JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

Regular First Appeal No.43/2012
M/s Tameer-e-Mashrique
Versus
Government of Pakistan, etc

Appellant by: Agha Tariq Mehmood Khan, learned ASC
Respondents by: Mr. Amir Latif Gill, Advocate
Date of Hearing: 22.07.2020.

FIAZ AHMAD ANJUM JANDRAN, J.- Through this judgment we propose to decide the instant Regular First Appeal which emanates from the judgment & decree dated 19.06.2012, passed by the learned Single Judge-in-Chambers, whereby suit for declaration, perpetual injunction and delivery of possession through specific performance filed by the appellant was dismissed.

2. The facts, relevant for the disposal of the instant appeal, are that the respondents 2&3-Capital Development Authority (**"respondent authority"**) vide a proclamation in Daily Dawn invited offers for development of a shopping mall in Islamabad. The appellant, a private limited company, submitted its offer and subsequently was directed to file certain documents which were submitted in due course. Vide letter dated 22.05.1996, the appellant was informed regarding its prequalification for furnishing of financial bid, which was accordingly submitted with security to the tune of Rs.20 Million through bank draft drawn on Muslim Commercial Bank Limited, Islamabad. The respondent authority vide letter dated 18.07.1996, issued Provisional Offer of Allotment of land (**"POL"**) to the appellant on 33 years lease basis, extendable for two terms of the said period on negotiable terms and conditions. It was stipulated in the POL that the appellant had to deposit 25% of the entire sale price within 15 days, 25% of the total cost within two months in

addition to 7.5% of the total sum as capital value tax and 3% of the total price of the land as advance income tax. It was further stipulated that after the receipt of 50% on account of land premium and full payment of taxes, allotment letter had to be issued and then remaining 50% to be paid in four quarterly installments. The appellant made efforts to get the challans prepared by the respondent authority for deposit of the balance sum but the same were not provided instead, a 3rd party i.e. M/s South Asian Construction Resources filed a writ petition against the respondent authority before the Hon'ble Lahore High Court, Rawalpindi Bench assailing refusal of their prequalification. Subsequently, vide letter dated 19.11.1996, the respondent authority withdrew the POL, which led to filing of the suit for declaration, perpetual injunction and delivery of possession through specific performance.

3. The suit was contested by the respondent authority through written statement, wherein they denied the claim of the appellant. On 25.01.2003, the learned trial Court out of pleadings of the parties, framed following issues:-

ISSUES:

1. Whether the plaintiffs are entitle to the decree as prayed for? OPP
2. Whether the plaintiffs have got no cause of action and locus standi to file this suit? OPD
3. Whether the suit is not maintainable in its present form? OPD
4. Whether the suit is barred under provisions of Specific Relief Act?
5. Whether the suit is barred by law and barred under Section 49-E of the CDA Ordinance? OPD
6. Whether the plaintiffs have come to the Court with unclean hands? OPD

7. Whether the plaintiffs are estopped by their words and conduct to file this suit? OPD

8. Relief

4. The parties produced their respective evidence. The appellant got examined its representative Mohammad Iqbal Khan as PW-1, who tendered brochure as Ex.P2 to Ex.P6, certified copy of advertisement Ex.P7, offer letter dated 12.11.1992 Ex.P8, original letter Ex.P9, letter of acceptance of bid Ex.P10, copy of writ petition and order thereupon Ex.P11 & Ex.P12, copy of withdrawal of offer of allotment Mark-A, and photo copy of minutes of meeting dated 08.09.1996 Ex.P23. The learned counsel for the appellant tendered letter of the respondent authority dated 24.02.1993 as Ex.P13, certified copy of letter dated 08.11.1993 Ex.P14, copy of letter dated 13.01.1994 Mark-B, letter dated 26.02.1994 Ex.P15, letter dated 22.05.1996 Ex.P16, letter dated 05.06.1996 Ex.P17, copy of bank draft dated 06.06.1996 amounting to Rs.20 Million Ex.P18, copy of letter dated 08.06.1996 Ex.P19, copy of letter dated 30.10.1996 Ex.P20, certified copy of letter dated 09.10.1996 Ex.P21, copy of letter of withdrawal of offer of allotment Ex.P22, certified copy of minutes of meeting Ex.P23, certified copy of notes number dated 21.07.1996 Ex.P24 and memorandum and articles of association as Ex.P25. The appellant also got examined one Shahid Ahmad as PW-2 while Mr. Shahid Ali, Section Officer, Cabinet Division appeared on behalf of *proforma* respondent i.e. Cabinet Division and tendered letter dated 16.03.2009 as Mark-C. The respondent authority got examined its Deputy Director Mohammad Afsar Khan as DW-1 who produced letter dated 18.07.1996 as Ex.D1, and letter dated 18.08.1996 Ex.D2.

5. The learned Single Judge-in-Chambers after hearing learned counsel for the parties, dismissed the suit vide

judgment and decree dated 19.06.2012, being impugned through the instant Regular First Appeal.

