IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE UMAR ATA BANDIAL
MR. JUSTICE SAJJAD ALI SHAH
MR. JUSTICE SAYYED MAZAHAR ALI AKBAR NAQVI

CIVIL APPEAL NO. 1120 OF 2009
(On appeal against the judgment dated 05.06.2008 passed by the Islamabad High Court, Islamabad in RFA No. 72/1998)

Capital Development Authority through its Chairman
... Appellant

VERSUS

Rana Munawar Khan
... Respondent

For the Appellant: Malik Javed Iqbal Wains, ASC

For the Respondent: Mr. Abdur Rashid Awan, ASC

Date of Hearing: 07.12.2020

JUDGMENT

SAYYED MAZAHAR ALI AKBAR NAQVI, J.- This appeal with leave of the Court has been directed against the judgment dated 05.06.2008 passed by the learned Islamabad High Court, Islamabad whereby the Regular First Appeal filed by the appellant Capital Development Authority was dismissed and the judgment and decree dated 06.09.1998 passed by the learned Civil Judge 1st Class, Islamabad, was maintained.

2. Briefly stated the facts of the matter are that on 21.01.1996 respondent filed a suit for declaration and permanent injunction before the Senior Civil Judge, Islamabad, alleging that he is allottee of plot No. 3-G, I/10 Markaz, Islamabad measuring 487.55 square yards through open auction being highest bidder of Rs.34,61,605/-, which was accepted vide letter dated 15.12.1987; that thereafter respondent immediately deposited 25% of the total amount i.e. Rs.8,65,401/- and the balance amount was to be paid

in four installments; that according to clause (6) of the allotment letter, the possession of the plot free from all encumbrances and ready for construction was to be delivered to the respondent within a period of one month i.e. on or before 14.01.1988 but the same was delivered on 27.02.1988 without removing high tension wires, electric poles, which were passing through all the commercial plots of that area; that the respondent could not start construction well within time due to the reason that possession of the plot was given late, therefore, could not deposit the first installment, which was due on 01.03.1988; that respondent made numerous representations to the appellant CDA for removing of high tension wires etc but no heed was paid to his request; that on 25.04.1989, the appellant issued notice to the respondent to deposit the installments or in failure the plot would stand cancelled. This led to filing of a suit by the respondent for declaration with the prayer that appellant CDA may be directed to remove the high tension wires from the plot and in the meanwhile the appellant may be restrained to cancel the plot. However, the respondent withdrew the said suit and submitted a complaint before the Wafaqi Mohtasib (Federal Ombudsman) for rescheduling of payment and waiving of the interest and delayed payment charges, which was accepted by the Ombudsman and pursuant to the letter issued by the Wafaqi Mohtasib Secretariate dated 26.09.1994, the appellant CDA rescheduled the installment plan on 27.10.1994. It was the claim of the respondent that after rescheduling, he had paid all the installments within time but despite that the appellant CDA has demanded an amount of Rs.26,01,099.46/- on account of delayed payment charges vide letters dated 07.03.1995 and 03.01.1996.

The learned Trial Court vide its judgment dated 06.06.1998 decreed the suit. Being aggrieved, the appellant CDA filed Regular First Appeal before the Islamabad High Court, but the same has been dismissed vide impugned judgment. Hence, this appeal with leave of the Court.

3. Learned counsel for the appellant *inter alia* contended that the impugned judgment passed by the learned High Court is non-speaking, suffers from misreading and non-reading of the evidence and is based on misinterpretation of allotment letter, which is not sustainable in law; that the evidence led by the appellant has not been considered in its true perspective, which has resulted into miscarriage of justice; that the learned courts below misinterpreted clause (6) of the allotment letter, which does not cast a duty on appellant to deliver possession, free from all encumbrances, within one month of the issuance of letter rather it was the duty of the respondent to take possession within one month; that the second suit filed by the appellant was barred by *res judicata* and the same was not proceedable; that the delayed payment charges to the tune of Rs.26,01,099.46/- were due from the respondent and the contention of the respondent that the same have been waived off by Wafaqi Mohtasib is incorrect and that if the delayed payment charges are waived off, the appellant would suffer a great financial loss. He lastly contended that keeping in view the facts and circumstances of this case, the suit of the respondent is liable to be dismissed and the judgment of the learned High Court may be set aside.

