

IN THE SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE IJAZ UL AHSAN

MR. JUSTICE YAHYA AFRIDI

CIVIL APPEAL NO.668 OF 2022

(Against the judgment dated 18.01.2022 of the Lahore High Court, Rawalpindi Bench, Rawalpindi passed in Civil Revision No.373/2022)

Raja Ali Zaman (decd.) thr. LRs and ...Appellant(s)
another

VERSUS

Evacuee Trust Property Board and ...Respondent(s)
another

For the Appellants: Mr. M. Munir Paracha, ASC
For Respondents No.1: Mr. Hafiz Ahsan A. Khokhar, ASC
For Respondent No.2: Mr. M. Amir Malik, ASC/AOR
For the Applicant: Mr. Wasim Sajjad, Sr. ASC
Syed Rafaqat Hussain Shah, AOR
(in CMA No.5399/2022)

Date of Hearing: 04.08.2022

JUDGMENT

IJAZ UL AHSAN, J:- Through the instant Appeal, the Appellants have challenged the judgment of the Lahore High Court, Rawalpindi Bench, Rawalpindi (hereinafter referred to as the "**High Court**") dated 18.01.2022(hereinafter referred to as the "**Impugned Judgment**") whereby the revision petition filed by the Respondents was allowed, the judgments and decrees of the Civil Judge 1st Class, Rawalpindi (hereinafter referred to as the "**Trial Court**") and the Additional District Judge, Rawalpindi (hereinafter referred to as the "**Appellate Court**") were set aside, and the suit of the Appellants was decreed.

2. The necessary facts giving rise to this *lis* are that commercial property No.B-2(b) situated in Liaquat Market, Iqbal Road, Rawalpindi (hereinafter referred to as the "**suit property**") was owned by the Evacuee Trust Property Board (hereinafter referred to as "**ETPB**"). The suit land was originally rented out to Raja Ali Zaman & Raja Muhammad Banaras (hereinafter referred to as the "**Appellants**") by the Deputy Commissioner/Chairman defunct Evacuee Trust Committee *via* order dated 16.05.1964. During their tenancy, the Appellants approached the Federal Minister for Social Welfare & Rural Development and sought outright sale of the suit property in their favour. The Federal Minister assented to the Appellants' request and allowed the sale of the suit land to the Appellants vide memorandum dated 22.03.1977. When the Federal Government was made aware of the memorandum dated 22.03.1977, it issued memorandum dated 13.05.1977 and restrained ETPB from finalizing the deal. The matter ostensibly came to an end but thereafter, on 06.06.1992, the Deputy Administrator ETPB, Rawalpindi executed Sale Deed (Exh.P4) dated 06.01.1992 (hereinafter referred to as the "**Sale Deed**") in favour of the Appellants. Being aggrieved of the sale deed, ETPB filed a suit for declaration, cancellation of the sale deed as well as permanent and mandatory injunction against the Appellants. This suit was dismissed by the Trial Court vide judgement dated 17.03.2002. ETPB appealed the judgement of the Trial Court. The Appellate Court, vide judgement dated 17.01.2008, dismissed the appeal but allowed the cross-

objection of the Appellants herein to the extent of Issue No.1. When the matter was assailed before the High Court, it vide the impugned judgement, set aside the concurrent findings of the lower fora and decreed the suit of ETPB as prayed for. The judgement of the High Court is now under challenge before this Court.

3. The main argument advanced by the learned counsel for the Appellants is that the High Court had erred in law by heavily relying on a judgement passed by this Court in *Messrs. Mustafa Impex, Karachi & others vs. Govt. of Pakistan thr. Secretary Finance, Islamabad & others (PLD 2016 SC 808)*. He contends that Article 99 of the Constitution of the Islamic Republic of Pakistan, as it stood before the 18th Amendment, allowed executive authorities (in this case, the ETPB) to exercise their authority under the law and relevant rules without having to route it through the Federal Government, contends that Mustafa Impex (*supra*) interpreted Article 99 of the Constitution post-18th Amendment and since the sale deed was executed well before the 18th Amendment, Mustafa Impex was inapplicable to the instant case. He further contends that it was not the Appellants' burden to ensure that the relevant officials were duly authorised by the ETPB to carry out the sale in question when the sale deed took place and that the Appellants could not be made to suffer for not inquiring into what ostensibly appeared to be departmental practice and procedure. He prayed that the

impugned judgement may be set aside and that the judgements of the lower for a restored.