6. Learned counsel for the appellant contends that no challan form was issued by the respondent authority, therefore, the remaining price could not be deposited; that the respondent authority in its board meeting dated 03.09.1996 had decided not to accept any amount from the appellant; no fault lies on the shoulder of the appellant for non-deposit of balance sale price; that Rs.20 Million was already deposited with the respondent authority, therefore, the suit has been unlawfully dismissed by the learned Single Judge-in-Chambers and at the most, surcharge could be imposed for late payment but the allotment could not be cancelled.

7. On the other hand, learned counsel for the respondent authority argued that admittedly the appellant had not deposited any amount as per POL, therefore, not entitled to the allotment of the plot; that the question regarding levy of surcharge is in respect of non-payment of annual ground rent and not on the total payment; it is established practice of the respondent authority that the payments are made through pay orders or demand drafts and there is no concept of challan form.

8. We have heard the learned counsel for the parties and examined the record with their able assistance.

9. In order to appreciate the submissions made in support of the instant appeal vis-à-vis the evidence on record, it is imperative to first go through the prayer clause of the plaint filed by the appellant which reads as under:-

> a. Declaration that the plaintiffs are entitled for the allotment and possession of the plot of land measuring 24299 sq.yds (300 Sq.yds x 726 sq.yds) = 5 Acres situated at the junction of Jinnad Avenue

and Faisal Avenue in the Blue Area of Islamabad on 33 years lease on the agreed terms and conditions, in the alternative damages in the sum of Rs.1000,000,000/- (Rupees one thousand Million only), (Rupees one Billion only) together with such inflationary component as may be determined at the time of decree;

b. Permanent Injunction, restraining the Defendants, their servants, agents, person(s) working at their instance, from negotiating, disposing of, transferring, allocating, alienating the aforesaid plot of land to any person or persons in any manner;

c. Mandatory Injunction directing to the Defendants for execution of lease in respect of the said plot of land in favour of the plaintiff and to deliver possession through specific performance thereto to the plaintiff in accordance with law;

d. Any other relief which under the circumstances their Hon'ble Court may deem fit and proper.

10. As is manifest from the title and prayer clause, ibid, the suit has been filed under Section 42 of the Specific Relief Act, 1877 ("**the Act of 1877**"), which reads as under:-

> ***42. Discretion of Court as to declaration of status or right***.– Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:
>
> **Bar to such declaration** Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.
>
> Explanation - ....

11. The bare reading of the above provision envisages that *any person who is entitled to any legal character or to right as to any property may institute a suit*. *The concept of declaration as per Section 42 of the Act of 1877, in the opinion of the Court, is that for qualifying the*

same, one has to necessarily prove that he has an existing right to a particular property, that means a right without any deficiency, lacuna and must be complete in all respect and not liable to be made complete after fulfilling the deficiencies particularly when the defendants have not only pointed out the said deficiencies but after taking into account said deficiencies have withdrew their initial POL. **The suit under Section 42 of the Act of 1877 is not meant for** ***rectifications, improvements to fulfill the shortcomings and then to reach upon the destination of a complete right but is for confirmation of existing complete right. The existence of a right is 'sina qua non' for a declaratory suit under Section 42 of the Act of 1877.*** **The right relating to property does not mean to convert a defective or a non-existent right into an effective/ complete right. A question may arise that when a right is complete in all respects, then why the plaintiff has to move the Court, the answer is that, although a right is complete in all respects yet the requirement which forced the plaintiff to move to the Court is that the defendants are denying or even interested in denying that right, therefore, he is compelled to move the Civil Court, being Court of plenary jurisdiction, to obtain a decree upon that existing right. It is so, because when a decree is passed in favour of the plaintiff, the law says that the defendants are bound to acknowledge said status/right in respect of that property, duly affirmed by the Court of competent jurisdiction.**

12. When the above stated principle is applied to the case at hand, then it transpires that initially after fulfilling some formalities, the appellant/plaintiff was issued POL of land dated 18.07.1996, Ex.P10. Said latter in its paragraph No.3 in an unambiguous manner states that total cost of the land was fixed as Rs.29,99,87,435.33/- at the rate of

Rs.12345.67/- per square yard out of which the appellant was required to deposit an amount of Rs.7,49,96,8585.83/- representing 25% of the total price within fifteen days of the receipt of said POL. The bid security already deposited with the respondent-authority was to be adjusted in that respect, while in paragraph 4, the appellant was required to deposit 25% of the total cost of land within two months from the date of issuance of that letter. Under paragraph 5, the appellant was required to deposit 7½% of the total price of the land as capital value tax and 3% of the total price of land as advance income tax with the Government Treasury and to submit the receipt to the respondent-authority or a requisite certificate in that respect. On receipt of said 50% along with taxes, the allotment letter containing detailed terms and conditions was to be issued to the appellant with direction to pay the balance 50% of the total cost in four equal quarterly installments. When this document Ex.P10 is considered in the light of concept of declaration as stated above, it unambiguously demonstrates that no complete right existed in favour of the appellant/plaintiff. As per clause 6 of the POL, only after fulfilling the requirements mentioned in paragraphs 3 to 5 of the POL, the allotment letter embodying detailed terms and conditions was to be issued and once this had happened, then, at the best, it could have been said that a right was in existence in favour of the appellant, because *if a development authority had issued a letter of allotment along with possession certificate to the individual plaintiff/appellant, it means that the entitlement of the appellant had been admitted. In that eventuality, in the opinion of the Court the appellant can sue for a declaratory decree.* Reliance is placed upon ***Manoj Rao V. T.Krishna (AIR 2001 SC 623)*.**

