

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

F.A.O.No.59 of 2016
Inam-ul-Haq
Versus
Capital Development Authority and another

Date of Hearing: 15.08.2017
Petitioner by: Mr. Abur Rasheed Awan, Advocate.
Respondent by: Mr. Muhammad Nazir Jawad, Advocate
for the respondents.

MIANGUL HASSAN AURANGZEB, J:- Through the instant appeal, the appellant, Inam-ul-Haq, impugns the order dated 01.06.2016, passed by the Court of the learned Civil Judge, Islamabad, whereby the appellant's application under Order XXXIX, Rules 1 and 2, read with Section 151 of the Code of Civil Procedure 1908, ("C.P.C."), was dismissed. The said application was filed alongwith the appellant's suit for declaration and permanent injunction. In the said suit, the appellant had prayed for a declaratory decree to the effect that the appellant, as lessee, had lawful possession of plots No.16 to 20, measuring 2 acres each in the Private Nursery Scheme, National Park Area, Islamabad ("the suit plots"). The appellant had also prayed for a permanent injunction restraining the Capital Development Authority ("C.D.A.") from cancelling the appellant's leasehold rights with respect to the suit plots.

2. Learned counsel for the appellant submitted that on 09.10.1972, the appellant was granted leasehold rights with respect to the suit plots by the C.D.A.; that the said lease was valid for a period of 20 years; that on 24.02.2010, the lease period with respect to the suit plots was extended for a further period of 30 years; that the said extension was granted after a meeting of the C.D.A. Board on 31.12.2009; that after the said extension, the lease period for the said plots did not expire until 2039; that on 22.03.2011, the appellant paid Rs.32,35,408/- as required by the C.D.A.; that on 14.05.2011, the C.D.A., in violation of a principles of natural justice, cancelled the said

lease; that the C.D.A. could not unilaterally convert a lease into a license; that on 24.02.2012, the appellant instituted a suit for declaration and permanent injunction against the C.D.A.; that along with the said suit, the appellant also filed an application for interim injunction; and that vide order dated 01.06.2016, the learned civil Court dismissed the appellant's application for interim injunction.

3. Learned counsel further submitted that the reliance placed by the learned civil Court on the judgment dated 18.02.2015, passed by this Court in writ petition No.3074/2011, was wholly misplaced, as the said judgment was distinguishable; and that the said judgment involved the cancellation of licenses, whereas the appellant's case was with respect to the premature cancellation of a time bound lease. It was further submitted that upon the extension in the lease period, strong vested rights were created in the appellant's favour; that the appellant had not violated any of the terms and conditions on which the said extension was granted; that no reasons were given for the cancellation of the lease; that the C.D.A. disposes off land under the provisions of Islamabad Land Disposal Regulations, 2005; that the definition of an "allottee" as provided in Regulation No.2(1)(c) of the said Regulations includes a lessee; that under the said Regulations, a lease could not be converted into a license; that the lease of a plot could be cancelled only in terms of Regulation No.19; that the provisions of Regulation No.19 did not apply in the instant case; that at all material times, the appellant's status was that of a lessee, and not a licensee; that the principle of *locus poenitentiae* was applicable in the case at hand; that since the appellant had already paid the requisite amount to the C.D.A. for the extension in the lease period to the C.D.A., and since the appellant was already in possession of the suit plots, the balance of convenience was in the appellant's favour; that since an extension in the lease period for a period of 30 years had already been granted by the C.D.A., the appellant had a strong *prima facie* case for the grant of interim injunction; and that if interim injunction was not granted in the appellant's

favour, the C.D.A. would put the suit plots to auction, causing irreparable loss to the petitioner. Learned counsel for the appellant prayed for the instant appeal to be allowed and for the C.D.A. to be restrained from taking adverse measures against the appellant till the disposal of the suit.