4. The learned counsel for ETPB on the other hand has argued in favour of the impugned judgement. He contends that the sale deed in question was executed incompetently and was in violation of the relevant ETPB laws and rules. He further contends that no approval was ever accorded to the sale by the Federal Government and that the entire process was initiated through memorandum dated 22.03.1977 which had no lawful authority. Lastly, he contends that the sale of the land was only permissible once all the relevant processes and approvals were followed by the ETPB and it is only when the Federal Government has recommended a sale that land under the ETPB's ownership may be sold off through a private treaty.

5. The Learned Counsel for Respondent No.2 has also defended the impugned judgement.

6. During the pendency of this Appeal, CMA No.5399/2022 was moved by the Learned Sr. ASC for the Applicants seeking impleadment of various persons who had subsequently purchased shops in the suit property. He contends that the Applicants were bona fide purchasers and had purchased shops in the suit property for valuable consideration and had not been impleaded by the ETPB in any of the proceedings before the Courts below even though they were necessary and proper parties for the purposes of

the present *lis*. As far as subsequent purchasers from the Appellants is concerned, their fate is intrinsically connected with them. They would sink or swim with them depending on the outcome of the appeal as would be seen herein below.

7. We have heard the learned counsel for the parties at length and gone through the case record with their assistance. The following questions fall for the determination of this Court:

1.UNDER WHAT LAW OR RULES IS ETPB AUTHORISED TO SELL PROPERTY UNDER ITS OWNERSHIP?

2.HOW CAN AUTHORISATION BE GRANTED FOR SALE OF THE LAND UNDER MANAGEMENT/CONTROL OF ETPB BY EITHER THE FEDERAL GOVERNMENT OR BY ETPB ITSELF ON BEHALF OF THE FEDERAL GOVERNMENT?

3.IF THERE IS A VIOLATION OF EITHER LAW, RULES OR PROCEDURE, WHAT EFFECT WOULD IT HAVE ON THE RIGHTS OF THE PARTIES?

UNDER WHAT LAW OR RULES IS ETPB AUTHORISED TO SELL PROPERTY UNDER ITS OWNERSHIP?

8. Before we proceed to discuss the merits of the case, it is prudent to first discuss the relevant laws, rules and regulations etc. that are applicable to the facts and circumstances of the instant appeal. ETPB was constituted by virtue of Section 3 of the Evacuee Trust Properties (Management & Disposal) Act of 1975 (hereinafter referred to as the "**ETPB ACT**"). The ETPB Act was deemed to have taken effect from 01.06.1974 by virtue of Section 1 of the same. The functions of ETPB are enumerated in Section 4 of the ETPB

Act. The relevant portions of Section 4 are reproduced below for ease of reference:-

Section 4. Functions of the Board

(1) The general supervision and control of all evacuee trust property shall, subject to any directions that may be given by the Federal Government, vest in the Board, and the Board shall take such action as it deems fit for the proper management, maintenance and disposal of such property in accordance with the provisions of this Act and the rules, schemes or directions made or issued there under.

(2) In particular and without prejudice to the generality of the foregoing power, the functions of the Board shall be:-

(a) ...;

(b) ...;

(c) ...;

(d) **to sell**, dispose of, or transfer to such person or body, and on such terms and conditions, as the Federal Government, may direct or with the prior approval of the Federal Government make an endowment of, or otherwise manage, evacuee trust property **consistent with the objects of this Act or a scheme or for any other object approved by the Federal Government;**

(e) ...;

(f) ...;

(g) ...;

(h) ...;

(i) ...;

(j) ...;

(k) ...;

(l) ...;

(m) ...;

(n) ...;

(o) ...;

(p) ...;

(q) ...;

