfare Trust*

*Army Welfare Trust (AWT) is a welfare organization and the entire income of the Trust is spent on the welfare of serving as well as retired military personnel. With the approval of COAS, GHQ have **proposed** (Annex-A) the transfer of the following lands to AWT for commercial purpose, free of cost:-*

- |    |  |   |
|----|--|---|
| a. | <i>Flashman Hotel Rawalpindi Survey No. 406</i>                | <i>The entire resumed area after Army gets its possession</i> |
| b. | <i>Land near Regent Plaza Survey No. 195, Karachi</i>          | <i>9.304 acres</i>  |
| c. | <i>Land near FTC Aluminium Huts, Survey no. 183/1, Karachi</i> | <i>8.48 acres</i>   |
| d. | <i>Land on JPMC Road Survey No. 197, Karachi</i>               | <i>1.319 acres</i>  |

- |    |  |                    |
|----|--|--------------------|
| e. | Land near Abesynia School (Lines Area), Survey No. 148/1, Karachi                      | 4.958 acres        |
| f. | DRO Faisalabad Residence near Mian Trust Hosp, Khasra No. 1370 & 1371, Faisalabad City | 46 kanals 2 marlas |
| g. | Khasra No. 254 (Kharian City)  | 4.3 acres          |
| h. | Survey No. 85, D.I. Khan   | 21.68 acres        |

2. The lands mentioned at Serial 1(b) to (h) above are Defence lands (A-1/A-2 Class), under occupation of the Army, while the land of FLashman Hotel, mentioned at Serial 1(a) above, being old grant property, is in the process of resumption for Army use. However, since presently its transfer to Army is subjudice in Lahore High Court, Rawalpindi Bench, the proposal for its transfer to AWT will be dealt with separately after the case is decided by the court.

3. DG ML&C has recommended the proposal under Cantonment Land Administration (CLA) **Rules** 1937 (Annex-B) and Acquisition Custody and Relinquishment (ACR) Rules, 1944 (Annex-C) for transfer of defence land to AWT (a non government organization) on rates as determined by the competent authority. Finance Division (Military) have, however, concurred to the proposal on payment of market rates.

4. Since Rules do not permit leasing out defence land free of cost, MoD supports payment of nominal premium and rent by AWT, being a welfare organization.

5. The Chief Executive, is therefore, requested to accord approval to the proposal of transfer on lease of the subject defence land, mentioned at serial (b) to (h) of para 1 for commercial purpose to AWT on a token premium of Rs. 10/- per sq. metre and annual ground rent @ Rs. 0.30 per sq. metre, in Schedule-X (Modified) of (CLA) Rules, 1937.

Sd/-  
Lt Gen (Retd)  
(Hamid Nawaz Khan)  
Secretary  
20 September, 2002”

Although this document purports to be a ‘Summary for the Chief Executive’, it has none of the attributes required of such official document. It does not disclose any of the happenings and decisions which took place in the ‘70’s nor does it refer to the minutes of various meetings during that period. It also does not make any mention of the Sindh Government Gazette of 1982 (considered above) or the contemporaneous correspondence between KDA and the functionaries of the Military Lands & Cantonments Department. We have also noted the cynical play

with the CLA Rules and the ACR Rules, 1944, as manifested in the document. Furthermore, none of the patent deviations from both sets of Rules have been highlighted, justified or otherwise commented upon. This Summary does not provide any indication of the events noted below, which surely would have been in the offing when the Summary was being processed. Much more can be said about this Summary, but it is not necessary to do so, as the document speaks for itself and presents a damning indictment of dictatorial one man rule.

