

JUDGMENT SHEET
LAHORE HIGH COURT LAHORE

JUDICIAL DEPARTMENT

I.C.A. No. 9534 of 2021

JUDGMENT

Ch. Rahmat Ali Memorial Trust

VERSUS

Lahore Development Authority and another

Date of hearing: 13.02.2023

Appellant by: Mr. Hfeez Saeed Akhtar, Advocate.
Respondents by: Mr. Sahibzada Muzaffar Ali, Advocate.

MUZAMIL AKHTAR SHABIR, J. Through this Intra Court Appeal filed under Section 3 of the Law Reforms Ordinance, 1972, appellant (Ch. Rahmat Ali Memorial Trust) has called in question order dated 10.12.2020 passed by learned Single Judge of this Court whereby W.P. No. 121280 of 2017 filed by the appellant against order dated 17.11.2017 passed by Director Estate Management, L.D.A. was disposed of with direction to avail remedy of Arbitration in terms of lease agreement dated 10.02.1981 between the parties and in the meanwhile respondent L.D.A. was restrained from taking any coercive measures against appellant.

2. Learned counsel for the appellant has argued that impugned order is not sustainable as on the one hand the learned Single Judge of this Court had held that the impugned termination notice was not sustainable and on the other hand instead of striking down the said termination notice had directed the appellant to avail alternate remedy against the same. It is further claimed that it had not been

appreciated by learned Single Judge of this Court that registered lease deed in favour of appellant cannot be unilaterally terminated by the respondent, furthermore, it was Government that had leased out the land to the appellant, therefore, L.D.A., which was subordinate authority, cannot cancel the same in view of principles laid down in judgment reported as “*Messrs Mustafa Impex, Karachi and others Vs. The Government of Pakistan through Secretary Finance, Islamabad and others*” (PLD 2016 SC 808).

3. On the other hand, learned counsel appearing on behalf of respondent-L.D.A. has defended the impugned order by stating that L.D.A., being successor of Housing and Physical Planning Department, is representing the said department which, through the District Housing Officer, Lahore Township Scheme, had earlier awarded lease of land to the appellant and due to non-compliance of conditions mentioned in the lease agreement, L.D.A. was well within its jurisdiction and had justification to cancel the lease in favour of respondents.

4. We have heard the arguments of both the parties and gone through the record with their able assistance.

5. Appellant had challenged order dated 17.11.2017 passed by Director Estate Management, L.D.A. through which in terms of Clause 14 of lease agreement dated 10.02.1981 executed in favour of appellant by the Government, lease in favour of appellant had been terminated, which clause is reproduced below:

“14. Provided always and it is hereby expressly agreed that the lease may be terminated by Government at any time for breach of any condition of this agreement, and it shall be lawful for the Government in housing and Physical Planning Department (Punjab) or any officer authorized on his behalf to enter into and upon the land to obtain possession of the same and of all such buildings, erections and materials as may then be found upon the land for the absolute use of Government; and thereupon the agreement, so far as it relates to the engagement of Government’s shall be void. Compensation for the buildings shall be determined by Deputy Commissioner Lahore and his decision shall be final and binding on the lessee.”

(emphasis supplied)

6. The impugned order dated 17.11.2017 for termination of lease issued by Director Estate Management (QAT), L.D.A. passed in terms of afore-referred Clause 14 is reproduced below:

“To

*The Secretary General,
Ch. Rehmat Ali Memorial Trust (Regd),
45, Civic Centre,
Quaid-e-Azam Town, Lahore.*

SUBJECT:- TERMINATION OF LEASE AGREEMENT EXECUTED WITH H&PP DEPARTMENT ON 10-2-1981.

The lease agreement executed with Ch. Rehmat Ali Memorial Trust (Regd), by the District Housing Officer, Lahore Township Scheme on 10-2-1981, in respect of lease of 26.43 acres land bearing plot No.45 Civic Centre, Quaid-e-Azam Town, for establishment of Hospital, is hereby terminated in light of clause 14 of the aforementioned lease agreement on account of failure of Ch. Rehmat Ali Memorial Trust (Regd) to comply with the directions of the Director General, LDA passed vide order bearing No.LDA/PS /DG/DEM(QAT)/7299 dt. 29.11.2016.