(r) to prepare a scheme or schemes with the prior approval of the Federal Government for promoting the objects of this Act, and;

(s) ...; (**Underlining and Highlighting is ours**)

It is important to note that sub-section 2(d) of Section 4 was inserted after the Evacuee Trust Properties (Management and Disposal) (Amendment) Ordinance of 1984 was promulgated. Before this amendment, the role of ETPB was strictly custodial in nature. By virtue of Section 6, all evacuee properties were vested in the Federal Government and land under ETPB's control was divided into two main categories namely: a) Rural Area; and b) Urban Area. Urban Area is defined under s.2(l) of the ETPB Act. It is reproduced below for reference:-

Section 2 **Definitions**

(l) "Urban Area" means the area situated within the limits of a municipal corporation, a municipal committee, a notified area committee, a town area committee, a small town committee, a sanitary committee or a cantonment as those limits existed on the fourteenth day of August, 1947.

It is important to note that the ETPB Act was passed after the Evacuee Property and Displaced Persons Law (Repeal) Act of 1975 (the "**Repealing Act**") was passed w.e.f. 01.07.1974. Section 3 of the Repealing Act is of importance for the purposes of the present Appeal. It is reproduced below for reference:-

Section 3 Transfer of Property

(1) **All properties**, both urban or rural, including agricultural land, other than such properties attached to charitable, religious or educational trusts or institutions, whether occupied or un-occupied, which may be available for disposal immediately before the repeal of the aforesaid Acts and Regulations or which may become available for disposal after such repeal as a result of a final order passed

under sub-section (3) of section 2, shall stand transferred to the Government, for disposal-

(a) in the case of urban properties, by the Government under a scheme to be prepared by it, and

(b) ...

(2) ... (Underlining and Highlighting is ours)

After the ETPB Act was passed, a scheme was framed by ETPB in 1977 i.e. Scheme For The Management and Disposal of Available Urban Properties Situated In The Province of Punjab, 1977 (hereinafter referred to as the "**1977 Scheme**"). Chapter III of the 1977 Scheme deals with the submission and scrutiny of applications. The relevant paras of the chapter are reproduced below for ease of reference:-

3. Inviting of Applications

The Member, Board of Revenue (Residual Properties) may, by notification issue from time to time in the official Gazette, invite applications for the transfer of available properties mentioned in paragraph 6. Such applications shall be made to the Deputy Administrator (Residual Properties) of the area concerned in such form and manner as may be prescribed. (Underlining is ours)

5. Scrutiny of Applications

The Deputy Administrator (Residual Properties) shall scrutinize the applications and if he finds that the application is deficient essential particulars, he shall get the deficiency supplied and shall determine entitlement.

Chapter IV of the 1977 Scheme deals with disposal of available properties. The relevant paras of Chapter IV are reproduced below for ease of reference:-

6. Transfer of house, shop and building site having construction.

(1) Subject to the provisions of this Scheme, an available house or shop of any value in possession of a person may, if he applies in this behalf, be transferred

to him on transfer price or on such price as may be fixed by the Administrator (Residual Properties) of the area concerned.

Provided that where a house or a shop is applied for by more than one person in possession, it may be transferred to them jointly.

(2) An available building site on which a person in possession has raised a permanent construction and applies for its transfer, it may be transferred to him on the transfer price:

Provided that in addition to the constructed area, only such portion of the available open space may be transferred to the applicant which may not exceed three times the constructed area.

(3) **Where any person having made a permanent construction on a building site does not apply for its transfer, it shall be disposed of through unrestricted public auction along with the construction.** The value of such construction shall be determined by the Deputy Administrator (Residual Properties) of the area concerned and paid to such a person out of the auction proceeds by such authority as may be specified.

