



The Federal Supreme Court (F.S.C.) was convened on 11.7.2021 headed by Judge Jasem Mohammad Abbood and the membership of the judges Sameer Abbas Mohammed, Ghaleb Amer Shnain, Haidar Jaber Abed, Haider Ali Noory, Khalaf Ahmad Rajab, Ayoub Abbas Salih, Abdul Rahman Suleiman Ali, and Diyar Muhammad Ali, who are authorized to judge in the name of the people, they made the following decision:

The appellant of unconstitutionality:

Judge Adel Khalaf Jassem/ Judge of the Nasiriyah Court of First Instance/ Presidency of the Dhi Qar Federal Court of Appeal.

The contested text to be unconstitutional:

Article (16/c) of the Sale and Lease of State Funds Law No. (21) of 2013.

The challenge summary:

The judge of the Nasiriyah Court of First Instance at the Presidency of the Federal Court of Appeal of Dhi Qar, requested on the occasion of his consideration of the initial case filed before the Nasiriyah Court of First Instance in the number (31/beh/2020) of the plaintiffs each of (Aqil Abdul-Wahhab Sukkar and Hazem Wahab Abdul-Hussein) against the defendant (Director of Nasiriyah Municipality/ in addition to his post) to claim the value of the new constructions on the property, sequence (535/89) of the Suwaiq district owned by the defendant, in addition to his post, according to

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the detail referred to therein. After the judgment was issued to annul the lease contract concluded between the two parties, it found that Article (16/c) of the Law of Sale and Rent of State Funds No. (21) for the year 2013, as amended, has a presence in the settlement of the case, as it stipulates that (C- The leaseholder is obligated to construct the construction during the period specified in the Leasehold contract and associated with the approval of the competent minister or the head of the entity not affiliated with a Ministry with the submission of the amount of the guarantee. The contract of Leasehold is considered canceled and the existing structures shall be transferred to the owner free of charge), he requested ruling of unconstitutionality in part of it as far as the matter is concerned with the phrase (... and the existing structures shall be transferred to the owner free of charge), for the following reasons:

1. Violation of the contested text to the provisions of Article (23/first) of the Constitution, which stipulates that (private property is protected and the owner has the right to benefit from, exploit and dispose of it within the limits of the law), since private property is related to the individual's activity and work and the movable or immovable funds resulting from this activity, as well as the right of the individual to claim compensation for the material and moral damage affected him, and that the contested text has undermined the protection guaranteed by the constitution to private property to ensure its protection from aggression according to the text of Article (23/first) above of the Constitution, and that the protection that the constitution preserved private ownership extends to all funds without distinction between them, considering that money is the right of material value, whether this right is personal or in kind, or

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whether it is a literary, artistic or industrial property right, and since that was the right to claim compensation for the buildings and facilities it created under the contract. An obligation on the party with whom he contracted, because saying otherwise constitutes enriching it at his expense without a legitimate reason, and that this right represents a positive element of the plaintiff's liability whose value is determined in accordance with the provisions of the law and the public rules, the contested text has resulted in a waste of that right despite the availability of the conditions for its entitlement and that it constitutes aggression against the constitutionally protected right of property.

2. Violation of the contested text to the provisions of Article (23/Second) of the Constitution, which states (It is not permissible to expropriate property except for public interest in return for fair compensation, and this shall be regulated by law), and as mentioned above that private ownership includes all funds without distinction between personal or in-kind and where the constitutional legislator forbade its confiscation or its expropriation from its owner except for public interest and that this is in return for fair compensation. The contested text authorized its confiscation and that this violates the nature of civil contracts and represents the expropriation of private property without compensation.
3. Violation of the contested text of the provisions of Article (46/ of the Constitution), which states (The restriction or limitation of the exercise of any of the rights and freedoms stipulated in this Constitution shall only be by law or based on it, provided that such limitation and restriction does not affect the essence of the right or freedom), since the right to private property is one of the

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rights approved by the Constitution and keen to protect it. Any restriction or prejudice to it in order for it to be legitimate and constitutionally permissible is based on two pillars. First that it must be by a law or based on a law, second that this restriction doesn't affect the constitutionally stipulated right, if one of the two pillars is missing, that restriction is in violation of the constitution, and since the contested text violated the sanctity of private property and affected the subjectivity of the right and removed it and took it from the hand of its owner without compensation, then it represents an aggression against that right. the violating to the origin of the right represents a conflict with the provisions of the Constitution accordingly affecting the origin of the right represent violation to the Constitution provision.

4. Violation of the contested text to the provisions of Article (19/Third) of the Constitution, which stipulates (Litigation is a safeguarded right guaranteed to all), as among the most important rules of litigation are the similarity of the legal positions of litigants and equality before the law, and since the defendant - the municipality of Nasiriyah - had previously contracted with the plaintiff according to the rules of private law, which means that they are in similar legal positions and the terms of the contract and legal texts that resolve the contract apply to them. Whenever a text is received that would prejudice the legal positions of the litigants without justification, that text constitutes a breach of the right to litigation, and therefore, in accordance with the provisions of Article (3) of the bylaw of the Federal Supreme Court No. (1) of 2005, this court asks the Federal Supreme Court to consider the legality of the text of

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Article (16/c) of the Law of Sale and Lease of State Funds No. (21) of 2013, in related to the phrase (the existing structures shall be transferred to the owner free of charge), for the reasons referred to above).

The decision:

Upon scrutiny and deliberation by the Federal Supreme Court, it became clear that the challenge of unconstitutionality is focused on the provisions of Article (16/c) of the Law No. (21) of 2013 amended on the sale and lease of state funds, which states that (the competent minister or the head of an entity not affiliated with a ministry or whoever is authorized by either of them has the authority to announce the establishment of Leasehold rights on immovable property for commercial, industrial and investment activities by way of public auction by the same procedures stipulated in Article (12) of this law and in the following manner, (The leaseholder is obligated to construct the construction during the period specified in the Leasehold contract and associated with the approval of the competent minister or the head of the entity not affiliated with a Ministry with the submission of the amount of the guarantee. The contract of Leasehold is considered canceled and the existing structures shall be transferred to the owner free of charge), this court finds when adapting the relationship between the two parties (the plaintiffs) in the lawsuit filed before the Court of first instant of Nasiriia No.(31/beh/2020) and still pending pleading, as a result of the decision of the Dhi Qar Federal Appeal Court in its original capacity,

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No. (451/452/453/Sin/2017) on 3/20/2018, which includes the termination of the Leasehold contract concluded between the two parties and the judgment of compensation for the non-compliance of the defendants (the plaintiffs in the lawsuit (No. 31/beh/2020)) to implement their mentioned obligations in the contract, according to the details mentioned in the decision that become final after been approved of cassation by dismissing the request of correcting according to what is stated in the attached files of lawsuits, as it is a relationship that subject to the provisions of the aforementioned Law of Sale and Rent of State Funds based on the Leasehold contract concluded between the two parties for the following reasons:

First: The leasehold contract, based on the provisions of Article (1266/1) civil, is (a right in kind that authorizes its owner to construct a building or facilities other than planting on the land of others according to an agreement between him and the owner of the land, and this agreement specifies the rights and obligations of the leasehold). Under the leasehold contract, its source is the agreement between the leasehold and the landowner. Under this agreement, the rights and obligations of the leasehold are determined, and the leasehold does not have a right before that contract, and that right does not arise just by concluding the contract, but rather arises after the implementation of the leasehold of what is included in the leasehold contract because that contract determines Leasehold rights and obligations, and the contracting party cannot claim the rights arising from the contract without performing his obligations, as

