

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

C.R.No.517 of 2015
Capital Development Authority through its Chairman & another
VERSUS
Liaqat Ali & others

Date of Hearing: 02.03.2016
Petitioners by: Mr. Ghulam Shabbir Akbar, Advocate
Respondents No.1 to 3 by: Mr. Zulfiqar Ali Abbasi, learned ASC

MIANGUL HASSAN AURANGZEB, J:- Through this Civil Revision Petition, the petitioners, Capital Development Authority ("CDA") etc, have impugned the Order dated 28.09.2015, passed by the Court of learned Additional District Judge, Islamabad (West), whereby respondent No.1 to 3's appeal against the order and decree dated 22.04.2015, passed by the Court of Senior Civil Judge, Islamabad (West), was allowed and the matter was remanded to the learned Civil Court with the direction to decide the suit on merits after recording of evidence. Vide the said Order dated 22.04.2015, the learned Civil Court had allowed the petitioners' application under Order VII, Rule 11 of the Code of Civil Procedure, 1908 ("CPC") and rejected the plaint by holding that the suit instituted by respondents No.1 to 3, was not maintainable.

2. The essential facts for the disposal of this petition are that on 23.10.2014, respondents No.1 to 3 instituted a suit for declaration, mandatory and permanent injunction against the CDA and Director (Land), CDA before the learned Civil Court praying for the following relief:-

"i) A decree for declaration to the effect that the plaintiffs are genuine affectees of Mouza Qadir Bakhsh, the defendants acquired their BUP, acknowledged the same by issuing offer/allotment letters and the CDA department is under obligation to deliver the possession of the suit plots to the plaintiffs and delay/denial and threats of cancellation of suit plots from the name of plaintiffs on the part of CDA department in this regard is illegal, unlawful,

unjustifiable and ineffective upon the rights of the plaintiffs.

ii) A decree for mandatory injunction directing the defendants to deliver the possession of the suit plots to the plaintiffs without any further delay.

iii) As a consequential relief a decree for permanent injunction restraining the defendants from canceling the allotment of suit plots from the name of plaintiffs, delaying/denying the entitlement of the plaintiffs qua the suit plots, making allotment of the same in the name anyone else or doing any other act detrimental to the rights of the plaintiffs qua the suit plots in any manner whatsoever may kindly be passed in favour of the plaintiffs and against the defendants.

Any other relief which the Honourable Court deems appropriate may also be awarded."

3. On 05.12.2014, the petitioners/CDA filed an application under Order VII, Rule 11 CPC, praying for the rejection of the plaint. The grounds taken by the petitioners/CDA in the said application for the rejection of the plaint are as follows:-

"1. That suit is barred under CDA Ordinance 1960 and Specific Relief Act.

2. That the plaint does not disclose any cause of action against the applicant and liable to be rejected.

3. That the plaintiff has not come to the court with clean hands hence not entitled to any equitable relief.

4. That the suit is false and frivolous."

4. The said application was contested by respondents No.1 to 3 by filing their reply. Vide Order dated 22.04.2015, the learned Civil Court allowed the petitioner/CDA's application under Order VII, Rule 11 CPC and rejected the plaint. Perusal of the said Order dated 22.04.2015 reveals that the petitioners/CDA had leveled allegations of fraud against the said respondents. Furthermore, the process by which the said respondents' names were included in the list of beneficiaries of the Award dated 26.07.1987, whereby land in Mouza Badia Qadir Bakhsh, was acquired by CDA, was alleged to have been passed fraudulently, resulting in a loss to the national exchequer. As per the said order dated 22.04.2015, the learned counsel for the CDA took the position that respondents No.1 to 3 were arraigned as accused in proceedings before the National

Accountability Bureau, which had investigated the said acquisition process. It had also been contended on behalf of the petitioners/CDA that the order passed by the Deputy Commissioner, CDA on 28.10.1990 with regard to the property in question had been upheld by the Commissioner, CDA, and that the order of the Commissioner, CDA was final and could not be questioned in any Court as respondents No.1 to 3 had not filed an appeal within a period of fifteen days from the date of the Award passed by the Deputy Commissioner, CDA. As mentioned above, the contention of the petitioners/CDA prevailed over the learned Civil Court, and, consequently, the plaint was rejected.

5. Against the said Order dated 22.04.2015, passed by the learned Civil Court, respondents No.1 to 3 preferred an appeal before the Court of learned Additional District Judge, Islamabad, who vide Judgment dated 28.09.2015, allowed the appeal and remanded the matter to the learned Civil Court with the direction to decide the suit on merits after recording of evidence. Perusal of the said appellate judgment reveals that vide order dated 28.10.1990, the Deputy Commissioner, CDA had accepted a review petition in favour of respondents No.1 to 3, and that CDA's appeal against the said order was dismissed by the Commissioner, CDA on 01.06.2004.

6. Learned counsel for the petitioners in his arguments defended the Order dated 22.04.2015, passed by the learned Civil Court, and challenged the appellate Judgment dated 28.09.2015 as having been passed with material irregularity and suffering from jurisdictional illegalities. He further submitted that the dispute between the contesting parties had earlier been adjudicated upon up to the level of the Apex Court in favour of the petitioners. In this regard, he drew the attention of the Court to the Order dated 25.09.2014, passed by the Hon'ble Supreme Court of Pakistan in Civil Petition

No.06/2014. He further submitted that as the competent fora had already decided the matter in dispute between the contesting parties, respondents No.1 to 3, by filing a suit for declaration etc, had tried to reopen a past and closed transaction. He also drew the attention of the Court to Section 49-E of the Capital Development Authority Ordinance, 1960, and submitted that no Court or authority had jurisdiction to question the legality of anything done or any action taken under the said Ordinance by or at the instance of CDA. He prayed for the Revision Petition to be accepted by setting aside the appellate judgment dated 28.09.2015 and restoring the order dated 22.04.2015, passed by the learned Civil Court.