13. It is an admitted position on the record that leaving aside amount of Rs.20 Million deposited at the time of submission of request letter, the remaining amount was never deposited in the account of the respondent authority and *most importantly said balance price was not even deposited in the court during the proceedings of the suit*. The plaintiff was at-least required to show his *bonafide* in respect of his cause, as a last resort by depositing the balance sale consideration even in the court when the proceedings were pending.

14. On 19.11.1996 POL Ex.P10 was withdrawn by the respondent authority vide letter Ex.P22 due to failure of the appellant to deposit balance amount as per POL. Surprisingly in suit, the appellant had not challenged that action of the respondent authority, whereby said POL was withdrawn. When said withdrawal of the POL has not been challenged/impugned in the instant suit, then how a declaratory decree could be passed in their favour and order could be made regarding receipt of payment from the appellant to the respondent authority. In this respect, we are guided by the dictum laid down by the Hon'ble Apex Court in *Iqbal Ahmad V. Managing Director, Provincial Urban Development Board NWFP, Peshawar & others (2015 SCMR 799)* wherein it is held that *"when the plaintiff in his suit did not specifically question the cancellation of his plot but sought a declaration that he be allowed to deposit the price of the plot in question, that suit could not succeed."*

15. The objection of the appellant regarding non-issuance of challan form by the respondent authority for the deposit of balance sale price, is of no avail due to the reason that the established practice of the respondent authority is the receipt of the sale amounts through pay orders or demand drafts and this fact finds support from

the appellant's own conduct, whereby they had deposited initial amount of Rs.20 Million through bank draft No.DD 0002972/2472, dated 06.06.1996 in the Muslim Commercial Bank Ltd., Main Civic Centre Branch, Islamabad. It means that they were well aware of the practice of respondent authority regarding deposit of amount, so the principle of *estoppel* is fully applicable in the case and no benefit could be extended in favour of the appellant.

16. There is another important aspect of the case that is document Ex.D2, letter written by the appellant to the respondent authority dated 18.08.1996, wherein it is stated that the POL was acknowledged with thanks and for deposit of remaining amount of Rs.7,49,96,858.83/- being 25% of the total value of the land, ten days' time was requested but even after lapse of that period, no amount was deposited in the account of the respondent authority. It means that the appellant was with intention and under an impression that only an amount of Rs.20 Million was sufficient for the allotment of said plot, regarding which total amount had been worked out as Rs.29,99,87,435.33/- but same could not be extended within the legal premises.

17. As stated above, no declaratory decree could be passed in favour of the appellant because no right was in existence in face of a denial on the part of the respondent authority, rather there was just a POL, which too, had been withdrawn by the respondent authority and said withdrawal had not been challenged by the appellant, in that eventuality, the Hon'ble Supreme Court of Pakistan in a recent judgment reported as ***Abdul Razaq V. Abdul Ghaffar and others (2020 SCMR 202)* held that:-**

> **"12. We are clear in our mind that through the Suit filed under section 42 of the Specific Relief Act, 1877 a declaration can be granted with regard to legal character or to right as to any property. However, no**

> **new right can be created in favour of Plaintiff, by grant of a declaratory decree. In these circumstances, the learned Trial Court was justified in dismissing the Suit, filed by Plaintiff/Respondent No. 1. Learned Appellate Court erred in law, while ignoring all these facts and points of law noted above and set aside the well reasoned judgment passed by the learned Trial Court: thereby reversing the same and decreeing the Suit, against which Petitioner/Defendant No.1 preferred the Civil Revision before the learned Lahore High Court, which too was wrongly dismissed."**

If at this stage, this Court allow the appellant to deposit balance sale consideration as prayed for, it would amount to create a new right in appellant's favour, which would be of course against the intention of the legislature expounded by the Hon'ble Apex Court in *supra dicta* and, therefore, no right in respect of immovable property could be declared by this Court in favour of the appellant.

18. Needless to mention that although in the amended plaint, alternate prayer of specific performance has been made but the same has not been pressed either before the learned Single Judge-in-Chambers or before this Court, therefore, need no deliberations.

19. The sequel of above discussion is that the appellant has not been able to make out a case warranting interference in the impugned judgment. Consequently, the instant regular first appeal being devoid of merits is accordingly dismissed.

(MOHSIN AKHTAR KAYANI) JUDGE

(FIAZ AHMAD ANJUM JANDRAN) JUDGE

Imran

Announced in open Court on _____.

JUDGE **JUDGE**

Approved for reporting