11. Sale by Auction

A house, shop or a building site having permanent construction for the transfer of which no application is received and every property that is cancelled from the name of a defaulter and a vacant building site **shall be disposed of by un-restricted auction.**

12. Disposal of houses, shops or a building site by negotiation

If a house, a shop or a building site **having been put to auction twice fetches no bid or fetches a bit short of the reserve price it shall be disposed by negotiation by inviting sealed tenders** which shall be opened by the Deputy Administrator (Residual Properties) of the area concerned in the presence of the tenderers. If the highest offer made for such a house, a shop or a building site is equal to or exceeds 75% of its reserve price, it may be

accepted by the Deputy Administrator (Residual Properties) and where the highest offer made is below 75% of the reserve price but not less than 50% it may be accepted by the Administrator (Residual Properties), of the area or where the highest offer is below 50% it may be accepted by the Member, Board of Revenue (Residual Properties).

Chapter V of the 1977 Scheme deals with Auction Committees and the Manner of Auction. For the purposes of this instant Appeal, paras 19 and 20 are of importance. They are reproduced below for ease of reference:-

19. Acceptance or refusal of bid.

No bid below the reserve price shall be accepted. However, the competent Authority may refuse to accept the highest bid without assigning reasons.

20. Reserve price

The reserve price of each property placed in auction shall be its transfer price.

9. Having gone over the relevant laws as well as the 1977 Scheme, it is clear and obvious to us that in order for a property to be disposed of by ETPB, it has to go through a rigorous and transparent process before it can be transferred to any private party. Before any evacuee land or property can be sold, it must be notified by the relevant Member Board of Revenue (Residual Properties) in the Official Gazette under para 3 of the 1977 Scheme. Once the requisite notification has been gazetted, applications need to be moved by prospective bidders to the concerned Deputy Administrator (Residual Properties) in order to become a part of the transfer process. A person in possession of the notified property/land may move an application to the concerned Deputy Administrator (Residual Properties) who is then required,

under para 6 of the 1977 Scheme, to transfer the notified land on such price as may be fixed by the concerned Administrator (Residual Properties). In the other instance, where no application is received, a process of un-restricted public auction commences where two rounds of public auction have to take place as per rule 12 before the notified land can be sold by the ETPB through negotiation/private treaty. Even where public auctions have failed and the ETPB resorts to disposing of the notified land under para 12, it is still important to note that negotiations can only take place after a tendering process has taken place and prospective tenderers have deposited their tenders with the ETPB. The ethos of transparency that pervades through para 12 can also be seen by the fact that all tenders need to be opened by the concerned Deputy Administrator (Residual Properties) in the presence of all other prospective tenderers or their duly-authorised representatives before a bid can be accepted. The Deputy Administrator (Residual Properties) is also constrained by the fact that if the tendered price is below the reserve price, the notified land can only be sold if the competent authority in the ETPB hierarchy accords its approval.

HOW CAN AUTHORISATION BE GRANTED FOR SALE OF THE LAND UNDER MANAGEMENT/CONTROL OF ETPB BY EITHER THE FEDERAL GOVERNMENT OR BY ETPB ITSELF ON BEHALF OF THE FEDERAL GOVERNMENT?

10. Before we can discuss how the Federal Government or ETPB itself on behalf of the Federal

Government may direct sale of land under the management and control of ETPB, it may be prudent to go over Section 3 of the ETPB Act, 1975. The relevant portions of Section 3 are reproduced below for ease of reference:-

S.3 CONSTITUTION OF THE BOARD

(1) The Federal Government shall constitute a Board, to be known as Evacuee Trust Property Board, for the management and disposal of the evacuee trust property.

(2) The Board shall be a body corporate by the name aforesaid having perpetual succession and common seal, with power to acquire, hold and dispose of property, both movable and immovable, and to contract, and shall by the said name sue and be sued.

(3) The Board shall consist of a Chairman and such members as the Federal Government may, by notification in the official Gazette, appoint.