61. The second document referred to above is the 'sanction' of the President dated 21.10.2002, i.e. just one month after the above referred Summary dated 20.9.2002. This 'sanction' reads as under:-

*"No. 55/79/Lands/2002-G/2198-A/D-12/ML&C/02  
Government of Pakistan  
Ministry of Defence (Def Divn)  
Rawalpindi the, 21<sup>st</sup> Oct, 2002*

*The DGML & C  
ML&C Department  
Rawalpindi.*

*Subject                   Transfer of land in survey No. 195, 183/1, 197/16 and 148/1  
to Army Welfare Trust in Karachi Cantonment.*

*Sir,*

*I am directed to convey the sanction of the President to the following measuring in Karachi Cantonment:-*

- (a)    Re-classification of land of survey No. 195 from A-1 to B-4 and land in Survey No. 183/1, 197/16 and 148/1 from A-2 to B-4.*
- (b)    Leasing out of land in following Survey Nos. to Army Welfare Trust (AWT) on the lease in Schedule -X (Modified) of the CLA Rules 1937 for commercial purposes for a period of 90 years from the date of issue of Government sanction at an annual rent and premium as indicated below:-*

<i>Survey No.</i>	<i>Area Sq Meter</i>	<i>Annual Rent Paise 30 Sqm</i>	<i>Premium Rs. 10 Sqm</i>	<i>Area in Acres</i>
<i>195</i>	<i>37652.00</i>	<i>Rs. 11,296,00</i>	<i>Rs. 376520.00</i>	<i>9.304</i>
<i>183/1</i>	<i>34317.00</i>	<i>Rs. 10296.00</i>	<i>Rs. 343170.00</i>	<i>8.48</i>
<i>197/16</i>	<i>5338.00</i>	<i>Rs. 1,602,00</i>	<i>Rs. 53380.00</i>	<i>1.319</i>
<i>148/1</i>	<i>20064.00</i>	<i>Rs. 6,020,00</i>	<i>Rs. 200640.00</i>	<i>4.958</i>

- (c)    Payment of development charges at current rates to the local cantt Board.*
- (d)    Execution/registration of lease deeds of aforementioned lands by Army Welfare Trust (AWT) at their own expenses.*

2. *This sanction is valid for a period of six months from the date of its issue.*

*Sd/-  
Muhammad Sadiq  
Section Officer ”*

Despite our repeated queries, no basis was provided to us by the learned Attorney general for re-classifying survey No.148/1 (the disputed playground), from category A-2 to B-4. The basis of the re-classification would be of relevance in the case as it would facilitate judicial review and would also enable us to ensure that the re-classification was made for valid and permissible considerations. As it stands, the so called sanction of the President appears to be wholly arbitrary and lacking in transparency. It is also violative of the Acquisition Custody and Relinquishment (ACR) Rules referred to in the Summary dated 20.9.2002. Since the ACR Rules of 1944 have been relied upon by the Secretary, Ministry of Defence in his Summary, it will be useful to reproduce relevant extracts from the same. Part IV of the said Rules relates to the relinquishment of military lands. The entire Part has a bearing on the case in hand. However, selected portions having relevance, are reproduced as under:-

*“15. The policy of the Government of [Pakistan] will be to limit their holdings of land to their actual requirements, present and prospective. Before land under the immediate control of the Defence Department, or in the possession of one Branch or Department of the Army, Navy or of the Air Force is relinquished, it shall be ascertained by the Defence Department whether the land is required, firstly, by any other Branch or Department of the Army, Navy or by the Air Force and, secondly, by any other Department of the Government of Pakistan.*

*Unless in any particular case orders are issued by the Government of Pakistan to the contrary, the proceeds of all lands relinquished, less any charges incurred in their disposal, shall be credited to the lands sales suspense account which does not form part of the Defence Services estimates*

*(ii) Should the land to be relinquished not be required by any other Department of the Government of Pakistan, the Provincial Government of the Province in which it is situate will be given the first option of assuming possession of the whole or any portion thereof, subject to the following conditions:-*

(a) *The Government of Pakistan themselves will be judges of whether they require to retain any particular land or not; ”*

62. After going through the above extracts from the ACR Rules, we can safely proceed on the premise that although the said Rules were not expressly mentioned in the minutes of various meetings held during the '70's (considered above) the decision-making was made by the GoP in conformity with the instructions contained in the ACR Rules. We have seen from the Summary dated 20.9.2002, that AWT was rightly mentioned as a non-governmental organization('NGO'). It was, however, granted Government land in a wholly opaque and non-transparent manner without any regard to the financial interests of the GoP and without an open invitation to interested bidders. The grant of leasehold rights to an NGO in this manner, obviously cannot be treated as a legitimate and permissible exercise of executive powers. The grant made to AWT was also in gross violation of the ACR Rules.

