JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

RFA No.113/2018

Capital Development Authority through its Chairman

versus

Shaikh Muhammad Ejaz & 31 others

Appellant by:	Mr.Aamir Latif Gill, Advocate.
Respondents by:	Rao Shehryar Ali Khan, Advocate for Respondent No.1. Respondents No.2 to 31, ex-parte.
Date of Decision:	17.02.2021.

MOHSIN AKHTAR KAYANI, J: Through this regular first appeal, the appellant has called in question judgment and decree of the learned Civil Judge (West), Islamabad, dated 08.06.2016, whereby suit filed by Shaikh Muhammad Ejaz has been decreed against the appellant.

2. Succinctly, Shaikh Muhammad Ejaz (Respondent No.1) filed a suit for specific performance, permanent and mandatory injunction in relation to sale agreement executed between Respondent No.1 and Gulistan (Respondent No.2), dated 22.02.2013, against which Respondent No.1 paid an amount of Rs.11,000,000/- to Respondent No.1 and one Mustansar Mehmood Sahi. The learned trial Court pursuant to recording of conceding statements of Respondents No.2 to 31 and by closing the right of appellant CDA to file the written statement, decreed the suit vide impugned judgment and decree, dated 08.06.2016. Hence, instant regular first appeal.

3. Learned counsel for appellant contended that the learned trial Court has ignored the fact that the suit for specific performance cannot be

decreed on the strength of agreements for being not enforceable under the law, as such, the learned trial Court failed to appreciate that there is no documentary evidence on record; that the learned trial Court has also ignored the dictum laid down by the superior Courts that the plaintiff has to establish his case on his own legs and the weaknesses of the defendants should not be used to give any advantage to the plaintiff; that the allotment of any land has not yet been concluded nor has the defendant been declared entitled for any kind of land or rehabilitation benefits, as such, all these aspects have not been considered by the learned Trial Court; that the impugned judgment and decree dated 08.06.2016 are against the law and facts of the case, same are liable to be set-aside and suit of respondent No.1 may be dismissed.

4. Conversely, learned counsel for respondent No.1 opposed the filing of instant appeal and argued in support of the impugned judgment and decree that the learned trial Court has rightly appreciated the facts and circumstances of the case, as a result whereof the suit has been decreed; that the learned trial Court has time and again directed the appellant CDA to file written statement but the latter failed to comply with the direction of the learned trial Court, which compelled the learned trial Court to close the right of CDA/appellant in terms of Order VIII Rule 10 CPC, as such, the suit has been decreed on merits vide the impugned judgment and decree, which are liable to be maintained. It has lastly been contended by learned counsel for respondent No.1 that the appeal is time barred and appellant remained silent for two years after passing of the decree.

5. Likewise, notices have been issued to respondents No.2 to 31 vide orders dated 18.09.2018, 10.12.2019 and 15.10.2020, even on the latter date, notices have been ordered to be issued through publication in the newspaper 'Daily Pakistan" for 18.01.2021, but even then, the said respondents have failed to put in appearance on 18.01.2021, as a result whereof, this Court was left with no other option but to proceed against them ex-parte.

6. Arguments heard, record perused.

7. Perusal of record reveals that Sheikh Muhammad Ejaz / Respondent No.1 filed a suit for specific performance against respondents No.1 to 31, including predecessor of some of the respondents, on the basis of agreements to sell, dated 10.07.2008, 04.11.2008 and 03.12.2008, for the *purchase of all rights, benefits and claims including shares of joint agro farm*. The respondents through different conceding statements acknowledged the claim of respondent No.1 through their counsel as well as by themselves on 02.09.2014, 16.09.2014, 25.06.2014, 08.07.2015, 04.11.2015, which have been recorded by the learned Trial Court, as a result whereof the learned Trial Court has decreed the suit in the following manner:

> *"3. As per record the land of defendants No.1 to 31 has been acquired by the CDA and according to CDA Policy the defendants are entitled to allotment of plot and as mentioned above defendants have consented to decree the suit of plaintiff qua their entitlement and right of allotment of plot hence, with the consent of defendants No.1 to 31 suit of the plaintiff stands decreed as prayed for, however, defendant No.32/CDA shall act in accordance with its by-laws, rules & regulations and transfer the suit plot in the name of plaintiff subject to fulfillment of all the codal formalities. No orders as to*

costs. Decree sheet be prepare accordingly. File be consigned to record."

8. We have confronted the learned counsel for respondent No.1 qua the suit plot, whereby it has been contended that respondents No.2 to 26 were owners of land measuring 76-Kanal &18-Marla in Khewat No.92/256, 12, 13, 91, 106, 109, 100 & 112 in revenue estate of Mouza Bokra, Islamabad, which was acquired by the CDA through an award in the year 1969. Similarly, respondents No.27-30 were owners of land measuring 02-Kanal and 17-Marla in Khewant No.245, 460, 482 & 265, Mouza Chahan, Islamabad, which was acquired by the CDA through an award, likewise, land measuring 03-Kanal & 19-Marla in Khewat No.284, Mouza Surain, Islamabad was acquired by the CDA vide award dated 12.06.1961, whereas land measuring 19-Kanal & 09-Marla in Khewant No.57, Mouza Bokra, Islamabad was acquired by the CDA through an award in the year 1968. On the basis of these acquisitions, respondent No.2 to 31 being affectees were / are entitled for allotment of a joint agro plot.

