

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

C.R. No.289/2013
Capital Development Authority
versus
National Insurance Company Ltd.

Petitioner by: Mr. Muhammad Nazir Jawad, Advocate.

Respondent by: Mr. Muhammad Izzat Khan, Advocate.

Date of Hearing: 12.11.2019.

MOHSIN AKHTAR KAYANI, J: Through this civil revision, the petitioner has called in question concurrent findings of the Courts below passed vide impugned judgments and decrees dated 10.05.2013 and 03.12.2012.

2. Brief facts referred in the instant civil revision petition are that the National Insurance Company Ltd. (NICL)/respondent entered into agreement with M/s Irshad Shahid Abdullah for construction of a building on Plot No.63, Jinnah Avenue, Blue Area, Islamabad. However, the respondent left the debris and rubbish material at the site of construction upon completion of building despite issuance of several notices by the CDA/petitioner, which ultimately constrained the petitioner to remove the debris/rubbish material at their own, vis-à-vis the petitioner served notices upon the respondent for payment of Rs.600,000/- as expenditures incurred on removal of the debris. Instead of making the said payment, the respondent filed a suit for declaration and permanent injunction against the petitioner, which was decreed by the learned trial Court vide impugned judgment and decree dated 03.12.2012. The petitioner feeling aggrieved thereof preferred an appeal, which was dismissed by the learned Additional District Judge (West), Islamabad vide impugned judgment and decree dated 10.05.2013. Hence, the instant civil revision.

3. Learned counsel for petitioner contended that the impugned judgments and decrees of the Courts below are not sustainable in the eyes of law and are

liable to be set-aside as the learned trial Court has failed to exercise the jurisdiction vested in it; that both the Courts below have not properly appreciated the pleadings and documents available on record and passed the impugned judgments and decrees; that the impugned judgments and decrees are based on misreading and non-reading of evidence available on record, therefore, the same may be set-aside and the suit so filed by the respondent may be dismissed.

4. Conversely, the learned counsel for respondent while supporting the impugned judgments and decrees contended that the learned trial Court pursuant to proper appreciation of the evidence and documents available on record decreed the suit and the same was upheld by the first appellate Court; that the debris and rubbish material allegedly lying at the construction site were removed upon completion of the building, whereas issuance of the notices by the petitioner for recovery of Rs.600,000/- was illegal; that the appeal filed by the petitioner before the first Appellate Court was time barred and has rightly been dismissed by the first Appellate Court, therefore, the instant civil revision petition may be dismissed.

5. Arguments heard, record perused.

6. Perusal of record reveals that the NICL/respondent through M/s Irshad Shahid Abdullah constructed their building on Plot No.63, Jinnah Avenue, Blue Area, Islamabad and dumped the construction waste material/debris at the car parking next to their building. Consequently, the CDA/petitioner issued them notices/letters dated 04.01.2005, 28.09.2005, 02.03.2006 and 18.04.2006 for payment of Rs.600,000/- on account of expenses incurred on removing the said debris. The respondent while replying the notice has taken the plea that no such material was dumped and in this regard the construction company had issued them a certificate and even the completion of the building has been processed by the CDA.

7. On the other hand, the respondent also filed a suit against the CDA for declaration and permanent injunction, which was contested by the CDA by reiterating their stance that construction debris was noted dumped at the site which was provided for temporary car parking and in this regard notice was also issued on 03.09.2002 by the Deputy Director Land Survey, CDA, which was further confirmed by the Central Engineering Lab, CDA being Quality Control Organization vide letter dated 29.08.2002. The CDA has taken the specific stance that it was the CDA's responsibility to complete the car parking of the said building and they had incurred heavy expenses for removal of debris dumped by the NICL, whereas the CDA has also submitted several photographs to substantiate their case in this regard.

8. The learned Trial Court on the basis of divergent pleadings of the parties has framed the issues on 24.05.2010 while placing the onus upon the NICL to prove that they had removed the debris from the site after completion of the construction and the claim of CDA regarding recovery of Rs.600,000/- is not justified. The other important issue framed by the learned trial Court is Issue No.4, whereby the CDA has raised the contention that the suit filed by the NICL is barred under Section 49-E of the CDA Ordinance, 1960.

9. The NICL/respondent produced PW-1 Syed Pir Zaman Shah/Zonal Head of NICL, who reiterated the stance that Plot No.63, Jinnah Avenue, Blue Area, Islamabad was allotted to NICL for construction of its building, which was completed through construction company namely M/s Irshad Shahid Abdullah (Pvt.) Ltd. in the year 1999. He also produced a clearance certificate dated 09.01.1999 and has referred Clauses No.32 and No.33 of the agreement under which the said construction company has to clear the car parking area. PW-1 has taken the specific stance that pursuant to issuance of letters dated 04.01.2005, 28.09.2005, 02.03.2006 and 18.04.2006 by the CDA regarding payment of Rs.600,000/- as a cost of removal of debris and construction material, the

respondent filed the suit and challenged the said notices with the contention that their claim is time barred. However, during the course of cross-examination, PW-1 Syed Pir Zaman Shah acknowledged that the NICL while attending the proceedings before the Senior Special Magistrate, CDA has taken the stance that they have challenged the proceedings before the Civil Court.