63. We now consider the status of AWT. We have seen its Memorandum and Articles of Association. It is a private Trust meant primarily for the benefit of serving and retired personnel of the armed forces of Pakistan and their families. We have no doubt that AWT has been established for the laudable objective of providing for the welfare of servicemen and their families. This objective, however laudable, must nonetheless be achieved through permissible means and not at the expense of the State exchequer or the public at large. This guiding principle must inform all decisions taken by State functionaries in the performance of their official duties. This Court has repeatedly emphasized the need for State functionaries to act in furtherance of the public interest. In this respect, they are fiduciaries, ultimately responsible to their paymasters i.e. the people of Pakistan. The case of Pervaiz Oliver, *supra* is just one of numerous precedents defining this obligation of Government functionaries. Unfortunately, in the present case, we see that the concerned administrative functionaries have been seriously remiss in the performance of their duty to protect the public

interest, whether in the form of providing amenities to the people, or of safeguarding the State's financial interests arising from the transfer of rights in State property. While saying this, we should not be taken as implying that grant of a lease of the playground to the highest bidder would have been an acceptable option in this case. Our reference to the CLA Rules and the financial interests of the State has only been made to underscore the point that the lease in favor of AWT is liable to be struck down for this additional reason.

64. Continuing with a discussion of the constitutional aspects of this case, we may add that the jurisdiction of this Court under Article 184 (3) of the Constitution is to be exercised, keeping in view both the letter and spirit of the Constitution. The people of Pakistan have been blessed with a Constitution and aspire, despite difficulties, to Constitutional rule. The Constitution, we can say with certainty, is imbued with an ethos and guiding spirit which underpins it and obliges the organs of the State and their functionaries to act in conformity with such guiding spirit. This ethos is discernable from the Preamble and certain substantive provisions of the Constitution such as Article 2A, Article 3 and Chapter 2 (Principles of Policy), Part II of the Constitution.

65. After having examined the entire record and having considered the submissions made on behalf of the parties, we have, for reasons recorded in this judgment, come to a decision which we now record. We declare, hold and direct that:-

- (a) the land measuring 4.958 Acres, which is the subject matter of this case, was included in the area transferred by the GoP to the KDA for the Lines Area Project;
- (b) the said land was reserved as an open space dedicated for use as a playground in the Master Plan of the Lines Area Project;
- (c) the playground was and remains an amenity plot falling within the jurisdiction and zoning/regulatory control of CDGK;
- (d) the GoP (acting in the name of the President) had no legal authority to grant leasehold rights in the said land to AWT;

- (e) the lease dated 19.12.2002 in favour of AWT is without lawful authority, with the result that the same is cancelled and set at naught;
- (f) as a consequence the sub-lease dated 31.7.2006 in favour of Makro-Habib is also without lawful authority and is, hereby cancelled and set at naught;
- (g) Makro-Habib is allowed three months from the date of this judgment, to remove its structures and installations from the playground, restore it to the same condition as existed on the date of the sub-lease and hand over its vacant possession to the CDGK;
- (h) the CDGK being the elected local government, representing the people, shall develop and maintain the land as a playground or shall allow its use for such other purposes as are permissible under law;

This case is decided in the above terms.

Chief Justice

Judge

Judge

Announced on 18.12.2009  
at Islamabad.

Judge

APPROVED FOR REPORTING.