JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

(JUDICIAL DEPARTMENT)

Regular First Appeal No.09 of 2012

Capital Development Authority
Versus
Muhammad Hanif Abbasi and others.

Appellant by:	Mr. Muhammad NazirJawad, Advocate.
Respondent by:	Raja Ishtiaq Ahmed, Advocate.
Date of Hearing:	02.06.2020.

GHULAM AZAM QAMBRANI,J.:- The appellant/Capital Development Authority (hereinafter referred to as the **"*appellant*")** has assailed judgment and decree dated 23.12.2011, passed by the learned Civil Judge 1st Class, Islamabad, whereby suit of the present respondents/plaintiffs was partially decreed to the extent of Rs.15,76,000/- against the appellant/defendant.

2. Brief facts leading to filing of instant appeal are that the respondents/plaintiffs (hereinafter be referred to as ***"respondents"***) filed a suit for declaration, injunction and recovery of damages with the averments that respondent No.1, namey Muhammad Hanif Abbasi alongwith one Akhlaq Ahmed Abbasi purchased a commercial plot No.18-B/2, situated at Markaz G-8, Islamabad (hereinafter referred to as the **"*plot*"**) in an open auction from the appellant and a thirty three years lease agreement was executed in favor of Muhammad Hanif Abbasi on 20.11.1988, for construction of a three storey commercial building. The said Akhlaq Ahmed Abbasi entered into a partnership with Muhammad Hanif for construction of a hotel building on the said plot; that each partner was to provide the finance required for construction of the building, as such Akhlaq Ahmed Abbasi transferred 1/3rd share of the plot to the respondent Muhammad Hanif and 1/3rd share to Mst. Naseer Begum and the said transfer was acknowledged by the appellant/defendant. Akhlaq Ahmed Abbasi submitted building plans which were approved by the appellant and the said building was completed by the end of March,

1991 but the same could not be occupied because the appellant did not provide the necessary infrastructure i.e. electricity and approach road etc., without which the building was useless, as such, the said building could not be put to any commercial use. Respondents invested millions of rupees on the said project. The appellant/defendant applied repeatedly for provision of the services and infrastructure but the same was not provided, therefore, without the services or infrastructure the commercial viability of the said building was nil and the investment made by the respondents was going to waste as the electricity was not provided until May, 1993. Likewise link road and car parking was also not provided till August, 1993, therefore, without these two major services the said building could not be occupied and put to commercial use; that the appellant was required to pay the cost of the transformer which was not paid and the respondents were forced to contribute Rs.1,50,000/-, as cost of the transformer whereas, the appellant paid remaining 50% in November, 1991; that electricity was provided by the WAPDA on 1st of May, 1993; that the respondents suffered losses due to negligence of the appellant by not providing the infrastructure and the services, as such, the respondents were entitled to demand an amount of Rs.52,00,000/- from the appellant. Further, said Akhlaq Ahmed Abbasi had earlier transferred 2/3rd share of the plot in favour of the respondents, and as such each respondent had become owner of 1/3rd of the plot. Later, Akhlaq Ahmed Abbasi transferred his remaining 1/3rd share in favor of respondent No.1 and thus, he had no share left in the plot or the building raised thereon and respondent No.1 became an owner to the extent of 2/3rd share of the plot. After Akhlaq Ahmed Abbasi ceased to have any interest in the plot, the respondent No.1 applied to the appellant for the transfer of the remaining 1/3rd share of the plot in his name. Although all formalities for the transfer of the plot had been fulfilled by the respondents and the appellant had agreed to transfer the said plot in the name of respondent No.1, yet at the final stage, the

appellant refused to issue the allotment letters in the name of the respondents on the ground that the property tax and other taxes for the building should be paid since March, 1991, when the building was completed; that this demand of the appellant was unreasonable because the building was completed in 1991, however could not be occupied and put to commercial use until August, 1993 and this was due to negligence of the appellant and as such, the appellant had no right to demand taxes for the said period, as the building was remained unoccupied. The refusal of the appellant to issue transfer/allotment letter of the plot in the names of the respondents is unlawful as this refusal is based on an illegal demand. It has also been pleaded that respondents are ready to pay the legal tax, which is leviable on the building from the date of its occupation and not from the date of its completion. It is submitted that the occupation of the building was delayed due to negligence of the appellant and hence, the appellant has no right to demand tax for the period for which the building could not be occupied.

3. Suit was contested by the appellant/defendant by filling written statement. Out of divergent pleadings of the parties, following issues were framed.

Issues

1. *Whether the plaintiffs have no cause of action and locus standi to file the suit: OPD*

2. *Whether the plaintiffs are neither the owners of the suit property nor they are entitled under law to file the suit? OPD*

3. *Whether the plaintiffs themselves have committed breach of the terms and conditions of the allotment as they constructed Hotel instead of shops and residential flats? OPD*

4. *Whether the plaintiffs are avoiding the lawful payment of property tax? OPD*

5. *Whether the suit is barred u/s 49-E of C.D.A Ordinance? OPD*

6. *Whether the suit is false and frivolous and is liable to be dismissed? OPD*

7. *Whether the defendant is entitled to get special costs under Section 35-A C.P.C? OPD*

8. *Whether the suit is filed by an un-authorized person? OPD*

9. *Whether the plaintiff is entitled to the decree as prayed for? OPP*

10. *Relief.*

4. After framing of the issues, respondents produced their oral as well as documentary evidence. Whereas the defence of the appellant was closed on 21.09.2004, due to non-production of evidence, inspite of availing numerous opportunities. In documentary evidence, the respondents placed on record copy of letter Exh.P1, letter dated 01.10.1992 Exh.P2, letter dated 04.01.1993 Exh-P3, reply of appellant/C.D.A dated 22.01.1994 Exh-P4 and letter dated 30.05.1993 Exh.P5 and closed their evidence. After hearing the ex-parte arguments, the learned Civil Judge partially decreed the suit of the respondents to the extent of Rs.15,76,000/-, to be recovered from the appellant. Feeling aggrieved from the impugned judgment and decree the appellant has filed the instant appeal.

5. Learned counsel for the appellant contended that the impugned judgment and decree dated 23.12.2011 is against the law and facts of the case; that the learned Civil Judge, Islamabad, has failed to appreciate the record available before him and passed the order unlawfully and in unjust manner without giving the appellant an opportunity to be heard; that respondents are not the owner/transferees of the suit plot, as the suit plot has not been transferred by the appellant in the name of respondents; that respondents were not competent in the eyes of lawto file suit, as, no proper transfer letter of the suit plot has been issued in favour of the respondents; that proper opportunity to lead evidence has not been provided to the appellant rather the right of evidence of appellant has been closed; that the learned Civil Judge, Islamabad, has passed order dated 23.12.2011 in a mechanical manner and has not applied judicial mind; that the impugned judgment is based upon misreading and non-reading of record, which resulted in grave miscarriage of justice. Further contended that the impugned

judgment is not a speaking one, therefore, the same is liable to be set-aside.

6. On the other hand, the learned counsel for the respondents supported the impugned judgment and contended that appellant/defendant was provided ample opportunities but they failed to produce their evidence as such, the learned trial Court has rightly closed the defence of the appellant/defendant due to non-production of evidence and passed a well-reasoned judgment.

7. Heard arguments of the learned counsels for the parties and perused the available record with their able assistance.

8. Perusal of the record reveals that the learned trial Court has failed to give its findings or decision with reasons for each separate issue which is against the mandate of Order XX Rule 5 C.P.C as such, non-speaking judgment has been passed without application of judicial mind. Under order XX Rule 5 C.P.C., the learned trial Court while deciding the matter has to render findings on each and every issue. For the sake of brevity the relevant provisions of law is reproduced below.-

> *"Order XX Rule 5 C.P.C., Court to state its decision on each issue. In suits in which issues have been framed, the Court shall state its finding or decision, with the reasons, therefore, upon each separate issue, unless the finding upon any one or more of the issues is sufficient for the decision of the suit."*

9. In the instant case, the learned trial Court has failed to deliver a judgment as was required under the law. The effect of not complying with order XX Rule 5 C.P.C., has been discussed in a renowned judgment of the Hon'ble Apex Court in "*Pakistan Refinery Ltd. Versus Barrett Hodgson Pakistan (Pvt.) Ltd.*" (**2019 SCMR 1726**), wherein it has been held as under:-

> *"A judgment delivered by the trial Court would not be a judgment in the real sense of the word if it does not conform to the requirements of Rule 5 of Order XX of the C.P.C. Similarly, a judgment delivered by the first court of appeal and final court of fact would not be a judgment if it does not conform to the requirements of Rule 31 Order XLI of the C.P.C. The rationale or raison d'etre behind these provisions is that not only*

> *the party loosing the case but the next higher forum may also understand what weighed with the court in deciding the lis against it. Such exercise cannot be dispensed with even in the cases of affirmative judgments otherwise who would know that arguments addressed were accepted or rejected with due application of mind."*

10. In view of the above facts and circumstances it would be appropriate that the matter be remanded to the learned trial Court for decision afresh and rendering its findings as per mandate of Order XX Rule 5 C.P.C.

11. The photocopies of the documents Exh.P1 to Exh.P5 produced in evidence by the respondents/plaintiffs within the meaning of Article 76(c) of Qanun-e-Shahadat Order, 1984 would not dispense with the requirement of the formal proof of the documents by primary evidence as provided by Articles 72 and 73 of the Order *ibid*. Secondary evidence can be admitted only on one or more conditions laid down in Article 76 of Qanun-e-Shahadat Order having been satisfied by the party tendering such evidence and; secondary evidence cannot be admitted of the contents of document without the non-production of the original having first been accounted for as required by the above-mentioned Article. The reception of secondary evidence without objection by the party against whom it is intended or required to be used in evidence cannot ordinarily object to the admission of such evidence at any subsequent stage, subject to provisions of Article 162 of Qanun-e-Shahadat Order. Reliance in this regard is placed on the case reported as "Mst. Fatima and two others vs. Najeeb Ullah and another" [**2020 CLC (Lahore) 780**]. In the instant case, the learned trial Court has not considered and dilated upon the requirement of law because admitting photocopy of a document in evidence and reading the same in evidence without observing legal requirements of Article 76 of the Qanun-e-Shahadat Order, 1984, would be illegal. Reliance is placed on "Feroz Din and others v. Nawab Khan and others"**[AIR 1928 Lahore 432]** and "Fazal Muhammad v. Mst. Chohara and others"[**1992 SCMR 2182]**. Neither authors of the documents nor the witnesses nor such documents in original have been produced in Court for inspection purposes. Thus, such documents, without formal proof, cannot be relied upon. Reliance in

this regard is placed upon "Khan Muhammad Yousaf Khan Khattak v. S.M. Ayub and 2 others"**[PLD 1973 SC 160]**, but as against this, the learned trial Court placing reliance on such documents have proceeded to pass the impugned judgment and decree, which cannot be allowed to hold field, because the basic purpose is to administer justice to the parties rather to knock them out on the basis of technicalities.

12. The requirement of law for production of secondary evidence is that the party in whose possession the document to be produced, is given notice for production of the same in the Court or that it is proved when the original is shown or appears to be in the possession or power of the person against whom the document is sought to be proved, or of any person legally bound to produce it, and when, after the notice mentioned in Article 77, such person does not produce it or when the original has been destroyed or lost or when the party offering evidence of its contents cannot, for any other reason not arising from his own default or neglect produce it in reasonable time.

13. Perusal of the record of the case reveals that the documents tendered by the respondents/plaintiffs were received in evidence improperly without the production of their originals and the conditions pre-requisite for permitting secondary evidence were also wanting and mere consent or omission to object to the reception of inadmissible evidence cannot be treated as a valid and legal piece of evidence because such departure of the rule appears to have a substantial effect on the decision of the Court below, which if excluded might have resulted in varying the decision, in view of the facts and circumstances of the case, and thus; the judgment impugned herein, cannot sustain. Reliance in this regard is placed on "Muhammad Farooq Marfani versus Abdul Qadir Tawakal and 7 others" [**P L D 2004 Karachi 595**]. It has been held by the Hon'ble Supreme Court of Pakistan in a case reported as "Farzand Raza Naqvi and 5 others vs. Muhammad Din through Legal Heirs and others" [**2004 SCMR 400**] as under:-

> *"Despite of non-representation of defendants in the suit, the trial Court was under legal obligation to attend the important question relating to the maintainability of the*

> *suit and the genuineness of the claim of plaintiff arising out of the pleadings of the parties, and decide the suit on merits to avoid any injustice to any party in his absence. The interest or administration of justice always demands that one should not be allowed to get any benefit in absence of his opponent to which he is not entitled in law."*

14. Further in the case reported as "East & West Steamship Co. v. Queensland Insurance Co. (**PLD 1963 SC 663**) the Hon'ble Supreme Court held:

> *"There can be no doubt of the duty of the Court to ensure, even when proceeding ex parte, that its decision is in accordance with the facts, which should be ascertained with as much care as is possible in the absence of any contesting party."*

It hardly needs to be emphasized that a plaintiff can succeed on the strength of his own case and not upon the weakness of the opponent's case. If any authority is needed in this respect, reference can be made to PLD 1958 Privy Council 161.

15. For what has been discussed above, the instant appeal is **allowed**, Judgment and decree dated 23.12.2011 is set-aside. Consequently, suit of the respondents/plaintiffs shall be deemed to have been pending before the learned trial Court who shall decide the suit after hearing the parties and to give findings on all the issues with reasons. This exercise shall be done by the learned trial Court within a period of sixty (60) days from the date of receipt of this judgment.

(MIANGUL HASSAN AURANGZEB)
JUDGE

(GHULAM AZAM QAMBRANI)
JUDGE

Announced in open Court, on 8th June, 2020.

JUDGE **JUDGE**

Approved for reporting.

"Rana M.Ift"