

JUDGMENT SHEET
ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

RFA No.183/2018

Capital Development Authority through its Chairman

versus

Muhammad Imran & another

Appellant by:	Mr. Hasnain Haider Thaheem, Advocate along with Imdad Ali, Deputy Director (Land), CDA.
Respondent No.1	Mr. Zulfiqar Ali Abbasi, Advocate.
Respondent No.2:	In-person
Date of Decision:	17.02.2021.

MOHSIN AKHTAR KAYANI, J: Through this regular first appeal, the appellant has called in question judgment and decree of the learned Civil Judge 1st Class (West), Islamabad, dated 24.05.2018, whereby suit filed by Muhammad Imran (Respondent No.1) has been decreed.

2. Succinctly, Muhammad Imran (Respondent No.1) filed a suit against Syed Ishtiaq Hussain Shah Kazmi (Respondent No.2) for specific performance, mandatory and permanent injunction with the pleas that Respondent No.2 having been owner of Plot No.370, Street No.37, Sector F-11/3, Islamabad (suit plot) sold out the same in favour of Respondent No.1 vide agreement to sell dated 11.01.2016, whereby the learned trial Court, despite the fact that the CDA (appellant) has denied the claim of Respondent No.1, decreed the suit vide impugned judgment and decree on the basis of compromise executed between the respondents. Hence, instant regular first appeal.

3. Learned counsel for appellant contended that the learned trial Court has decreed the suit of respondent No.1 while relying upon a fake and dubious allotment letter produced by respondent No.1, per se, the said allotment letter had already been declared dubious by this Court vide order dated 20.12.2017, passed in W.P. No.4627/2014; that the learned trial Court has also taken into account the written submissions of the appellant filed in contest of the suit, rather wrongly appreciated the facts and circumstances of the case, whereby the impugned judgment and decree have been passed.

4. Learned counsel for the respondent No.1 contends that the claim of the respondent No.1 has been conceded and as such there is no requirement of the law to prove the case in the light Article 32 of Qanun-e-Shahadat Order, 1984, even otherwise, the appeal is time barred.

5. Respondent No. 2 in person opposed the filing of instant appeal on the grounds that the learned trial Court pursuant to proper appreciation of the facts and circumstances of the case decreed the suit of respondent No.1, as such, the respondents have already executed a compromise with respect to suit plot, therefore, the instant matter is no more alive, per se, the impugned judgment and decree have been passed in accordance with law and are liable to be maintained.

6. Arguments heard, record perused.

7. Perusal of record reveals that Muhammad Imran / Respondent No.1 has filed a suit for specific performance of agreement to sell, dated 11.01.2016, qua Plot No.370, Street No.37, Sector F-11/3, Islamabad (*suit plot*) having been sold by Syed Ishtiaq Hussain Shah Kazmi / Respondent No.2 against total sale consideration of Rs.18,000,000/-, however, during

pendency of the suit, respondents No.1 and 2 entered into a compromise (Exh.C1), whereby respondent No.2 received balance sale consideration and recorded his conceding statement that he has no objection if a decree is passed in favour of respondent No.1. However, the impugned judgment and decree, dated 24.05.2018, passed by the learned Trial Court on the conceding statement of respondent No.2 have been assailed by the CDA primarily on the ground that the same are based upon misreading and non-reading of documentary evidence, especially when the impugned judgment and decree were passed without considering the fact that allotment rights claimed by respondent No.2 are fake and dubious and as such, there was no authenticity of allotment letter.

8. In view of the stance taken by the appellant CDA in this appeal, we have confronted learned counsel for respondent No.1 / decree-holder and respondent No.2 / judgment-debtor, who in-person appeared before this Court, with the fact qua submission of allotment letter, but no such record has been exhibited or produced in the court.