***DIRECTOR ESTATE MANAGEMENT (QAT)
LDA”***

7. The afore-referred order shows that the lease in favour of the appellant had been terminated on account of failure of the appellant to comply with directions earlier issued by Director General, L.D.A. through his order dated 29.11.2016. Although, appellant had claimed that through another order passed by D.G., L.D.A. prior to aforesaid date, the allegation of subletting property, subject matter of lease, against the appellant relating to breach of terms of lease agreement had been withdrawn and the default, if any, had been condoned, therefore, there was no reason for L.D.A. to unilaterally terminate the contract of appellant without specifying any reason, yet the said aspect of the matter, arising from non-compliance of order dated 29.11.2016, appears to be apparently based on different cause of action; hence, whether compliance of previous orders would amount to discharge of subsequent direction/demand by the D.G. L.D.A. could not be determined in constitutional jurisdiction of this Court, especially when the lease agreement dated 10.02.1981, which has been terminated through impugned order dated 17.11.2017, provides for Arbitration Clause where parties can approach the Arbitrator for resolution of their dispute, which even otherwise requires determination of disputed facts and beyond the powers to be

exercised in constitutional jurisdiction of this Court as it is settled by now that disputed questions of fact cannot be looked into in Constitutional Petition as the same require recording of evidence. Reliance is placed upon judgments reported as “*Amir Jamal and others Vs. Malik Zahoor-Ul-Haq and others*” (2011 SCMR 1023), “*Fida Hussain and another Vs. Mst. Saiqa and others*” (2011 SCMR 1990) and “*Sheikh Muhammad Sadiq Vs. Elahi Bakhsh and 2 others*” (2006 SCMR 12).

8. Moreover, alternate remedy of arbitration is available to the appellant under Clause No.17 of the lease agreement dated 10.02.1981 which is reproduced below:

“17. If any question, difference or objection, whatsoever, shall arise in any way connected with or arising out of this instrument or the meaning or operation of any part thereof or the rights, duties or liabilities of either party, then save in so far as the decision of any such matter is hereinbefore provided for and has been so decided, every such matter including the question whether its decision has been otherwise provided for, and or whether it has been finally decided accordingly, or whether the lease should be terminated or has been rightly terminated and as regards the rights and obligation of the parties as the result of such termination shall be referred for arbitration to the Commissioner of the Lahore Division and his decision shall be final and binding and where the matter involves a claim for or the payment or recovery or deduction of money, only the amount, if any, awarded in such arbitration shall be recoverable in respect of the matter so referred.”

9. The perusal of afore-referred Clause 17 shows that the question, whether the lease should be terminated or has rightly been terminated and what are the rights and obligations of the parties as result of such termination are to be determined by arbitration through Commissioner Lahore Division whose decision would be final. Having agreed to afore-referred clause, the appellant cannot wriggle out of the arbitration proceedings merely by stating that arbitration proceedings are not in terms of the arbitration clause mentioned above for the reason that the parties could not be allowed to approbate and reprobate and having themselves agreed to have the matter decided through arbitration while entering into the lease agreement, the appellant could not be later on allowed to take a contradictory stand. For this purpose, reliance may be placed on principles laid down in judgment reported as “*Sardar Ali Khan Vs.*

State Bank of Pakistan and others” (2022 SCMR 1454) wherein it is provided as under:

“The maxim qui approbat non-reprobat (one who approbates cannot reprobate) is firmly embodied in English common law. It is akin to the doctrine of benefits and burdens which at its most basic level provides that a person taking advantage under an instrument which both grants a benefit and imposes a burden cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument.”

In support of afore-referred principles reliance may also be placed upon judgment reported as *“Divisional Superintendent Postal Services Faisalabad and others Vs. Khalid Mahmood and others”* (2023 SCMR 354) wherein it is laid down as under:

“7. It is somewhat strange and astonishing for us that the petitioners have assailed the judgment of the learned Tribunal which was simply disposed of with the concurrence of the petitioners on the basis of their comments, and nothing was decided by the Tribunal, except recording the consensual statement made in the comments. The factual position encapsulated in the comments cannot be challenged by the petitioners due to their acquiescence that the services of the respondents (employees) have been regularized and their Service books have also been verified with a further promise to pay arrears on the availability of funds, hence at this stage the petitioners' plea is also hit by the doctrine of approbate and reprobate, which means to approve and disapprove. This doctrine is founded on the maxim 'quod approbo non reprobo' which translates to 'that which I approve, I cannot disapprove'. It is also known as principle of equitable doctrine of election.”

10. Main grievance raised by the appellant is that termination of lease of property where hospital has been constructed will result in irreparable loss to the appellant as the appellant is running said institute/hospital on the basis of donations which would no longer be available as donors would not donate for an institution which has lost its substratum due to cancellation of lease, hence, this exercise would cause irreparable loss to the appellants, however, we have noticed that learned Single Judge of this Court has taken into consideration all the afore-referred aspects of the matter and passed the order to settle the matter between the parties through Arbitration in terms of the lease agreement and in the meanwhile restrained the respondents to adopt any coercive measures or take possession of property from the appellant, operative part of which is reproduced as under:

*“However, since the petitioner has a remedy to apply for arbitration, it must do so under the terms of the lease agreement. This petition is **disposed of** with a direction that the petitioner may approach the arbitrator under the terms of lease agreement for resolution of the dispute regarding termination of lease agreement. Till the time the arbitration is decided by the arbitrator LDA shall not take any coercive measures against the petitioner nor will it try to take possession of the property in question.”*

11. The Arbitrator appointed under the Arbitration Act, 1940 while determining the dispute referred to him has the authority to determine all the legal questions arising out of the lease agreement including question of validity of the said agreement, maintainability of Arbitration proceedings, proper and necessary parties to the said proceedings, legality of termination order, etc. which is well within its jurisdiction in view of judgments reported as *“Gerry’s International (Pvt.) Ltd. Vs. Aeroflot Russian International Airlines” (2018 SCMR 662)*, wherein it is provided as under:

- “(1) When a claim or matters in dispute are referred to an arbitrator, he is the sole and final Judge of all questions, both of law and of fact.*
- (2) The arbitrator alone is the judge of the quality as well as the quantity of evidence.”*

12. The rights of the appellant have sufficiently been protected by the learned Single Judge by observing that respondents in the meanwhile shall not adopt any coercive measures or take possession of the property from the appellant, hence, no prejudice has been caused to the appellant by observations made in the impugned order dated 10.12.2020 passed by learned Single Judge of this Court and as appellant’s rights have been protected by the said order whereby it has been directed to avail alternate remedy of arbitration provided under the law instead of insisting upon seeking relief through Constitutional jurisdiction of this Court which, as was held by the Apex Court, is barred in the wake of availability of an alternate and efficacious remedy to a litigant under the law. Reliance is placed on *“Province of Punjab through Secretary Communication and Works Department, Lahore through Chief Engineer (North/Central) Punjab Highway Department, Lahore v. Yasir Majeed Sheikh and others” (2021 SCMR 624)*, *“Federation of Pakistan through Secretary Establishment Division, Islamabad v. Shafqat-ur-Rehman Ranjha*

and others” (2021 SCMR 153), “Indus Trading and Contracting Company v. Collector of Customs (Preventive) Karachi and others” (2016 SCMR 842), “Dr. Sher Afgan Khan Niazi v. Ali S. Habib and others” (2011 SCMR 1813) and “Muhammad Abbasi v. S.H.O. Bhara Kahu and 7 others” (PLD 2010 SC 969).

13. In view of what has been discussed above, there is no illegality or jurisdictional defect in the well-reasoned impugned order passed by learned Single Judge for this Court to warrant interference. Hence, this appeal being devoid of merits is **dismissed**.

(Ch. Muhammad Iqbal)
Judge

(Muzamil Akhtar Shabir)
Judge

*MuzamilMohsin**