

Form No: HCJD/C-121

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

Regular First Appeal No. 26 of 2013

Syed Muhammad Sajjad Shabbir Bukhari

Versus

FGEHF and another

Regular First Appeal No. 197 of 2020

Syed Muhammad Ashfaq Shabbir

Versus

FGEHF and others

Appellants by: Mr. Khalil ur Rehman
Abbasi, Advocate.

Respondents by: Mr. Muhammad Nazir
Jawad, Advocate.

Date of Decision: 22.06.2021.

TARIQ MEHMOOD JAHANGIRI, J: Through this single judgment, we intend to decide the above mentioned two regular first appeals against consolidated judgment and decree dated 28.11.2012, passed by Civil Judge 1st Class (West) Islamabad, whereby suits of the appellants were dismissed.

02. Brief facts of the case are that the appellant of RFA No. 197 of 2020 namely Syed Muhammad Ashfaq Shabbir being employee of Federal Government, applied for allotment of plot on ownership basis in housing scheme Phase-III, Sector G-13, Islamabad, through the brochure issued by the respondent No. 1 /

Federal Government Employees Housing Foundation. Thereafter, provisional offer letter for allotment of plot was issued on 07.11.1999 and final allotment letter was issued on 17.04.2002, whereby the respondent No. 1 was allotted Category-III, Plot No. 59, measuring 35 x 70, Street No. 9, Sector G-13/3, Islamabad. The appellant / allottee paid his installments in accordance with the criteria mentioned in the brochure and also paid the development charges.

03. That the appellant / allottee Syed Muhammad Ashfaq Shabbir sold the plot to his real brother Syed Muhammad Sajjad Shabbir Bukhari on 13.08.2007. Later on, the Federal Government Employees Housing Foundation cancelled the provisional allotment letter as well as final allotment letter of the appellant vide letter dated 29.10.2008. The appellants being aggrieved filed suits for declaration, cancellation letter dated 29.10.2008, mandatory and permanent injunction before the Civil Judge, Islamabad.

04. Both the suits filed by Syed Muhammad Ashfaq Shabbir, appellant in RFA No. 197 of 2020 and Syed Muhammad Sajjad Shabbir Bukhari, appellant in RFA No. 26 of 2013 were consolidated; the respondents / FGEHF filed written statement and the learned trial Court has framed the following issues:

"1. Whether the letter No. 3 (S-0922)/HF dated 29.10.2008 is against the law and facts and the same is

liable to be cancelled on the grounds mentioned in the plaint? OPP.

2. Whether the Plaintiff has legal right to transfer the suit property in his name on the grounds mentioned in the plaint? OPP.

3. Whether the suit is not maintainable in its present form? OPD-1.

4. Whether the Plaintiff has not come to the court with clean hands? OPD-1.

5. Whether the Plaintiff has filed the suit with collusion of Defendant No. 2? OPD-1.

6. Whether the allotment of suit plot was based on forged and fictitious documents, hence the same is liable to be dismissed? OPD-1.

7. Relief."

05. That the parties appeared before the Court and produced their evidence oral as well as documentary. Syed Muhammad Sajjad Shabbir Bukhari appeared as PW-1, Syed Muhammad Ashfaq Shabbir appeared as PW-2 and Fayaz Umer Sayal Assistant Director, appeared as PW-3. In documentary evidence, appellants have produced agreement to sell as Ex.P-1, provisional allotment letter as Ex.P-2, brochure as Ex.P-3, development charges receipt as Ex.P-4, cancellation letter dated 29.10.2008 as Ex.P-5, authority letter as Ex.P-6, final allotment letter as Ex.P-7 / Mark-A, payment receipts as Ex.P-8, High Court decision in ICA No. 77 of 2005 as Ex.P-9, application of Ihsan Ali

Naser as Ex.P-10, provisional allotment of Ihsan Ali Naser as Ex.P-11, final allotment of Ihsan Ali Naser as Ex.P-12, working papers as Ex.P-13, cancellation of allotment, provisional and final, of Ihsan Ali Naser as Ex.P-14, Service certificate of Syed Ashfaq Shabbir dated 24.07.1996 as Ex.P-15, allotment of plot to Mst. Farhat dated 11.05.2010 as Ex.P-16 and certificate of transfer of plot dated 31.05.2010 as Ex.P-17.