7. On the other hand, learned counsel for respondents No.1 to 3 submitted that the Deputy Commissioner, CDA had vide order dated 28.10.1990, allowed respondents No.1 to 3's Review Petition and included their names in the list of affectees, who were entitled to compensation for the acquisition of their built-up immovable property. He submitted that the Commissioner, on 01.06.2004, had dismissed CDA's appeal against the said order. He further submitted that the Hon'ble Supreme Court of Pakistan had not decided the dispute between the contesting parties on merits but had observed that a heavy liability could not be placed on CDA without the recording of evidence and due trial. Therefore, respondents No.1 to 3 had instituted the suit so as to get the benefit of the Award.

8. I have heard the arguments of the learned counsel for the parties and perused the record with their able assistance.

9. I do not deem it appropriate to go into the merits of the dispute between the contesting parties, as it is not necessary for the disposal of this petition. The petitioners as well as respondents 1 to 3 placed reliance on the Order dated 25.09.2014, passed by the Hon'ble Supreme

Court of Pakistan in Civil Petition No.06/2014. This order is reproduced herein below in its entirety:-

"The petitioner CDA impugns the judgment of a learned Division Bench of the High Court dated 2.12.2013 whereby Writ Petition No.3603 of 2002 filed by the respondents 1 to 3 namely Nazakat Ali, Ijaz Ahmad and Liaquat Ali was allowed. As a consequence, it was held as under:-

"Contention of learned counsel for the respondent CDA is not correct, as in the comments it has been admitted that petitioners No.1 and 2 were allotted plots No.1273 and 1274 in G-11/1 and third petitioner was also offered plot in the same Sector. Now learned counsel cannot be permitted to argue the case against the comments filed by CDA. The claim of the petitioners stands admitted and accordingly, the writ petition is accepted."

2. We have heard learned counsel for the parties at length and have also gone through the available record. The order of the High Court is premised on facts and circumstances which are dated subsequent to the acquisition proceedings. The very fact that the award was dated 28.4.1985 and possession was taken under Section 27 of the CDA Act on 26.07.1987, is strong indication that there was no build up area belonging to respondents 1, 2 and 3. However, the High Court had proceeded on the premise which has been reproduced above although strong evidence constituted in the award and the taking over of possession suggests that the case which was subsequently set up i.e. 5 years after the date of award by the respondents Nos.1, 2 and 3 to assert that there was built up area on the acquired land belonging to them has not been taken into account by the High Court. In fact where such factual determination was essential for ascertaining the respective rights and liabilities of the respondents and CDA, writ jurisdiction of the High Court was not the appropriate remedy.

3. In view of the above discussion, we find that the learned Bench in the High Court proceeded to make a factual determination without recording evidence and without taking note of the award dated 28.4.1985 and notification dated 26.07.1987. This, we say with respect, was not appropriate. With such strong, prima facie, evidence favouring CDA, it would not be proper to place a heavy liability on CDA without recording of evidence and due trial. We, therefore, convert this petition into appeal and allow the same. The impugned judgment is set aside. This, however, shall not prejudice either the proceedings in Reference No.28/2007 filed by the NAB or any other proceedings before a competent forum. However, CDA shall retrieve possession of any land which may have been given to respondents in lieu of the built up area claimed by them. A report in this

behalf shall be submitted in Court within 15 days for our perusal in Chambers." (Emphasis added)

10. Perusal of the said order reveals that it contains strong observations in favour of CDA. Through the said order, the Hon'ble Supreme Court, set-aside the judgment dated 02.12.2013, passed by the Hon'ble Islamabad High Court in W.P.No.3603/2002. In the said order, it has been observed that a factual determination was essential for ascertaining the respective rights and liabilities of the CDA and the respondents, for which writ jurisdiction of the High Court was not the appropriate remedy. Furthermore, it was observed that a heavy liability could not be placed on the CDA without the recording of evidence and due trial. The Hon'ble Supreme Court of Pakistan set-aside the judgment of the Hon'ble Islamabad High Court with the direction to the CDA to retrieve possession of any land which may have been given to the respondents in lieu of the built-up area claimed by them. It is after the said order dated 25.09.2014 that respondents No.1 to 3 instituted their suit before a Court of plenary jurisdiction. The earlier judgment dated 02.12.2013 passed in favour of the respondents by the Hon'ble Islamabad High Court was set at naught by the Hon'ble Supreme Court of Pakistan primarily for the reason that disputed questions of fact involved in the dispute could not be resolved by the Hon'ble High Court in writ jurisdiction under Article 199 of the Constitution. It is acknowledged in the said order that given the strong *prima facie* evidence in favour of CDA, the recording of evidence and due trial would be proper. Furthermore, a Court of plenary jurisdiction can resolve the allegations of fraud made by the petitioners/CDA. Whether the ultimate order passed in the hierarchy of CDA was in favour of the petitioners or the contesting respondents is also a question that the learned Civil Court can resolve after relevant evidence is adduced. Consequently, it is my view that the learned Appellate

Court did not commit any jurisdictional error in setting aside the order dated 22.04.2015, passed by the learned Civil Court and remanding the matter for a decision on merits after recording the evidence.

11. Learned counsel for the petitioners submitted that till date the petitioners have not filed their written statement before the learned Civil Court. There is nothing preventing the petitioners from filing their written statement and taking all the legal and factual objections available to them. The learned Civil Court is to decide the matter after giving due weight and deference to all the factual observations made by the Hon'ble Supreme Court of Pakistan in the said Order dated 25.09.2014, in terms of Article 189 of the Constitution.

12. In view of the above, this petition is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2016

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan*