

Form No: HCJD/C-121.
JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

W.P.No.2177/2009

Mst. Khadija Qurban

Vs

Federal Government Employees Housing Foundation

PETITIONER BY: Mr. Imran Shafique, Advocate.

RESPONDENT BY: Ms. Shahina Akbar, Advocate

DATE OF DECISION: 03.06.2015

AAMER FAROOQ, J. Through the instant Constitutional petition under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973, the petitioner seeks declaration to the effect that she is entitled to allotment of plot in Category-III, Phase-IV of Housing Scheme, launched by the respondent.

2. The facts, in brief, are that the petitioner being a teacher in the Federal Government Institution retired from service on 25.03.2006 after attaining superannuation in BPS-16. The petitioner's husband was also a Federal Government employee and retired in the year 2004. The respondent launched a housing scheme and invited applications from the government employees for allotment of plots in different categories. The petitioner and her husband made applications for allotment of the plots and fulfilled all the requirements as provided in the brochure. The petitioner applied in Category-III by tendering pay order in the sum of Rs. 65000/- as seed money. The respondent directed the petitioner to provide the specimen affidavit and visit the office for payment of two installments to the tune of Rs.4,35,000/- (Rupees four lacs and thirty five thousand only), however, despite needful being done, no further response was given by the respondent. The respondent vide order dated 24.12.2008 turned down the application for allotment made by the petitioner on the ground that her husband has also been provisionally allotted Category-II plot in Housing Scheme, Phase-IV, thus, she

is not eligible for allotment of plot as mentioned in clause 2.2 of the brochure.

3. The learned counsel for the petitioner *inter alia* submitted that vide letter dated 29.09.2008, the respondent considered the application of the petitioner for allotment of plot and despite fulfillment of all pre-requisites, her application has been turned down without any justification or basis. It was further contended that under Article 24 of the Constitution of Islamic Republic of Pakistan, 1973, it is fundamental right of the petitioner to acquire and hold property and she cannot be deprived of the same in an arbitrary manner. It was further contended that under the law, husband and wife are two distinct persons and cannot be termed as one for the purposes of allotment of property. In support of his contentions, the learned counsel placed reliance on case titled "*Prof. Kazim Hussain and others Vs Government of Pakistan through Secretary M/o Law Justice & Parliamentary Affairs and others*" reported as (PLD 2013 FSC 18).
4. The learned counsel for the respondent *inter alia* submitted that no provisional allotment was made in favour of the petitioner and her application has been turned down on the basis of terms and conditions of the brochure which forms part of the contract between the applicant and the respondent.
5. The application of the petitioner has been turned down on the basis of clause 2.2 of the brochure for Islamabad Housing Scheme, Phase-IV. The referred clause reads as under:

"Priority shall be given to those applicants who or their spouse or family:

- i) *Where not allotted a house/flat or plot in Islamabad by the Housing Foundation, CDA or any Government Agency at any time and whether it was retained or disposed off.*
- ii) *Each applicant shall have to submit an affidavit to the effect duly countersigned by a First Class Magistrate. If at any stage, contents of the Affidavit are found to be fictitious or false or any material facts, found to have been*

concealed/misstated or suppressed deliberately and knowingly, the allotment shall be cancelled and the seed money deposit shall be forfeited and such legal action as deemed appropriate will also be taken."

6. The brochure is part of the agreement between the parties inasmuch as in petitioner clause 22 of the application for allotment an undertaking has been signed by the petitioner whereby he agreed to abide by the terms and conditions as given in the brochure titled "*Housing Scheme for Federal Government Employees*" on ownership basis in Islamabad Phase-IV. Under section 2.2 of the brochure, priority is to be given to the applicants whose spouse or family has not been allotted a house/flat or plot in Islamabad by the Housing Foundation, CDA or any Government Agency at any time. In case titled "*Ishrat Jabeen Saeed Vs Multan Development Authority*" (2007 MLD 1164), the Hon'ble Lahore High Court, Lahore, observed that enforcement of contract could not be ordered through Constitutional petition. It was further observed that one of clauses mentioned in advertisement was that if both husband and wife were successful in draw, only one of them would be entitled to retain; object of scheme was to accommodate as many families as possible and the petitioners were bound by such condition. Therefore, in the instant case the petitioner is bound by the undertaking and cannot question clause 2.2 at this stage.