9. The above referred farfetched interpretation given by respondent No.1 could not be considered valid, especially when both the parties i.e. respondent No.1 and respondents No.2 to 31, have never placed any such document on record nor have requisitioned any record of the CDA to discharge the onus as to whether some subject matter of the contract exists in the official record of the CDA or otherwise. In such eventuality, the primary onus is upon the plaintiff / respondent No.1 in terms of Article 117 of the Qanun-e-Shahadat Order, 1984, where he desires the Court to give judgment in his favour qua his legal right on existence of facts which

he asserts, he is under obligation to prove that those facts exist and as such, it is his burden of proof to demonstrate that:

a) certain land is in existence in the name of respondents No.2 to 31, which was acquired by the CDA through different awards;
b) respondents No.2 to 31 have applied for rehabilitation benefits to the CDA authorities;
c) respondents No.2 to 31 have been declared entitled by the CDA for rehabilitation benefits under the CDA By-laws; and,
d) rehabilitation benefits declared by the CDA were in shape of agro plot.

But, the aforementioned factors have not been demonstrated from the record, even it is not the case of respondents No.2 to 31 that they have been declared eligible for any rehabilitation benefits through any document and as such, the entire record is silent.

10. In view of above reasons, this Court is of the view that the subject property is not in existence nor was any future benefit agreed by the CDA neither the same was matured in any manner, therefore, the very basis of alleged agreement to sell ceased to exists and such kind of agreements are directly hit by doctrine of frustration, which should be considered as impossibility to perform in future, which is covered in terms of Section 56 of the Contract Act, 1872, which provides the following essentials conditions, fulfillment of which establish the doctrine of frustration:

i. Valid and subsistence contract formulated between the parties;

ii. There must be some part of contract performed;

iii. Contract, after it is entered, becomes impossible to be performed or unlawful;

iv. the impossibility to perform is caused by an event which is beyond the control of both the parties;

v. If non-performance is proved in the knowledge of promisor, he must compensate promisee for the lost sustained;

vi. The impossibility of performance of contract by intrusion or occurrence of an unexpected event or change of circumstances beyond the parties' contemplation.

11. The above referred factors have been highlighted in the case reported as ***1999 CLC 483 Karachi (State Life Insurance Corporation of Pakistan v. M/s Bibojee Services Ltd.)***, and as such, the contract, if at all, agreed between the parties, is considered to be void in terms of the Specific Relief Act, 1877.

12. We have also confronted learned counsel for respondent No.1 as to whether contracts have been placed on record and what were the terms of those contracts as referred by the learned Trial Court in the impugned judgment, whereby learned counsel conceded that no evidence whatsoever of any nature was recorded in the learned Trial Court as respondents No.2 to 31 agreed to the claim of respondent No.1 by recording their conceding statements. Such state of affairs demonstrates the lacking of basic knowledge of law on the part of the learned Trial Court, who has not considered the law in its true perspective as it is the obligation and duty of

the learned Trial Court to take the record of entitlement, ownership, allotment of the suit property, if any, along with original agreements on record in shape of documentary evidence in terms of Article 72 read with Article 73 of the Qanun-e-Shahadat Order, 1984.

13. There is no cavil to proposition that admission of respondents No.2 to 31 in favour of respondent No.1 has been recorded by the learned Trial Court in terms of Article 32 of the Qanun-e-Shahadat Order, 1984, but this does not absolve the learned trial Court from verification of the record or to record findings as to whether the agreement was performable / executable, especially when the concept of performance of agreement to sell has to be considered in the light of Section 21 of the Specific Relief Act, 1877 where the Court has to see the enforceability of the agreement. Simultaneously, the Court is also under obligation to take into consideration Section 21 of the Specific Relief Act, 1877 in such type of inconclusive agreements, where the rights of the promisor or transferor have not yet been accrued, to determine as to whether such kind of contracts are specifically enforceable or otherwise. Per se, clause (c) of Section 21 of the Specific Relief Act, 1877 reads that *a contract the terms of which the Court cannot find with reasonable certainty*, whereas clause (h) enunciates that, *a contract of which a material part of the subject-matter, supposed by both parties to exist, has before it has been made, ceased to exist*. All these provisions of law have not been considered in its true perspective by the learned Trial Court, even there is not a single document available on record to resolve as to whether the agreements were ever executed

between the parties and what were terms settled therein. As such, it is trite law that when there is uncertainty in an agreement, the same could not be specifically enforced. Reliance is placed upon ***2008 CLC 418 Karachi (Anwer Hussain Surya v. Sumair Builders)***.

14. The Court has to see the principle for certainty in terms of description, which enables the court to determine with certainty the subject matter of contract and in case of absence of such certainty of subject matter, specific performance could not be made. Reliance is placed upon ***2002 CLC 1339 Lahore (Fida Hussain v. Jalal Khan)***. This Court is guided by the judgment of the apex Court, whereby it has been held that where identity of land agreed to be sold is uncertain, no decree for specific performance could be granted. Reliance is placed upon ***1987 SCMR 624 (Muhammad Saleem v. Hameeda Begum)***.

