

Ownership of Unsettled Land Belonging to the Indigenous Tribes in Balochistan
Sher Zaman v The Government of Balochistan
C.P. No. 1269 of 2018 & 1128 of 2020

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Introduction

The Balochistan High Court (“BHC”) judgment in *Sher Zaman v the Government of Balochistan*¹ is a landmark decision that has declared that the ownership of “unsettled land” belongs to the indigenous tribes of the poorest province of Pakistan.² The “unsettled land” means the land that does not have any formal or written documents authorised by the state.³ Geographically, Balochistan constitutes more than 90% of the land as unsettled, which has been possessed by the indigenous tribes for centuries.⁴ The BHC has ordered that the presumption of ownership of these unsettled lands under Section 50(2)⁵ of the Land Revenue Act 1967 (“LRA”) belongs to the local tribes, and the government is responsible for conducting the settlement records under the LRA.

This note critically evaluates this significant judgment by first summarising the facts of the case, followed by its ruling. Afterwards, it will briefly provide the background and prior case law on the evidentiary requirement about the proof of ownership and the remarkably progressive interpretation of Article 172⁶ of the Constitution of Pakistan 1973 (“Constitution”).

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¹ Constitutional Petition No. 1269 of 2018 and 1128 of 2020 in the Balochistan High Court.

² Hasnaat Malik, ‘Landmark judgment: ‘Unsettled land’ Belongs to Local Tribes: BHC’ *The Express Tribune* (Islamabad). <<https://tribune.com.pk/story/2291055/landmark-judgment-unsettled-land-belongs-to-local-tribes-bhc>> accessed 19 August 2021.

³ Ibid.

⁴ Ibid.

⁵ The Constitution of Pakistan 1973, Article 50.

Presumption as to ownership of forests, quarries and waste-lands.—

(1) When in any Record of Rights completed on or before the eighteenth day of November, 1871, in territories where the Punjab Land Revenue Act, 1887 (Punjab Act XVII of 1887), was, with or without modifications, in force immediately before the commencement of this Act, or completed on or before the seventeenth day of July, 1879, in territories where the Bombay Land Revenue Code, 1897, (Bombay Act V of 1879), or the Sindh Land Revenue Code, 1879 (Sind Act V of 1879), was so in force, it is not expressly provided that any forest or quarry, or any unclaimed, unoccupied, deserted or waste-land or any spontaneous produce or other accessory interest in land belongs to the land-owners, it shall be presumed to belong to Government.

(2) When in any Record of Rights completed after eighteenth day of November, 1871, or the seventeenth day of July, 1879, as the case may be, it is not expressly provided that any forest or quarry, or any such land, produce or interest as aforesaid, belongs to Government, it shall be presumed to belong to the land owners concerned.

⁶ The Constitution of Pakistan 1973, Article 172.

Ownerless property. —

(1) Any property which has no rightful owner shall, if located in a Province, vest in the Government of that Province, and in every other case, in the Federal Government.

(2) All lands, minerals and other things of value within the continental shelf or underlying the ocean beyond the territorial waters of Pakistan shall vest in the Federal Government.

(3) Subject to the existing commitments and obligations, mineral oil and natural gas within the Province or the territorial water adjacent thereto shall vest jointly and equally in that Province and the Federal Government.

Subsequently, it will analyse the societal importance of the judgment in safeguarding the fundamental rights of subaltern tribes considering the meta-political and economic development within the province of Balochistan. At the same time, the conclusion will critique the historical inadequate role of superior courts in protecting the rights of the most vulnerable communities in the era of land dispossession.

Facts and Ruling

As per the facts of the judgment, two separate petitions of an identical claim is filed by the agriculturalists of the area before the BHC under Article 199 of the Constitution. The grievance of the petitioners is that the Provincial Government of Balochistan (“GOB”) is denying the petitioners’ claim of ownership over the unsettled land, and GOB presumes to be the owner of the concerned land. The petitioners argue that inhabitants of the unsettled land are the indigenous tribes and communities of Balochistan who have been living on these lands for centuries through the practice of collective and individual ownership over their village’s agricultural lands, grazing fields, and forests. The fact that almost 90% of the province’s land is unsettled, the petitioners point that it is the failure of the GOB to compile the revenue settlement records of these lands as per the provisions of the LRA. In the absence of such compilation, the ownership of the unsettled land will belong to the indigenous tribes under Section 50(2) of the LRA.

On the other hand, the Advocate General, on behalf of the GOB, argue that the unsettled land is without a record of the names of landowners. So the presumption about ownership should belong to the GOB under Section 50(1) of LRA. Furthermore, the Advocate General relies on Article 172 of the Constitution by arguing that the absence of no rightful owner will allow the GOB to be the owner of the unsettled land.

BHC, re-examined the relevant provisions of LRA and the scope of Article 172 of the Constitution. The Court held that the “collective possession and control” over the unsettled land by the indigenous communities since their forefathers is a strong proof of ownership.⁷ The GOB and the concerned parties to this case both do not have any formal documented record, so the presumption of ownership of these lands will belong to tribal communities as they have a possessory right. While interpreting Article 172 of the Constitution, the BHC takes a restricted approach, yet progressive, by holding that the said article is only related to the law of escheat where the state becomes the owner of the ownerless property when there is no rightful owner. Here, BHC holds that the indigenous tribes and sub-tribes have been residing on these unsettled lands and having longstanding possession, despite the documentary proof or records, would “give a good legitimate title to them against the Government on the basis whereof, they claim to be owners of the same.”⁸ Lastly, the BHC orders the GOB to start conducting the settlement proceedings of these unsettled land into the formalised records.⁹

Background and Prior Law

As the judgment of the BHC rules after looking at the evidentiary requirement about the proof of ownership over the unsettled land, it is important to look at the well-established case law on the said subject. As per the Supreme Court (“SC”), the legal status about ownership of property

⁷ *Sher* (n 1).

⁸ *Ibid.*

⁹ *Ibid.*

is to “certainly be a mixed question of law and fact to be decided in the light of the evidence.”¹⁰ There are two ways through which a party can claim the rightful and legitimate ownership over the property: (i) if there exists a legal document and formal record about the property in favour of that party; or (ii) the party is in a longstanding possession of that property.¹¹ In *Bibi Babo v Muhammad Aslam*,¹² the Court held that there is always a presumption of truth attached to the revenue record unless it could be proven otherwise with sufficient rebutting evidence. The Court further ruled that the rightful ownership by the established and documented record cannot supersede the possessory right. “It is settled that a claim on the basis of possession is good against the whole world except the rightful owner, it is not a good defence against a true owner.”¹³ In *Muhammad Muzammal Khan v Imtiaz Bibi*,¹⁴ the Lahore High Court rejects the only stance of longstanding possession in favour of the person who is an actual owner of the property. It was held, “It is settled proposition that in order to prove adverse possession, the person claiming, is required to prove his open hostile, adverse, uninterrupted possession to the owner.”¹⁵

In the instant case, the distinct fact is that the unsettled land is without any documentation proof of ownership. It is not just the indigenous tribes who are without any formal record, but also the GOB has no equivalent legal right over the unsettled land. “For arguments sake, if documents are believed to be the only source of proof of ownership, then such principle is equally applicable to the Government.”¹⁶

In the absence of the formalised documents, the possessory right prevails. In *Administrator Municipal Corporation, Peshawar v Taimoor Hussain Amin*,¹⁷ the possession of the disputed property by the Corporation is seen as sufficient evidence as a right of ownership over that property. In another case, the SC held that the Court would have accepted the party’s argument about continuous possession of the disputed property only if the party would have proved such possessory right by presenting sufficient evidence.¹⁸ In *Abdul Manan v Asmatullah*,¹⁹ it ruled that possession is the incident of ownership. Hence, the BHC ruled, “possession is important when there is no title document and other relevant record, but once a document and record of title came before the Court, it is the title, which has to be taken into consideration. Possession cannot be considered in vacuum.”²⁰

In *Noorani Gul v Government of N.W.F.P.*,²¹ there is a similar issue as the case at hand, where the people of the concerned area acquired the land as a verbal and oral gift from the ex-ruler of Swat. People have not anything to show about the origins of their ownership to the property in a formal record, except the longstanding possession. Hence, the Peshawar High

¹⁰ *Shajar Islam v Muhammad Siddique* PLD 2007 SC 45, [4].