7. Under clause 15 of the above mentioned brochure, there is an arbitration clause which provides for settlement of all disputes between the applicants/allotees and the respondent through arbitration. The relevant clause reads as follows:

"ARBITRATION

All disputes between the Housing Foundation and the allottees/applicants shall be referred to the Executive Committee for arbitration and the decision of the Committee shall be final and binding on both the parties."

The plain reading of the above said clause shows that the Executive Committee of the respondent is to be the sole Judge in the matter, in case any dispute arises between any applicant and

the respondent. The petitioner, therefore, has an alternate remedy which is efficacious in nature. It is an established principle of law that where an alternate and efficacious remedy is available, the petition under Article 199 of the Constitution is not maintainable. In this behalf, reliance is placed on case titled "*M/s Gandapur Construction Company Vs Government of KPK & others*" (2014 CLD 400) wherein Hon'ble Peshawar High Court, Peshawar held as follows:

"7. Undisputedly, there is a clause in the agreement executed between the parties bearing clause No.25 to the agreement. According to this clause, in the event of any disagreement arising out of the contract, the matter shall first be referred to the Superintending Engineer for decision who shall, after making such enquiries as he may deem fit, give his decision in writing not later than three months after the reference is made to him.

8. This clause No.25 of the agreement provides a forum to the parties to settle their disputes out of court through the process of arbitration. This is a forum where all the disputed matters will be discussed by referring to each and every aspect of the case even by recording pro and contra evidence by the experts on the subjects.

9. When the agreement itself provides a forum for resolving a dispute among the parties to the suit then without availing such forum how a disputed question of fact can be placed before the High Court for its resolution. A High Court under Article 199 of the Constitution of Pakistan 1973 may issue a writ only when facts are admitted and when there is no alternate remedy to the aggrieved person for resolution of his grievance. Here in this case neither facts of the case are admitted nor the petitioner is divested of alternate forum for the resolution of his grievance as the agreement itself provides him a forum to settle his dispute with the respondent-department. So it is held that in view of clause 25 of the agreement, the instant writ petition is not maintainable."

In case titled "*M/s N.A.A. Consulting Engineers & others Vs Karachi Metropolitan Corporation*" (2014 MLD 1795), the Hon'ble Sindh High Court, Sindh observed as follows:

"We have also observed that the instant petition is not maintainable for the reasons that it pertains to

contractual obligation between promisor and promisee under an "arbitration agreement". Expression "arbitration agreement" within the contemplation of section 2(a) of Arbitration Act, 1940 means a written agreement to submit present or future differences to arbitration."

In case titled "S.M. Hashim Hussain Vs Pakistan Defence Officer's Housing Authority" (2005 SCMR 1782), the Hon'ble Supreme Court of Pakistan held that in terms of clause 18 (arbitration clause of the condition of agreement), it is obligating upon the parties to refer the dispute arising between them to arbitration for its resolution.

In case titled "*Haji Khalid Usman Vs Secretary to the Government of Punjab, Agriculture Department, Lahore*" (2008 CLC 1360), it was observed as follows:

"To resolve the present controversy the best course is to advert to the plain reading of Article 199 of the Constitution, which reveals that an aggrieved person can invoke the jurisdiction of the High Court under Article 199 if he has no alternate remedy, whereas in the present controversy undisputedly clause 65 of the Contract itself enables the parties to invoke the provisions of Arbitration Laws. The Arbitration Laws are unambiguous in terms and if some dispute arose in any controversy as is contended in the present petition, the only course is to approach the Civil Court for resolving the controversy and not to rush to the High Court invoking the provisions of Article 199 of the Constitution."

In case titled "*M/s Tauseef Corporation (Pvt.) Ltd. Lahore Vs Lahore Development Authority and 02 others*" (1999 CLC 26), it was held as follows:

"The only remedy provided for such breach of contractual liability entailed the incident of damages falling purely within the ambit of civil action under the plenary jurisdiction of Civil Court. Lastly, the agreement itself contained a clause for arbitration whereby the differences of opinion between the parties or any dispute arising out of the impugned agreement could be referred to an arbitrator for settlement instead of bringing legal action. It is, thus, obvious that an efficacious and effective remedy was available to the appellants in the form of arbitration or civil action under the normal law. The writ jurisdiction in such a situation could not be invoked.

8. In view of above, the instant Constitutional petition is not maintainable and therefore is dismissed.

(AAMER FAROOQ)
JUDGE

M.AMIR

Approved for Reporting

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