4. On the other hand, learned counsel for the C.D.A. submitted that the impugned order was strictly in accordance with the law and facts of the case; that the C.D.A. Board had taken a decision to cancel all the nursery plots situated in the Private Nursery Scheme, Park Road, Chak Shahzad, Islamabad; that the Environment Wing had formulated new policy for the disposal of all the nursery plots by granting licenses through a bidding process; that the appellant was at liberty to participate in the bidding process for the grant of licenses with respect to the suit plots; that against the cancellation of nursery plots adjacent to the suit plots, writ petitions had been filed by allottees of such plots before this Court; that vide order dated 18.02.2015, passed in writ petition No.3074/2011 and connected matters, this Court held that the petitioners in the said petitions had no vested right in the properties in question, and that a license could always be revoked; that the said order dated 18.02.2015, whereby the said writ petitions were dismissed was upheld by the Division Bench of this Court; that under the terms of the original lease deed, the C.D.A. had an unfettered right to terminate the lease without assigning any reason; that the lease period was extended on payment of a paltry amount; that the grant of an extension in the lease period without a tender bidding process was a violation of the law; that the decision to cancel all the nursery plots was a policy decision taken by the C.D.A., and that this Court did not have the jurisdiction to interfere in policy matters. Learned counsel for the C.D.A. prayed for the appeal to be dismissed.

5. I have heard the contentions of the learned counsel for the contesting parties, and have perused the record with their able assistance.

6. The record shows that on 09.10.1972, a registered lease deed was executed between the C.D.A. and the appellant whereunder the former leased the suit plots to the latter for a term of 20 years, (extendable for a further term of 20 years or less at the C.D.A's option). Furthermore, under the terms of the said lease deed, the annual ground rent was Rs.3,000/- (i.e. Rs.300/- per acre). In case of a default in the payment of annual ground rent, the C.D.A. had the right to determine the lease in addition to the right to recover interest at the rate of 7% per annum from the appellant. As per clause-5 of the covenants in the lease deed, the appellant could utilize the suit plots only for the purpose of establishing, maintaining and running a private nursery for growing ornamental and fruit plants. The suit plots could not be utilized for any other purpose. Under clause-13 of the covenants in the lease deed, the appellant could not, except with the previous specific permission of the C.D.A., construct any building or structure on the suit plots. Any building, structure or construction for which the appellant sought permission could not be of a permanent nature. Clause-4 of the lease deed is reproduced herein below:-

“(4) That the Lessor shall have the right to terminate this lease at any time without assigning any reason [whereof] in which case the Lessor shall give 6 months notice in writing of its intention to terminate this lease and the Lessee shall be entitled to the refund of the proportionate rent for the unexpired period and shall also be entitled to remove all his material and structures therefrom within the said period of 6 months failing which the Lessor may forfeit the same or get sold by auction or otherwise and after deducting the expenses so incurred refund whole or part of the price of the Lessee.”

(Emphasis added)

7. On the expiry of the lease period or the earlier cancellation of the lease, the appellant was under an obligation to restore and deliver possession of the suit plots to the C.D.A. However, under clause-5 of the lease deed, the C.D.A. could, on the appellant's request in writing at least 6 months prior to the expiry of the lease, extend the lease for a further term of 20 years or less.

8. Apparently, the C.D.A. Board in its meeting held on 31.12.2009, approved an extension in the lease period subject to

certain terms and conditions. Consequently, vide letter dated 24.02.2010, the C.D.A. extended the lease with respect to the suit plots on the terms and conditions set out in the said letter. The extension in the lease was for a period of 30 years. The appellant was required to pay Rs.37,90,400/- within a period of one month from the date of the said letter, whereas Rs.37,90,400/- was payable by 23.07.2010, Rs.37,90,400/- by 23.11.2010, and Rs.37,90,400/- by 23.03.2011. Unlike the terms of the original lease deed, the appellant was permitted to raise construction on the suit plots, subject to the approval of the building plans by the C.D.A. The conditions on which the lease was extended were in addition to the provisions of law, rules and regulations of the competent authority that were applicable to allotments of such plots and their use.