4. Learned counsel for the respondent, on the other hand, opposed the contentions of the learned counsel for the

appellant. He contended that both the suits filed by the respondent were filed on different cause of action, therefore, the principle of *res judicata* would not apply; that the rescheduling was made on the direction of Federal Ombudsman and the respondent accordingly paid the entire amount; that after payment of the dues after rescheduling, the mater became past and closed transaction and the respondent could not have been again asked to pay the late payment charges. He lastly contended that the learned courts below after considering the evidence led by him have rightly decreed the suit, to which no exception can be taken.

5. We have heard learned counsel for the parties and have perused the case file.

6. The main emphasis of the respondent as to why he did not pay the installments well within time after allotment of plot is that according to clause (6) of the lease agreement dated 15.12.1987, the possession of the plot free from all encumbrances and ready for construction was to be delivered to him within a period of one month i.e. on or before 14.01.1988 but the same was delivered on 27.02.1988 without removing high tension wires and electric poles, which were passing through all the commercial plots of that area. It would be advantageous to reproduce the said clause for ready reference. The same reads as under:-

> *"6. The lessee shall take over possession of the land within one month from the date of issue of this letter, failing which possession shall be deemed to have been taken over and execute an agreement within one month from the date of possession and get the same registered at his/her own cost. The lessee shall submit building plans/drawings duly prepared by any of the approved/registered/licensed Architect of the CDA. However, in case of lessee desires to get*

> *the building designed from CDA, same would be arranged by the Deputy Director General (Design) CDA on payment of designing fee @ 3% or designing and top supervision fee @ Rs.6% of the estimated cost of the building.*

7. There is nowhere mentioned in this clause that the appellant Authority was bound to deliver the possession after removing of high tension wires etc. However, it appears from the noting portion of the CDA that Town Planner-I vide his memo dated 23.01.1988 had informed that a overhead electric line is encroaching the commercial plots in the south of I-10 Markaz but the same was removed and the possession was handed over to the respondent without any further encroachment. This finds force from the possession letter dated 27.02.1988, wherein the respondent has himself admitted that "*there is no encroachment on my plot*". The respondent has himself signed the possession letter and certified that he has seen his plot and all its corners, there is no encroachment on his plot, and no service line is passing within his plot. Although possession was delivered to him late but the delay was only of 40 to 45 days. The respondent had to pay the first installment by 01.03.1988 but despite the fact that possession was handed over to him on 27.02.1988, he did not pay the same. The appellant CDA issued him a letter dated 08.04.1989 to make the payment but instead of complying, he filed a suit for permanent injunction on 17.04.1989, which *prima facie* shows that he wanted to avoid payment accrued towards him. In the written reply, it was the claim of the CDA that the respondent has already made construction and removal of electric poles was just a lame excuse with malicious intent. This stance of the appellant

CDA could not be denied by the respondent. The respondent had also filed stay application in the earlier suit but the same was dismissed on 11.07.1990. This suit was ultimately dismissed as withdrawn vide order dated 22.02.1994. It appears that the only purpose of the respondent was to evade payment while buying time. Even after dismissal of his stay application on 11.07.1990, he did not pay any installment. The proceedings before the Civil Court in the earlier suit continued for a period of five years and when the respondent saw that he would not be able to get a favourable order, he withdrew the suit and approached the Federal Ombudsman. The only basis on which the Federal Ombudsman in its letter dated 26.09.1994 had directed rescheduling was that the Vice Chairman CDA had already agreed vide para 89/ante of noting portion dated 01.01.1994 that the case of the respondent deserves re-scheduling. However, we have noted that although the Vice Chairman CDA was of the view that the case of the respondent deserves rescheduling but the same was without any approval of the CDA Board. From the noting portion, it is clearly apparent that the proposal of the Vice Chairman was resisted by the other members rather the same was not approved. However, so far as the payment of delayed charges amounting to Rs.26,01,099/- is concerned, the CDA Board duly gave its permission, which is available at page 162 of CMA No. 503 of 2020. So far as the plea of the appellant's counsel that the subsequent suit filed by the respondent was hit by *res judicata*, we are reluctant to make any observation regarding this aspect because we have been informed that the lease period is going to expire on 15.12.2020, hence, any finding at this stage would be a

futile exercise whereas the case of the respondent is squarely a case of high handedness against a statutory authority. This Court cannot lose sight of the fact that both the courts below have misread and misinterpreted evidence as well as clause (6) of the agreement and came to the wrong conclusion.

8. For what has been discussed above, we are of the considered view that the judgments of the two courts below suffer from misreading and non-reading of the evidence. Consequently, we allow this appeal and set aside the impugned judgments.

9. The above are the detailed reasons of our short order dated 07.12.2020.

JUDGE

JUDGE

JUDGE

Islamabad, the
7th of December, 2020
Approved For Reporting
Khurram