06. On the other hand, Faiz Umer Sayal, Assistant Director appeared as DW-1 on behalf of respondents / defendants No. 1 to 3. In documentary evidence he produced an application No. 0416 as Ex.D-1, service certificate issued to Syed Ashfaq Shabbir as Ex.D-2, provisional allotment letter issued to Syed Ashfaq Shabbir as Ex.D-3, final allotment letter as Ex.D-4, authority letter as Ex.D-5, letter dated 23.07.2007 as Ex.D-6, letter dated 15.01.2008 as Ex. D-7, letter dated 13.2.2008 as Ex.D-8, letter dated 08.10.2008 as Ex.D-9, letter dated 29.10.2008 as Ex.D-10, application dated 08.07.2007 as Ex.D-11, sale tax invoice as Ex.D-12 and letter dispatch register as Ex.D-13.

07. The learned trial Court dismissed the suits of the appellants vide impugned judgment and decree dated 28.11.2012, hence the instant Regular First Appeals.

08. Learned Counsel for the appellants has argued that the impugned judgment and decree has been passed without

recording or discussing the evidence of the appellant in its prospective manner and the learned trial Court has dismissed the suits without applying judicial mind; that the cancellation of plot of one applicant namely Ihsan Ali Naser was set aside in a writ petition No. 2783/2004 by the Hon'ble Lahore High Court Rawalpindi Bench, Rawalpindi and Intra Court Appeal against the said judgment was also dismissed by the said Hon'ble Court.

09. That the appellant Syed Muhammad Sajjad Bukhari in RFA No. 26/2013 was a bonafide purchaser of said plot and issue No. 2 was liable to be decided in favour of the appellant and the suit was liable to be decreed as prayed by him.

10. As there was no procedural defect in the allotment of plot, the respondents had no power to cancel the same in the light of principle of locus poenitentiae as once an allotment is made and taken effect, the same would have legal protection and such right created cannot be withdrawn.

11. That the learned trial Court on the basis of issues No. 1 and 2, decided the issues No. 3, 4, 5 and 7 against the appellants, whole judgment of the trial Court is based upon surmises, conjectures, passed without applying the judicial mind and is rendered against the law and facts and is liable to be set aside.

12. Conversely, learned counsel for the respondents / FGEHF has stated that the impugned judgment and decree has rightly been passed; the appellant / allottee of the plot namely Syed Muhammad Ashfaq Shabbir has mentioned his wrong date of birth as 16.03.1942 in the application form (Ex.D-1) of purchase / allotment of plot, which was subsequently found to be incorrect and the actual date of birth, as per report of his parent department (Ex.D-7), was 16.03.1952. Facts of the case of applicant Ihsan Ali Naser in ICA No. 77/2005 were entirely different from the case of appellants, impugned Judgment / decree has been passed on merits and according to law, hence the appeals are liable to be dismissed.

13. Arguments heard, record perused.

14. The scheme for allotment of plots to the employees of Federal Government on ownership basis in Islamabad (Phase-III) was introduced vide brochure (Ex.P-3), containing the criteria for eligibility and terms and conditions etc.. It is mentioned in clause (a) for criteria of allotment that "*Mode of scrutiny of applications and the seniority for the purpose of allotment shall be determined in the order of the date of birth of the applicant*". It is also mentioned in Clause-B of brochure that, "*if at any stage, contents of the Affidavits are found to be fictitious or false or any material facts found to have been concealed / mis-stated or suppressed*

deliberately and knowingly, the allotment will be cancelled. In addition, the amount deposited will be forfeited and such legal action as deemed appropriate will also be taken."

15. The appellant in RFA No. 197/2020 namely Syed Muhammad Ashfaq Shabbir had applied for allotment of plot vide application (Ex.D-1), whereas, in column No. 4, the applicant mentioned his D.O.B as 16.03.1942, thereafter, provisional offer for allotment was issued on 07.09.1999 (Ex.P-2), wherein it is categorically mentioned in clause 10 that "*if at any stage, contents of the documents submitted with your application are found to be fictitious or false or any material facts found to have been concealed / mis-stated or suppressed deliberately and knowingly, the allotment shall be liable to cancellation. In addition, the amount deposited by you shall be forfeited and such legal action as deemed appropriate shall also be taken*". Final allotment letter for plot No. 59 Cat-III, Sector G-13/3 was issued on 17.04.2002 (Ex.P-7).

16. A letter dated 23.07.2007 (Ex.D-6), was sent to the Admin Department, Ministry of Information and Broadcasting regarding the confirmation of Date of Birth of the appellant / Syed Muhammad Ashfaq Shabbir in the service record, in response thereto, letter dated 15.01.2008 (Ex.D-7), was issued by the Section Officer, Ministry of Information and Broadcasting to the

Federal Government Employees Housing Foundation, wherein it is apprised that the Date of Birth of Syed Muhammad Ashfaq Shabbir / allottee was 16.03.1952 instead of 16.03.1942.