¹¹ Although these two requirements are not exhaustive, but they are often considered substantive as per various case law and relevant provisions of Transfer of Property Act 1882.

¹² 2015 CLC 1555.

¹³ *Shajar* (n 10) [10].

¹⁴ 2008 CLR 789 Lahore.

¹⁵ *Bibi* (n 12) [8].

¹⁶ *Sher* (n 1) [18].

¹⁷ PLD 2020 SC 249, [13].

¹⁸ *Haji Wajdad v Provincial Government* 2020 SCMR 2046, [8].

¹⁹ 2019 CLC 1096 Balochistan.

²⁰ *Abdul* (n 19) [22].

²¹ 2012 MLD 1731.

Court recognised the right of the petitioner over the ownership of the property based on continuing possession.²²

Moreover, the BHC looks at Article 172 of the Constitution. The BHC takes on a restrictive approach to Article 172 by declaring:

[T]his Article relates to the law of escheat, on the basis of which, the Government becomes owner of the property, which has no rightful owner...Thus, any property which is unclaimed because of death or disappearance of its owner, leaving behind no legal heir, his/her property passes to the Government concerned, after declaring it as ownerless.²³

This interpretation of the aforementioned Article is consistent with the prior case law. In *Secretary, Muktagachha Abbasia Senior Madrassa v Province of East Pakistan*,²⁴ Article 146²⁵ of the 1962 Constitution is declared as relating to the law of escheat or *res nullius*.²⁶ In *Nanney Khan v Muhammad Dawood Khan*, the property will be escheated as per Article 172 of the Constitution if there is “none is available to claim ownership of immovable property in his own right or by means of inheritance the property would be treated as an ownerless property.”²⁷ The state has a duty to protect private property under Article 24²⁸ of the Constitution, so it will be the custodian of such property unless the Court is satisfied that no one is known to the Court who claims the right or entitlement to the property.²⁹ In *Idara-e-Noor-e-Haq v Public-at-Large*,³⁰ the Sindh High Court held that the property will be declared ownerless under Article 172 of the Constitution after the law-enforcement agencies making all efforts to locate the owner or legal heirs of the property. Once the property is rendered ownerless, the Court has a duty “to protect it from being misappropriated or wasted or damaged.”³¹

While interpreting the “rightful owner” in Article 172 of the Constitution, the BHC held that a person can be a rightful owner if they have a “just or legally established claim.”³² Such a claim can be established either through “form of documented or in case there is no record of right, longstanding possession or control over the land is a prima-facie just and legally accepted proof of ownership.”³³ This shows a progressive and liberal approach to Article 172 by restricting its scope. Here the “progressively restricting” the said article has two meanings.

²² *Noorani* (n 21) [9].

²³ *Sher* (n 1) [17].

²⁴ PLD 1964 Dacca 64, [33].

²⁵ Article 146 of the 1962 Constitution is exactly like the Article 172 of the 1973 Constitution.

²⁶ Similarly, held in *Ghulam Rasool v Abdul Rashid* 2007 MLD 515; *Muhammad Sadiq v Taj Muhammad* 1994 CLC 326; *Muhammad Boota v Member (Revenue), Board of Revenue, Punjab* PLD 2003 SC 979; *Kalsoom Akhtar v Sardar Muhammad* 2018 YLR 1652.

²⁷ 2015 YLR 1652, [11].

²⁸ The Constitution of Pakistan 1973, Article 24.

Protection of property rights. -

(1) No person shall be deprived of his property save in accordance with law.

(2)

(3) Nothing in this Article shall affect the validity of— (a) ... (b) ... (c) ... (d) any law providing for the taking over of the management of any property by the State for a limited period, either in the public interest or in order to secure the proper management of the property, or for the benefit of its owner; or

²⁹ *Secretary, Muktagachha* (n 24).