(4) The Chairman shall be appointed by the Federal Government on such terms and conditions as it may determine, shall hold office during the pleasure of the Federal Government and shall be the administrative and executive head of the Board ... **(Highlighting is ours)**

Before any land can be sold by ETPB, it has to first conduct an internal board meeting and decide whether to sell land under its management and control. If, through a Board meeting, ETPB decided to sell any land under its management and control, a resolution has to be moved and passed to that effect which would then be subject to approval of the Federal Government. This is especially important in light of the fact that the status of ETPB, as made clear in Section 3 *ibid*, is managerial and custodial. It is also important to note that the land that is managed and supervised by ETPB is not its own

land/property. All land or properties managed and supervised by ETPB belong to the Federal Government and it is only after seeking permission from the Federal Government that the ETPB can be permitted to sell or dispose of land under its supervision. Therefore, it is incumbent upon ETPB to seek permission from the Federal Government before it can dispose of any land under its management or supervision. If the ETPB's Board never moves a resolution recommending sale seeks approval/permission to sell, then it will be deemed that the Federal Government's permission was never sought for the sale of ETPB-managed land. If, however, it was the Federal Government that wished to sell any of the land under the management of ETPB, the process for doing so would be to refer the matter to the ETPB's Board, allow the Board to deliberate on the matter and then give its recommendations to the Federal Government before any sale is carried out. After the Federal Government has accorded its approval, the Chairman of ETPB would then exercise authority under Section 12 of the ETPB Act to designate an officer to carry out the sale or disposal of the land/property. For ease of reference, Section 12 of the ETPB Act is reproduced below:-

Section 12. Appointment And Duties Of Officers And Staff

(1)The Chairman may, with the prior approval of the Federal Government and on such terms and conditions as the Board may determine, appoint Administrators, Deputy Administrators, Assistant Administrators, and may also appoint such other officers and staff as may be necessary for the efficient performance of the functions of the Board.

(2) The Chairman may, by general order or special order, provide for the distribution or allocation of work to be performed by persons appointed under subsection (1). (Underlining and Highlighting is ours)

In essence, in order to sell or dispose of land managed by the ETPB, a resolution has to be passed by the ETPB's Board which is then approved by the Federal Government. Once approval has been accorded by the Federal Government, an officer is designated and authorised by the Chairman in terms of Section 12(2) of the ETPB Act who shall then carry out the sale or disposal of the land/property in question in the terms laid down by the Federal Government-sanctioned Board resolution.

IF THERE IS A VIOLATION OF EITHER LAW, RULES OR PROCEDURE, WHAT EFFECT WOULD IT HAVE ON THE RIGHTS OF THE PARTIES?

11. Coming to the merits of the instant appeal, in their written statement before the Trial Court, the Appellants have contended that they had applied to the Federal Government for the sale of the suit property to them. However, there is nothing on the record to suggest that they had ever applied to the ETPB under Para 6 of the 1977 Scheme. Instead, the Appellants approached the relevant Federal Minister as opposed to the ETPB who, vide his memorandum dated 22.03.1977, accorded approval for the sale. No doubt if an appropriate application under Para 6 had been moved by the Appellants, the matter would have been taken up by the Board, but the suit property could only have been sold subject to a resolution to that effect as well as the

necessary approval of the Federal Government. Instead, the Appellants approached the concerned Minister. There is no provision in the law governing the ETPB, the relevant rules or the 1977 Scheme which allows a Federal Minister to approve sale of evacuee land in either his discretion or in relaxation of rules. It is important to note that Para 6 starts with the phrase: "*Subject to the provisions of this Scheme...*" which highlights that even if one were to assume that an application to the Federal Government via the Minister concerned was a competent application under Para 6 of the 1977 Scheme, it would still be necessary for the Federal Government to refer the matter to the ETPB's Board for deliberation. It is only after the Board had deliberated on the matter and passed a resolution for the sale of the suit property could the Federal Government have accorded their approval for a sale in favour of the Appellants. A bare perusal of the memorandum dated 22.03.1977 would also show that the price was determined by the concerned Federal Minister who was not the competent person to assess the value of the suit property under the 1977 Scheme. In holding that the Minister was not the competent person to be approached for the purposes of Para 6 of the 1977 Scheme, we hold that no competent application had ever been moved by the Appellants within the contemplation of the 1977 Scheme. In the absence of an appropriate application before the Competent Authority, and without it being processed in the departmental hierarchy according to the law and rules, the entire superstructure of the transaction which culminated in the Sale Deed was based