17. Show Cause Notices dated 13.02.2008 and 08.10.2008 (Ex.D-8 & D-9), respectively regarding the cancellation of plot on the basis of mentioning wrong D.O.B, were issued to the allottee / appellant and finally allotment of the plot was cancelled vide letter dated 29.10.2008 (Ex.D-10).

18. The appellant in support of the correctness of his D.O.B only produced a certificate issued by Parveen Malik / Chief Editor, Magazines Regional Publications Office Directorate of Films and Publication, Government of Pakistan, Lahore (Ex.P-15), wherein it is mentioned that D.O.B of Syed Muhammad Ashfaq Shabbir is 16.03.1942, the said letter is neither addressed to anyone nor contains any heading or subject etc. and the author of letter Parveen Malik has also not been produced as a witness.

19. Evidence of the appellant / allottee Syed Muhammad Ashfaq Shabbir was recorded after his retirement on 15.11.2020, but in cross-examination he has stated that he does not remember the actual date of retirement. Said statement proves that he mentioned wrong D.O.B in the application form, as it is impossible that a retired government servant does not remember his date of retirement.

20. Appellants have neither produced the copy of writ petition filed by Ihsan Ali Naser nor copy of Judgment dated 31.05.2005 of learned Single Bench and only got exhibited Judgment dated 13.02.2007. Learned counsel for the respondents states that facts of the case of Ihsan Ali Naser are entirely different and no benefit can be extended to appellants on the basis of decision of ICA No. 77/2005.

21. As far as argument of learned counsel for the appellants that on the principle of locus poenitentiae, allotment of the plot was not liable to be cancelled is concerned, it is well settled principle of law that the principle of locus poenitentiae can be invoked only in respect of order which is legal and not in respect of an order which has been obtained on the basis of false and incorrect facts / information. Reference in this regard may be made to the following case laws:

(i) In the case of **Senate through Chairman Vs. Shahiq Ahmed Khan (2016 SCMR 460)**, it has been held as follows:-

"we are constrained to observe that the principle is meant to condone a bona fide mistake and not to be pressed into service for reaping the benefit of any fraud or to camouflage the same".

- (ii) In the case of **Muhammad Sidiq through L.Rs. Vs. Punjab Service Tribunal, Lahore and others** **(2007 SCMR 318)**, it has been held as follows:-

"it is a settled proposition of law that if the order is illegal then perpetual rights cannot be gained on the basis of an illegal order and in such situation principle of locus poenitentiae is not attracted as the law laid down by this Court in Abdul Haque Indhar's case 2000 SCMR 907".

- (iii) In the case of **Nazir Ahmad Panhwar Vs. Government of Sindh through Chief Secretary, Sindh and others (2005 SCMR 1814)**, it has been held as follows:-

"The contention on behalf of the petitioner that the order, dated 24.11.1997 had been acted upon, therefore, a vested right had been conferred on the petitioner to continue on the post of Director (Administration) in Sindh Seed Corporation, in view of the principle of locus poenitentiae is misconceived as this principle can be invoked only in respect of an order which is legal and not in respect of an order which is contrary to and in contravention of any provision of law or the rules made thereunder or a settled provision of law. If any authority is required in support of above proposition the same is available from the judgments in the cases of (i) The Engineer-in-Chief Branch through Ministry of Defence, Rawalpindi and

another v. Jalaluddin PLD 1992 SC 207 and (ii) Abdul Haque Indhar and others v. Province of Sindh through Secretary Forest, Fisheries and Livestock Department, . Karachi and 3 others 2000 SCMR 907”.

- (iv) In the case of **Shakeel Ahmad Zaidi and others Vs. Secretary, Higher Education, Government of Punjab, Lahore and others (2021 SCMR 474)**, it has been held as follows:-

"We are therefore clear in our minds that only where lawful orders have been passed by an authority having the power to do so under the relevant law and a person bona fide receives a benefit under the said law without any positive action on his part, such beneficiary can claim a right under the exception to the principle of locus-poenitentiae and claim that the benefit bona fide received by him by virtue of an a lawful order passed by the competent authority (which at the relevant time and for its duration till its withdrawal was lawfully passed by an authority competent to pass such order) cannot subsequently be recovered by virtue of the protection available under the exception to the aforesaid rule”.