15. On the other hand, the effect of non-production of agreement executed between the parties has to be seen in juxtaposition with the description of the property. In order to clarify the same, it is obligatory upon the plaintiff to produce all those agreements on record when evidence is likely to be recorded, therefore, in all material aspects the suit which has been decreed by the learned Trial Court is not warranted under the law, especially in all these circumstances in terms of Section 22 of the Specific Relief Act, 1877, the jurisdiction to decree a suit for specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so, especially, in cases where agreements executed without fixing of any date for performance, having

incomplete description of property or non-existence of subject matter, the Court can decide whether discretion in terms of Section 22 of the Specific Relief Act, 1877 is to be exercised in favour of specific performance or not. Reliance is placed upon ***PLD 2014 SC 506 (Liaqat Ali Khan v. Falak Sher)***. As such, the contract could not be performed under the reasons and violation of law committed by the learned Trial Court as the judgment and decree are silent qua any reason.

16. The second important limb of this case is the role of the Capital Development Authority, who are hand in glove with the parties of the suit as the record demonstrates that the CDA put in appearance before the learned Trial Court through Mr. Farooq Iqbal Khan, Advocate on 01.12.2014, whereby learned counsel was directed to file written statement but, no effort had been made by the CDA authorities to file written statement nor had they raised any objection qua the existence of subject matter, however in subsequent proceedings, Ms. Nousheen Gul Kharral, Advocate, put in appearance on behalf of the CDA on 08.07.2015 and recorded her stance that the suit property was acquired by the CDA in the year 1969 through an award and CDA is pro-forma party. The said learned counsel further stated that suit is intra-party, the CDA is only a record keeper and CDA authorities will implement the order of the Court. Such statement on the part of CDA without referring to any record amounts to connivance of officials in order to strengthen the cases of all those persons who have not yet achieved the entitlement / eligibility under the law.

17. We are also surprised to see that the learned Trial Court has further gone ahead in this illegal classic case of abuse of process, where warrant for arrest were issued against Estate Director, CDA on 08.06.2018, without considering the fact that the decree so passed is not executable on the facts of it.

18. The last question raised is the question of limitation, whereby suit was decreed on 08.06.2016 and appeal was filed after two years when warrant of arrest of Director Estate Management, CDA was issued by the learned Executing Court, whereafter CDA authorities came to know about severity of this case and they compelled to file instant appeal. In this backdrop, the question of date of knowledge of decree is the key factor to be considered in this case, especially when the CDA authorities have also filed application for condonation of delay through CM No.3/2018, whereby in Para-2 of said application, it has been stated that, "*the applicant came to know about impugned judgment and decree during proceedings of the learned Executing Court when warrants were issued for Director Estate Management for implementation of impugned judgment and decree. The learned counsel for CDA submitted his power of attorney on 18.07.2018 before the learned Executing Court and from the date of knowledge the instant appeal is within time.*"

19. While considering the above referred background, it also appears that the officials of the CDA as well as previous counsel of the CDA are in league with the parties in order to deprive the CDA of its assets by playing a fraud, therefore, while relying upon the analogy that the question of limitation could only be considered relevant when a substantial justice

under the law has been observed by the learned Trial Court and if the decree of the learned Trial Court has already been declared void, such appeal could not be dismissed on the ground of limitation. Reliance is placed upon ***2000 YLR 1054 Lahore (Muhammad Saleem v. Barkat Ali)***. By virtue of void decree, the public property of the CDA could not be destroyed at the whims and caprice of the parties, when the entire edifice built by the private parties in connivance with the CDA authorities would create a charge on the public property against the settled principles of law. The courts are bound to protect, preserve and defend the title and rights of public properties in accordance with law being its bounded duty and in such eventuality, the limitation period in filing of such appeal has to be condoned. Reliance is placed upon ***2007 SCMR 1574 (Government of Baluchistan through Secretary Board of Revenue v. Muhammad Ali)***.

20. While considering the entire background of this case, we are of the view that when subject matter of agreement to sell is not in existence at the time of execution of agreement to sell with no specific description of plot, street or sector, the courts are bound to take the objectivity of agreement and without existence of suit property, performance could not be claimed nor even any legal enforcement be made. Reliance is placed upon ***2018 CLC 648 Islamabad (Saeed Ullah Khan v. Muhammad Khalid)***. Accordingly, the instant appeal is hereby ***ALLOWED***, the impugned judgment and decree, dated 08.06.2016, are ***SET ASIDE*** and the suit filed by respondent No.1 is hereby dismissed. Copy of this judgment may also

be transmitted and circulated amongst the Civil Courts through learned MIT as well as through learned Sessions Judge for information.

21. Before parting with this judgment, the admission on the part of respondents No.2 to 31 is apparent on record qua receiving of payment from respondent No.1, therefore, they are directed to return the amount to respondent No.1 within the period of 30 days.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.