³⁰ PLD 2020 Sindh 563

³¹ *Idara-e-Noor-e-Haq* (n 30) [5].

³² *Sher* (n 1) [18].

³³ *Ibid*.

Firstly, the Court is narrowing down the broader meaning of Article 172, which has the capacity to excessively empower the state to claim ownership over the ownerless property. Secondly, the Court is tilted towards a “right-based approach” so that to expand the civil-political and socio-economic rights of people against the state’s escheating.

Analysis

This note appreciates the political and social significance of the above judgment by protecting and safeguarding the property rights of the indigenous communities. In the neoliberal epoch, where the Bahria Towns, DHAs, Askaris, etc., are the dispossession reality of the subaltern classes by the state and private actors. David Harvey’s famous thesis of ‘dispossession by accumulation’ constitute the process of:

[C]ommodification and privatisation of land and the forceful expulsion of peasant populations; the conversion of various forms of property rights (common, collective, state, etc.) into exclusive private property rights; the suppression of rights to the commons; the commodification of labour power and the suppression of alternative (indigenous) forms of production and consumption.³⁴

The dispossession by accumulation is what Harvey calls “the new imperialism” of the contemporary era.³⁵ The acquisition of the land from the indigenous communities in Balochistan under the myth of “mega-development” is the neoliberal project exclusive to the elite for profit accumulation, with no benefit to the common people.³⁶ Balochistan has mass amounts of natural resources, like gas, minerals, strategic coastline, etc., which has become the “huge corporate empire” for some dominant state actors, i.e., military and multinational capital.³⁷ Hence, the above judgment needs to be appreciated because it has safeguarded the rights of indigenous communities over the land from capitalist dispossession in the poorest province of Pakistan.

As the sociological studies are relied on in the *Brown v Board of Education*,³⁸ the BHC has substantially looked at the historical archives in the judgment. Historically, the pre-colonial province is divided between British Balochistan³⁹ and Balochistan Agency⁴⁰. Unlike other provinces of British India, where there existed the formal revenue records, the colonial administration accepted the indigenous communities’ collective and individual ownership of the unsettled land.⁴¹ The formalisation of records and land settlement into ownership rights, title, interest, and liabilities is considered as part of the colonial civilisation process. The civilisation process is, however, not expanded to the tribal societies of Balochistan because of the colonial stereotypical assumption of ‘ungovernable’ subjects. Furthermore, Ahmad argues that the British imperialism in Balochistan has mainly the interest of military and geopolitical nature.⁴² As a result, the Raj treated Balochistan as a ‘buffer’ to safe its empire from other

³⁴ David Harvey, *The New Imperialism* (Oxford University Press 2005) 202-3.

³⁵ Ibid 249.

³⁶ Aasim Sajjad Akhtar, "Balochistan versus Pakistan" (2007) 42 (45/46) Economic and Political Weekly 73, 76.

³⁷ Akhtar (n 36).

³⁸ 347 US 483 (1954).

³⁹ Region constituting Chagai, Quetta, Zhob, Sibi and Naseer Abad Divisions.

⁴⁰ Region comprising Princely States, namely Khanate of Kalat, Khاران, Mekran and Las-Bela.

⁴¹ *Sher* (n 1) [6].

⁴² Aijaz Ahmad, "The National Question in Baluchistan" (1973) 3 Pakistan Forum 4-18+37, 9.

empires' expansionism.⁴³ Therefore, the intention of colonial authority was never to rule the province under the rule of law. So, the absence of rule of law means the absence of formal revenue records, which made the status of land as unsettled.

The above judgment also has significance with respect to international law. The mandate of the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP") requires the preservation and promotion of the cultural, political, and economic rights of the indigenous communities.⁴⁴ Article 10 of the UNDRIP states, "Indigenous peoples shall not be forcibly removed from their lands or territory. No relocation shall take place without the free, prior and informed consent of the indigenous people" Article 8 of the UNDRIP creates the obligation over the state to take "effective mechanisms" in the prevention of their "dispossessing them of their lands, territory or resources." Though the declarations are not binding over states, they have substantive importance in customary international law.⁴⁵ As Pakistan is a signatory to the UNDRIP, the BHC has correctly safeguarded the rights of indigenous tribes over unsettled land in Balochistan.⁴⁶ The BHC also looked at the UN Habitat's "A Guide on Land and Property Right in Pakistan" of the year 2011 and 2012.⁴⁷ Both these documents, as the BHC rightly noted, "Did not collect any evidence or law to recognise the Government, as the owner of the unsettled land."⁴⁸