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contract rights arise after the contractor fulfills his obligations under the contract. this is based on the provisions of Article (1269/1) of the Civil Code, which stipulates that (the leaseholder owns the leasehold private property whatever building or other facilities were built on the land, and he may dispose of it in conjunction with the leasehold right to sell, disposal and other ownership contracts in the Real Estate Registration Department without prejudice to the right of the landowner and the purpose for which the building or installations were prepared, all of this unless there is an agreement to the contrary), the ownership of the surfaces of the building or other facilities he created and the disposal of it. It must be associated with the right of leasehold, because the contract is the one that arranged it, and the implementation of the contract and under Article (150/1) civil must be in accordance with what it includes and in a manner consistent with what necessitates good faith and in accordance with paragraph (2) of the same article, the implementation of the contract is not limited to obligating the contracting party to what is stated in it, but it also deals with its requirements and in accordance with the law, custom and justice depending on the nature of the obligation. This is on the one hand and the other hand, what was stated in Article (16/Jim) of the amended Law No. 21 of 2013 of Sale and Rent of State Funds, which stipulates that (the leaseholder is obligated to construct the construction during the period specified in the Leasehold contract and associated with the approval of the competent minister or the head of the entity not affiliated with a Ministry with

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the submission of the amount of the guarantee. The contract of Leasehold is considered canceled and the existing structures shall be transferred to the owner free of charge), what stated in the mentioned text consider part of the leasehold contracts that are conducted according to the law of Sale and Rent of State Funds No. (21) of 2013, which must implement the Leasehold contract according to what is stated in it and in accordance with what was stated in the mentioned article, and the contract may not be concluded in violation of a legal text that includes the procedures for concluding and implementing those contracts. Therefore, we conclude from all of the above that the leasehold has no private ownership in the leasehold contract before it implements what it was committed to under the law and the contract concluded in accordance with that law and that transferring the existing facilities to the owner without compensation is due to the leasehold's failure to fulfill its contractual obligations has nothing to do with private ownership. Because the private ownership of the leaseholder based on the construction or facilities that were not completed before the completion of the implementation of the contract by the leaseholder, there is no conflict between Article (16/c) of the Law of Selling and Renting State Funds No. (21) of 2013 and Article (23/first)) of the Constitution, which states: (Private property is safeguarded, and the owner has the right to benefit from, use and dispose of it within the limits of the law.)

Second: The provisions of Article (16/c) of the aforementioned Law of Sale and Lease of State Funds are complementary and

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restrictive to the generality of the text of Article (1270) of the aforementioned Civil Code, based on the rule (that the private restricts the public) on the basis that the law of sale and lease of state property is a special law restricting the generality of civil law, and since the leasehold relates to land owned by the state and not by individuals, the contracting parties are aware of what is included in the law governing the relationship between them, especially if it is one of the peremptory texts that it is not permissible to agree on what contradicts its provisions, as a result of the public auction that was conducted in accordance with the procedures stipulated in Article (12) of the aforementioned law of sale and lease of state funds, on the basis of which the Leasehold contract was concluded, the legislator, through the text of the article contested as being unconstitutional, has two principles, the first is the protection of funds the real estate of the state and preventing its seizure or possession contrary to the purpose for which it was allocated, and the second is to protect the interests and rights of the state, if the contracting party with it under the Leasehold contract breaches its obligations arising from the contract, in the event of non-construction during the period specified by the Leasehold contract, the guarantee amount shall be confiscated, and the Leasehold contract shall be considered null and the existing constructions shall be transferred to the owner without compensation, and this is a penalty for breaching the contract. Upon the expiry of the term of the Leasehold contract without compensation, and it shall also devolve to him if the contract is terminated or canceled due to