9. We have gone through the record with able assistance of learned counsel for the parties, including written statement submitted by the CDA in this case, whereby a psycholostyle written statement is available on record signed by the Deputy Director, CDA Islamabad, where no specific plea was raised on the part of CDA except that CDA authorities have denied the allotment and ownership of Respondent No.2 qua suit plot in para-2, while rest of the paragraphs have been denied for want of knowledge. This aspect demonstrates that it is the obligation of the parties to discharge the onus in terms of Article 117 of the Qanun-e-Shahadat Order, 1984, which obliges the person, who intends to get benefit from the

Court qua his legal right or liability, which is depended on existence of facts which he asserts, to discharge the burden of proof. In such type of proposition, when the CDA has denied the ownership, it is necessary to prove the existence of suit property and even it is obligation of the learned Trial Court to receive minimum evidence, even in cases of compromise, to satisfy its conscience qua the subject matter of agreement to sell as to whether the same was in existence at the time of execution of agreement to sell with reference to plot, street or sector, even the learned Trial Court has to see the objectivity of agreement and to draw a conclusion as to whether suit plot or property is in existence or its lawful allotment is available on record, which has been verified from the concerned department, as a sequence, a decree for specific performance may be passed, which is admittedly a discretionary relief in terms of Section 22 of the Specific Relief Act, 1877 as there is no compulsion upon the learned Trial Court to pass decree for specific performance in each and every case and the Court may refuse to allow relief of specific enforcement, as such, it is not the right of plaintiff to claim the specific performance, rather it has to be decided on the basis of peculiar facts and circumstances to resolve as to whether the discretionary relief is to be exercised or otherwise. Reliance is placed upon PLD 2014 SC 506 (Liaqat Ali Khan v. Falak Sher), PLD 2010 SC 952 (Mst. Mehmooda Begum v. Syed Hassan Sajjad), 2010 SCMR 1507 (Shakeel Ahmad v. Mst. Shaheen Kousar), 2012 SCMR 900 (Muhammad Sharif v. Nabi Bakhsh) and PLD 2015 SC 187 (Farzand Ali v. Khuda Bakhsh).

10. It is admitted position on record that the respondents have not produced original agreement to sell or allotment letter and even they have not requisitioned the record of the Capital Development Authority qua the

allotment rights of Respondent No.2 and in this backdrop, the decree is considered to be void, even the learned Trial Court has not applied judicial principles for specific performance in its true perspective, rather passed the decree in a mechanical fashion, which speaks volumes about the legal acumen of the learned Trial Court.

11. Another important aspect highlighted during the course of arguments is that allotment in favour of respondent No.2 is based upon a factious record and the CDA has refused to acknowledge the rights claimed by the said respondent, in such eventuality, the impugned judgment and decree could not be sustained, although respondent No.2 contended that he was initially prosecuted by the learned Accountability Court in a reference for fake allotment, but he was later on acquitted of the charges, even the NAB authorities have issued NOC in this regard, per se, the appeal filed by State has also been dismissed by this Court and as such, his right qua the suit plot has been clearly established, but we are surprised to know that no such record is available in the learned Trial Court file and at this stage we could not conclude that as to whether Respondent No.2 is the original allottee in the prevailing circumstances, therefore, the question of ownership is yet to be established being the primary question.

12. The respondents' side have also raised the question of maintainability of instant appeal being time barred, though this fact is apparent on the record but the question of limitation could only be considered relevant, when substantial justice under the law has been observed by the learned Trial Court and if the decree of the learned Trial Court has already been declared void, such appeal could not be dismissed

on the ground of limitation. Reliance is placed upon 2000 YLR 1054 Lahore (Muhammad Saleem v. Barkat Ali).

13. In view of above reason, the instant regular first appeal is ALLOWED, the impugned judgment and decree are hereby SET ASIDE and the matter is REMANDED to the learned Trial Court to give a fair chance to the parties to record necessary evidence in order to establish the allotment of the suit plot, if any, after requisition of the CDA record and then decide the same within period of six (06) months, under intimation to this Court.

(FIAZ AHMAD ANJUM JANDRAN)
JUDGE

(MOHSIN AKHTAR KAYANI)
JUDGE

Khalid Z.