- (v) In the case of **Engineer in Chief Branch through Ministry of Defence, Rawalpindi and others Vs. Jallal ud Din (PLD 1992 SC 207)**, wherein the relief was granted in a very structured manner and it was clearly and categorically held that:-

"locus poenitentiae is the power of receding till a decisive step is taken. But it is not a principle of law that order once passed becomes irrevocable and it is past and closed transaction. If the order is illegal then perpetual rights cannot be gained on the basis of an illegal order. The appellants when came to know that on the basis of incorrect letter, the respondent was granted Grade-II, they withdrew the said letter. The principle of locus poenitentiae would not apply in this case."

- (vi) In the case of **Muhammad Feroz Vs. Deputy District Officer (Education) and others (2005 SCMR 1490)**, where a person was mistakenly appointed as PTC Teacher against a post for which he lacked the requisite qualification this Court held as follows:-

"We are not persuaded to agree with learned Advocate Supreme Court on behalf of the petitioner that after having appointed the service of the petitioner could not have been terminated on the principle of locus poenitentiae because the said principle can only be pressed into service to protect the legal rights based on lawful orders."

- (vii) In the case of **Mst. Sameena Ashfaq Syed Amin AL Vs. Government of Pakistan through Ministry of Finance and 3 others (2018 CLD 475 [Lahore])**, it has been held as follows:-

"the principle of locus poenitentiae of receding back the steps is available only where an action or representation has been made erroneously".

22. It is trite that declaration is a discretionary and equitable relief, it is pre-condition that the parties should approach to the Courts with clean hands, in order to get the relief of declaration. Reference in this regard may be made to the following case laws:-

- (i) In the case of **Shafqatullah and others Vs. District and Sessions Judge, Nowshera, N.W.F.P and 4 others" (2001 SCMR 274),** it has been held as follows:-

"It would also appear from the record that the petitioners did not approach the High Court with clean hands entitling them to the discretionary, equitable relief under the Constitutional jurisdiction".

- (ii) In the case of **Manzoor Hussain and 3 others Vs. Muhammad Siddique (2000 CLC 623 [Lahore]),** it has been held as follows:-

"The grant or refusal of declaration is essentially discretionary and in this case, to my mind, the plaintiff had forfeited his right to an equitable relief by putting up a false case".

- (iii) In the case of **Shahnaz Parveen and another Vs. Javed Yaqoob and others (2020 MLD 638 [Islamabad])**, it has been held as follows:-

"It must be remembered that the declaration claimed under Section 42 of the Specific Relief Act, 1877 lies entirely within the judicial discretion of the Court and is to be exercised with caution according to the exigencies of a particular case. A party cannot, as of right, claim such a declaration, because such relief is more in the nature of an equitable relief than a legal remedy. Litigants with inequitable conduct ought not to be granted equitable reliefs such as declaration and injunctions. In the case of Muhammad Rafique v. Liaqat Ali (2006 YLR 2689), the Hon'ble Mr. Justice Sair Ali (as he then was) had the occasion to hold that plaintiffs who contradict their pleadings through their evidence deprive themselves of the equitable relief of declaration. Having adopted contradictory positions, respondent No.1 could not have approached the Court for seeking the discretionary and equitable relief of declaration".

- (iv) In the case of **University of the Punjab and another Vs. Malik Jehangir Khan (1994 PLC(CS) 314 [Lahore High Court])**, it has been held as follows:-

"Even otherwise it was a suit for declaration, the conduct of the plaintiff is very material. It is equitable relief and Court would be justified to

refuse the relief if the plaintiff's hands were not clean".

- (v) In the case of **Muhammad Siddique Vs. Yahya Khan (1994 CLC 1374 [Lahore])**, it has been held as follows:-

"It was a suit for declaration, the conduct of the plaintiff is very material. It is equitable relief and Court would be justified to refuse the relief if the plaintiff's hands were not clean".

23. The appellants / plaintiffs in the present case are not entitled to any relief for the reasons, that firstly they failed to produce any convincing evidence in support of the correctness of D.O.B like Birth Certificate, Matric Certificate, Service Record and record of NADRA etc. and secondly, have violated the instructions / conditions mentioned in the brochure and provisional allotment letter by providing false and incorrect information / D.O.B.

24. For what has been stated above we hold that the suits filed by the appellants were rightly dismissed by the Court of Civil Judge 1st Class (West) Islamabad, on 28.11.2012. Hence, both the Regular First Appeals are without merit and accordingly **dismissed.**

(MIANGUL HASSAN AURANGZEB)
JUDGE

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

Approved for reporting.