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the contracting party's failure to fulfill his obligation, in the application of the provisions of the law and based on the principle (that the contract is the law of the contracting parties) and according to the principle of the authority of the will, which means that the contracting party, when constructing the constructions on land owned by the state based on the Leasehold contract, agreed to give up his private ownership of it, to the owner of the land after the expiry of the term of the Leasehold contract or upon its termination or cancellation For non-performance of his obligations under the contract, with his right to use them together (the land and the constructions) by use, exploitation, and disposal during the period of validity of the Leasehold contract. It would prejudice the right of the contracting party's private ownership of the modernized structures, but rather that it would protect the state's funds and interests based on the specificity of the Leasehold contract concluded between the contractor and the state on land owned by the state. Arising from the Leasehold contract arising on land belonging to the state, it was in accordance with the law and based on it in the application of the provisions of Article (16/c) of the Sale and Lease Law State funds No. (21) of 2013, as amended, and it is a special provision that is restricted and complements the provision of Article (1270) of Civil Law No. (40) of 1051, as amended. Thus, the text of Article (16/c) of the aforementioned Law of Sale and Rent of State Funds is in agreement with Provisions of Article (23) of the Constitution of the Republic of Iraq for the year 2005, in which paragraph (first)

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stipulates that (private property is protected, and the owner has the right to benefit from, exploit and dispose of it within the limits of the law), and paragraph (Second) thereof states that (property may not be expropriated. Except for public interest in return for fair compensation, and this shall be regulated by law), and Article (46) of the aforementioned Constitution which stipulates that “Restriction or limitation of the exercise of any of the rights and freedoms stipulated in this Constitution shall not be except by a law or based on it, provided that this limitation does not affect that limitation.” The restriction is the essence of the right or freedom), because the aforementioned two articles stipulated the existence of a law regulating how private property and the exercise of rights and freedoms are infringed.

Third: The text contested for being unconstitutional does not contradict the text of Article (19/Third) of the Constitution, which stipulates (Litigation is a safeguarded right guaranteed to all), because there is no phrase in it that prevents the contracting party whose construction has been transferred to the owner to cancel or terminate the Leasehold contract due to his breach of his obligations the contractual law and the exercise of his right to litigation before the competent courts, and for the foregoing and to prove the constitutionality of the text of Article (16/c) of the Sale and Lease of State Funds Law No. 21 of 2013 and that it does not violate its provisions, so the request submitted to challenge its unconstitutionality is obligatory to be dismissed, and for the

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foregoing, the ruling decided to reject the request submitted to this court by the judge of the Nasiriyah Court of First Instance in the presidency of the Dhi Qar Federal Court of Appeal to challenge the unconstitutionality of Article (16/c) of the Law No. 21 of 2013 of the amended Sale and Rent of State Funds, especially the phrase (...the existing structures shall be transferred to the owner), on the occasion of his consideration of the initial lawsuit filed before the Nasiriyah Court of First Instance in No. (31/Beh/2020) for the plaintiffs (Aqil Abdul-Wahhab Sukkar, Hazem Wahab Abdul-Hussein) and the defendant (Director of Nasiriyah Municipality in addition to his post) requesting the value of the constructed buildings on the real estate, the sequence 535 / 89, Al-Suwaij District, owned by the defendant, in addition to his post, for not violating the provisions of the Constitution, and notifying the aforementioned Court of First Instance judge that it is not permissible to delay the aforementioned lawsuit when the court challenges the unconstitutionality based on the provisions of Article (4) of the bylaw of the Federal Court No. (1) of 2005, because the delay is done in the case of unconstitutionality before the trial court by one of the parties to the case exclusively in application of the provisions of Article (5) of the aforementioned bylaw, and the decision was issued by agreement, final based on the provisions of Articles (93/First and 94) of the Constitution and Article (5) of the Federal Supreme Court Law No. (30) of 2005 as amended by Law No. (25) of 2021, and publicly understood on (30/Dhu al-Qa'dah/1442 AH.) corresponding to 7/11/2021 AD.

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Signature of
The president

**Jasem Mohammad
Abbood**

Signature of
The member

Haidar Jaber Abed

Signature of
The member

Ayoub Abbas Salih

Signature of
The member

**Sameer Abbas
Mohammed**

Signature of
The member

Haider Ali Noory

Signature of
The member

**Abdul Rahman
Suleiman Ali**

Signature of
The member

**Ghaleb Amer
Shnain**

Signature of
The member

Khalaf Ahmad Rajab

Signature of
The member

**Diyar Muhammad
Ali**

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