9. On 26.11.2010, the C.D.A. 'advised' one Muhammad Saqib Abbasi to remit an amount of Rs.32,32,592/- as annual ground rent in addition to delayed charges and the third installment for extension in the lease. On 22.03.2011, Muhammad Saqib Abbasi paid Rs.32,35,408/- to the C.D.A. through three pay orders.

10. Vide letter dated 14.05.2011, addressed by the C.D.A. to the appellant, the extension in the lease period of the suit plots was withdrawn/cancelled. The appellant was informed that the C.D.A. Board in its meeting dated 08.03.2011, had decided to withdraw/cancel the extension in the lease period. Furthermore, the appellant was informed that the status of the suit plots was reverted to licenses in the best interest of C.D.A.

11. Aggrieved by the said letter dated 24.02.2010, the appellant instituted a suit for declaration and permanent injunction against the C.D.A. Vide the impugned order dated 01.06.2016, the learned civil Court dismissed the appellant's application for interim injunction. The said order dated 01.06.2016, has been impugned by the appellant in the instant appeal.

12. It is not disputed that vide registered lease deed dated 09.10.1972, the C.D.A. had granted a lease with respect to the suit plots to the appellant for a period of 20 years. The lease

period could be extended by the C.D.A. for a period of 20 years or less provided the appellant applied for an extension at least six months prior to the expiry of the lease. There is no document on record showing that the appellant had prior to 09.10.1992, applied to the C.D.A. for an extension in the lease period. Be that as it may, the C.D.A. vide letter dated 24.02.2010, conveyed to the appellant the decision of the C.D.A. Board to extend the lease period for 30 years subject to the terms and conditions mentioned in the said letter. It is also not disputed that the appellant has paid the entire amount which he was required to pay in terms of the said letter.

13. The vital question that needs to be answered is whether the terms and conditions of the original lease deed dated 09.10.1972, remain in the field or do they stand extinguished and replaced in their entirety by the terms and conditions set out in C.D.A.'s letter dated 24.02.2010. If the terms and conditions of the original lease deed still hold the field then the C.D.A. could in exercise of its contractual rights set out in Clause-4 of the said lease deed, terminate the lease without assigning any reason. To hold that the C.D.A. could not, even in the presence of such a Clause in the lease deed, terminate the same, would amount to turning a blind eye to an express agreement between the appellant and the C.D.A. If on the other hand, the terms and conditions of the said lease deed do not survive and are entirely replaced by the terms and conditions set out in the said letter dated 24.02.2010, then the question that arises is as to how a public sector organization like the C.D.A. could grant a lease of 10 acres of land in Islamabad for a period of 30 years to the appellant, without a competitive tender bidding process.

14. This Court in the judgment dated 28.11.2013, passed in writ petition No.3423/2013, titled "M/s Mega Sign etc Vs. C.D.A. etc" held as follows:-

"11. The license in question ostensibly confers a right in favour of its holder, but as the same time, it cannot lost sight that the right which was alienated in favour of the petitioners originally belonged to the State and the State being a virtual entity exercised its authority through the public functionaries, therefore, whenever a right belonging to the State is going to be

alienated, the inventor/public functionary is under obligation to protect & preserve the transparency and to ensure the maximum gain for the public exchequer. In order to achieve the goal, legislature by way of principle as well as delegated legislation has settled the procedure. The pivotal aspect of the said exercise remains that equal opportunity shall be extended to all potential aspirants, who intend to acquire the State property, which is being alienated and for achieving this objective, it is mandatory for the public functionary to invoke such provisions of the statute, which ensure maximum participation of competitors with an object to gain maximum advantage.

12. Inspection of the procedure adopted for grant of the licenses in question on the above touchstone reflects that the very fundamental exercise of public notice was not followed, rendering the whole exercise superfluous.

13. At the same time, while dealing with the State Property, it is also the duty of the Public functionary to ensure transparency and where a right has been accrued without adhering to the parameters highlighted above, the principle of locus poenitentiae would not be applicable.