Conclusion

The judgment in *Sher Zaman v The Government of Balochistan* is a significant decision in terms of constitutional, human rights, and public international law. The BHC restrictively interprets the scope of Article 172 of the Constitution, which limits the power of the state in taking over the ownerless property. Regarding human rights law, the judgment promotes the rights of local tribes over their land through the longstanding possession in the absence of the formalized record. This decision is also consistent with the customary international law, which leans towards recognising the indigenous communities' cultural, economic, and social rights.

The BHC's decision is quite surprising considering Pakistan's judiciary has consistently legitimised the illegal land dispossessions of vulnerable classes. For example, the SC recognised the fact that Bahria Town Karachi ("BTK") is illegally developed, but the apex court rules the land illegality as legal after accepting the BTK's offer of Rs. 460 billion.⁴⁹ In another instance, courts have maintained the illegalities of the encroachment by evicting the poor people. Like SC in a suo moto case ordered that the house of the people living near the Gujjar Nala in Karachi should be dismantled and demolished.⁵⁰ The case of BTK and Gujjar Nala shows the contradiction in the attitude of the superior courts in dealing with the interest

⁴³ Ibid.

⁴⁴ James S. Phillips, "The Rights of Indigenous Peoples under International Law" (2015) 26 Global Bioethics 120, 120.

⁴⁵ Phillips (n 44).

⁴⁶ There are also other international law treaties and conventions that safeguard the rights of indigenous communities. Like, Article 27 of the International Covenant on Civil and Political Rights (ICCPR) supports the protection and promotion of cultural and religious rights of indigenous minorities. ILO Convention 169 is about the indigenous and tribal peoples.

⁴⁷ This detailed researched document of UN Habitat is an important guideline in assisting the government over land and property rights in Pakistan.

⁴⁸ *Sher* (n 1) [16].

⁴⁹ Haseeb Bhatti, 'SC Accepts Bahria Town Karachi's Rs460bn Offer, Halts NAB References' *Dawn* (Karachi). <<https://www.dawn.com/news/1471002>> accessed 9 September 2021.

⁵⁰ *Niamatullah Khan Advocate v Federation of Pakistan* 2021 SCMR 1849; *Shehri - Citizens for a Better Environment v Federation of Pakistan* PLD 2021 SC 743.

of the common people in relation to the elites. Azeem, also, similarly argues that the Pakistani's judiciary has "strongly resisted" any legislative changes or social reforms which has substantively favoured the socio-economic rights of the people.⁵¹

The rights of the indigenous and local communities in Pakistan will be negatively affected under the neoliberal age where the executive of the modern state is mainly critiqued as "a committee for managing the common affairs" of the elites.⁵² Akhtar rightly says, "the destruction of traditional livelihoods and dispossession has been a consistent feature of our 'development' for hundreds of years."⁵³ Having this in mind, it is argued that the state must rethink of its role; it needs to be an active agent regarding socio-economic rights rather than being a passive bystander of capitalistic dispossession. Therefore, it is recommended that the substantive legislation is a need of the time for the protection of promotion of the rights of indigenous communities in Pakistan.

⁵¹ Muhammad Azeem, *Law, State and Inequality in Pakistan* (1st edn, Springer 2017), 4. Azeem gives, specifically, an example of *QazalBash Waqf v Chief Land Commissioner* PLD 1981 FSC 23, where the Federal Shariat Court declared the pro-people land reforms as un-Islamic.

⁵² Karl Marx, *The Communist Manifesto* (Lahore, Readings 2016) 14.

⁵³ Asim Sajjad Akhtar, 'Fish, Farm, Forest' *Dawn* (Karachi). <<https://www.dawn.com/news/1644221/fish-farm-forest>> accessed 03 September 2021.