10. The NICL has also produced Asif Abbasi/Incharge Building Construction as PW-2, who stated that the building was completed in the year 1999 and possession thereof was delivered to the NICL and entire area around the building was cleared and in this regard he has produced a letter Exh.P1. However, during the course of cross-examination, he acknowledged that:

"بلڈنگ کا طلبہ ہم نے اسلام آباد سے باہر پھینکا۔ بلڈنگ کا قبضہ حوالہ کرنے کے وقت سے پہلے ہم نے پارکنگ مکمل کی۔ پارکنگ کا ایریا مکمل کرنا ہماری ذمہ داری تھی۔"

11. On the other hand, the CDA has produced Ijaz-ul-Hassan, Deputy Director, CDA as DW-1, who stated that the CDA was responsible to build parking area on the plot next to NICL building and when they visited the plot they observed construction waste material/debris lying there dumped by the NICL, whereas in this regard the report submitted by the survey department of CDA on the basis of CDA laboratory test further confirms that the debris had been dumped by the NICL after completion of the construction, therefore, it was not possible for the CDA to complete the construction of parking area without removal of the said debris. DW-1 Ijaz-ul-Hassan further stated that the contract was awarded to contractor for building of parking area pursuant to calculation of potential expenses to be incurred on removal of debris from the site and even the audit has also raised an objection, whereafter notices were issued to NICL for payment of Rs.600,000/-.

12. During the course of cross-examination, DW-1 Ijaz-ul-Hassan acknowledged that he neither visited the site nor seen the debris or waste construction material, however the people who inspected the site are alive, who

will be produced in the Court if the Court desires. He also acknowledged that the concerned SDO, Executive Engineer, Deputy Director Land Survey and Deputy Director Engineering Laboratory, who had verified the construction material lying on the site, are the concerned officials, but they are not produced before the Court today. DW-1 Ijaz-ul-Hassan further acknowledged that Nisar Ullah Amaan was the concerned Deputy Director of Land Survey Department, who conducted the survey, but he has not been produced in the Court. Likewise, he further acknowledged that nobody from M/s Zafar and Co., who completed the work on site for car parking, has also not been produced in the Court. DW-1 Ijaz-ul-Hassan lastly acknowledged that he is also not aware as to who calculated the cost of removal of the debris and that the notices for recovery of Rs.600,000/- were issued after audit inspection and raising of objection by the DAC.

13. The entire evidence discussed above clearly establishes that the CDA has failed to justify their stance on record, although factors regarding the Inspection Team, Land Survey Department, Laboratory Report and the construction of car parking through M/s Zafar & Co. have been reflected in the evidence of DW-1 Ijaz-ul-Hassan, but surprisingly, all these facts have not been substantiated by the CDA on record, which could easily be proved from their own record. Although, the CDA in order to prove their case has tendered in evidence their letters, Exh.D1 to Exh.D3, pertaining to construction of car parking area, but the onus has not been discharged by the CDA. It is the statutory duty of the CDA to justify the contention by producing the evidence of their officers, who conducted the survey, and on mere submission of the construction material laboratory report the entire facts could not be proved, therefore, the findings of the learned Trial Court to that extent are justified.

14. Besides the above referred position, the core issue of maintainability of the suit in terms of Section 49-E of the CDA Ordinance, 1960 has not been answered

by the learned trial Court. The said Section bars any proceedings against the CDA limiting the jurisdiction of the Courts to entertain such claim, especially when the proceedings have been initiated before the Senior Special Magistrate, CDA, and as such, such legal proceedings cannot be challenged in the Civil Court and in such eventuality, the bar contained in Section 49-E of the CDA Ordinance, 1960 comes into play. All the grounds raised by the NICL could only be adjudicated before the Senior Special Magistrate, CDA, whereas the NICL being plaintiff has failed to justify the acts of the CDA as to whether the same are based on any malafide, therefore, the suit filed by the NICL is contrary to the said provision of law as the NICL has failed to justify the alleged colorable exercise of powers or malafide or actions beyond jurisdiction on the part of the CDA, which are the key factors in such type of proceedings. In this regard, reliance is placed upon PLD 1978 Lahore 1116 (Carrier Telephone Industries Ltd. Islamabad vs. Sohail Brothers), PLD 1981 Lahore 341 (CDA vs. Abdul Majid Farooqi), 1979 CLC 565 Lahore (Hasan Amin vs. CDA, Islamabad) and PLD 1995 SC 457 (Kishwar Malik vs. M. Sadiq Malik).

15. This Court being scrupulous with the legal principles settled in the aforesaid reported cases is of the view that Issue No.4 has not been properly addressed by the learned trial Court and as such, the suit is barred, especially when PW-1 Syed Pir Zaman Shah/Zonal Head of NICL admitted that the notice had been received from the Senior Special Magistrate, CDA, therefore, the Civil Court had no jurisdiction in terms of Section 9 of the CPC to pass any decree against any proceedings initiated before the Senior Special Magistrate, CDA. Unexpectedly, both the Courts below have failed to appreciate this aspect of the case and resorted to passing of the impugned judgments and decrees, while the learned first Appellate Court has only confined its findings to the extent of filing of regular first appeal beyond the period of limitation.

16. In view of above settled position, the illegal exercise of jurisdiction on the part of both the Courts below is apparent on record, who have not answered the legal question of bar contained in Section 49-E of the CDA Ordinance, 1960, therefore, the concurrent findings of the Courts below are hereby declared to be contrary to law and based on illegal exercise of jurisdiction, hence, the instant civil revision petition is hereby ACCEPTED, the concurrent findings of both the Courts below passed vide impugned judgments and decrees dated 10.05.2013 and 03.12.2012 are SET ASIDE and the suit filed by the NICL is DISMISSED.

17. The CDA authorities are independent and allowed to proceed before the Court of Senior Special Magistrate, CDA, whereby both the parties can lead their evidence on record, who shall decide the pending proceedings within the period of 06 months.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 21 Nov 2013.

JUDGE

Khalid Z.