14. Admittedly, the license were granted to the petitioners without any competitive process under the prescribed rules, therefore, the petitioners cannot claim to have a vested right to continue for the license period. There was also violation of Article 18 of the Constitution as no other competitor except the petitioners as individuals were invited for bidding. The action has been taken across the board against all the licenses, which were issued without any competitive process, so there arises no question of discrimination.”

15. The said judgment dated 28.11.2013, was upheld by the Hon'ble Supreme Court, vide order dated 07.07.2007, passed in Civil Petition No.256/2014, titled “M/s Mega Sign and two others Vs. C.D.A. and others”. Additionally, in the case of Shabnam Ashraf Vs. Capital Development Authority (2011 C.L.C. 814), it has *inter-alia* been held that disposal of land situated in Islamabad and in control of the C.D.A., is made as per Islamabad Land Disposal Regulations, 2005, and that Regulation No.7(4) of the said Regulations provides that plots earmarked for educational institutions in the private sector shall be allotted after inviting applications and as per the criteria to be laid down by the C.D.A. Board. This Court upheld that cancellation of allotments of land made in violation of the said Regulation.

16. Now the contention of the learned counsel for the C.D.A. that the C.D.A. could convert a lease into a license, does not appeal to me. Learned counsel for the C.D.A. could not point out to any provision of the Capital Development Authority Ordinance,

1960 and/or any Rules or Regulations made thereunder giving power to the C.D.A. to unilaterally convert a lease into a license. Under the said statute and statutory instruments, the C.D.A. may have the power to dispose of land by granting licenses or leases but the power to unilaterally convert a lease into a license has not been specifically conferred. Indeed in writ petition No.3423/2013, and writ petition No.3074/2011, the question before this Court was whether 'licensees' could invoke the constitutional jurisdiction of this Court against C.D.A.'s decision to cancel licenses for plots. But the question whether the C.D.A. could unilaterally convert a lease into a license had not been determined in the said cases. Be that as it may, even if it is assumed that the C.D.A. had not converted the appellant's lease with respect to the suit plots into a license, I am of the view that the C.D.A. could not be restrained from terminating the lease in pursuance of Clause-4 of the original lease deed. As mentioned above, if it is to be assumed that the terms and conditions of the original lease deed were no longer applicable, then the covenant contained therein regarding an extension in the lease period would also be inapplicable to the instant case. I would, in such a scenario, tend to agree with the learned counsel for the C.D.A. that leasehold rights with respect to the suit plots for a period of 30 years could not be granted by the C.D.A. without resorting to a competitive tender bidding process. The grant of such rights without such a competitive process would not prevent the C.D.A. from recalling the letter dated 24.02.2010.

17. The grant of leasehold rights for a period of 30 years without a tender bidding process does not satisfy the test of reasonableness and public interest. A public authority like the C.D.A. cannot lease out its property for a consideration less than the amount that can be obtained through a tender bidding process. The C.D.A. is not free to act as it likes in granting largess such as leasing out its property. C.D.A. comes within the meaning of "procuring agency" as defined in Section 2 (j) of the Public Procurement Regulatory Authority Ordinance, 2002. Rule 4 of the Public Procurement Rules, 2004, mandates that

procuring agencies, while engaging in procurements, shall ensure that the procurements are conducted in a fair and transparent manner, the object of procurement brings value for money to the agency, and the procurement process is efficient and economical. If the appellant feels that he has paid equal to or more than the price that could have been fetched by the C.D.A. had it resorted to a tender bidding process for the grant of leasehold rights with respect to the suit plots for 30 years, the appellant should have no reservation in participating in the tender bidding process for the grant of licenses with respect to the said plots proposed to be conducted by the C.D.A.

18. In view of the above, I find no reason to fault the learned civil Court in dismissing the appellant's application for interim injunction. Therefore, this appeal is dismissed with no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 13/092017

(JUDGE)

APPROVED FOR REPORTING

Ahtesham