on an incompetent and unlawful exercise and therefore any and all actions taken on the basis of the memorandum dated 22.03.1977 were unlawful and inconsequential on the rights of ETPB/Federal Government insofar as far as ownership of the suit property was concerned. The Learned Counsel for the Appellant could not point to any law or rule which could reasonably lead us to believe that the Federal Minister was allowed to exercise any power let alone discretion in relaxation of the 1977 Scheme when he acted both as the ETPB in accepting an application of the Appellants, as the Administrator (Residual Properties) when he determined the price of the suit property @ Rs.100,000/- per Kanal. We find that the Minister could have had no power or authority on behalf of the Federal Government and approve the sale of the suit property specially so in the absence of a resolution passed by the ETPB's Board seeking permission for sale of the suit property in favour of the Appellants.

12. As far as the contentions of the Learned Counsel for the Appellants are concerned that the High Court has relied mainly on the *Mustafa Impex (supra)* in allowing the revision petition of the Respondents even though the said case interpreted Article 90 of the Constitution post-18th Amendment, it is important to note that Article 173 of the Constitution of Pakistan deals with the power of both the Federation as well as the Provinces to acquire property and to make contracts etc. It is reproduced below for ease of reference:-

173. Power to acquire property and to make contracts, etc.

(1) The executive authority of the Federation and of a Province shall extend, subject to any Act of the appropriate Legislature, to the grant, sale, disposition or mortgage of any property vested in, and to the purchase or acquisition of property on behalf of, the Federal Government or, as the case may be, the Provincial Government, and to the making of contracts.

(2) All property acquired for the purposes of the Federation or of a Province shall vest in the Federal Government or, as the case may be, in the Provincial Government.

(3) All contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made in the name of the President or, as the case may be, the Governor of the Province, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the President or Governor by such persons and in such manner as he may direct or authorize.

(4) Neither the President, nor the Governor of a Province, shall be personally liable in respect of any contract or assurance made or executed in the exercise of the executive authority of the Federation or, as the case may be, the Province, nor shall any person making or executing any such contract or assurance on behalf of any of them be personally liable in respect thereof.

(5) Transfer of land by the Federal Government or a Provincial Government shall be regulated by law.

There is a presumption that the Legislature intends to legislate on matters in complete harmony with the Articles of the Constitution and that the Courts will give effect to the will of the Legislature which manifests itself through the laws passed by the Legislature. In the present appeal, in order to give effect to the Parliament's intention, a harmonious interpretation of Article 173 of the Constitution read with the ETPB Act (specifically Section 4(d) & 4(e) of the said Act) would be the one where it would be presumed that since Article 173 of the Constitution is "subject to any Act of the appropriate Legislature", all acts of the Federal Government (or a Federal Minister) not in compliance with or going against the express

provisions of an Act of the appropriate Legislature would cease to retain their executive nature as envisaged under Article 173 of the Constitution. In essence, what this would mean for the purposes of this appeal is that when the concerned Federal Minister accorded approval for sale of the suit property when he was not authorised to do so by the competent Legislature (in this case, the Majlis-e-Shoora), his actions cannot be considered as executive actions in terms of Article 173 of the Constitution of Pakistan, 1973. If the actions of the concerned Federal Minister were bereft of executive nature, then as a natural corollary, they cannot be construed as being authorised by the President of Pakistan in terms of Article 99 of the Constitution of Pakistan, 1973 as it stood in 1977.

13. On being confronted with the question as to whether ETPB's board had ever moved a resolution to the effect that the suit property is to be sold to the Appellants, the Learned Counsel for the Appellants was unable to point out any document which could reasonably lead us to conclude the existence of such a resolution. Even otherwise, no resolution from the ETPB's Board sanctioning sale of the suit property to the Appellants was ever placed on record. There is also nothing on the record to suggest that the concerned Minister had ever directed the ETPB's board to deliberate on the matter and pass a resolution concerning the sale of the suit property to the Appellants. If there was never any resolution, then there was never any sanction of the sale

either. If there was never any sanction, then there could have been no approval from the Federal Government for sale of the suit property. If there was never any approval from the Federal Government, then the Sale Deed itself would be illegal as well as ineffective owing to the reason that in light of Article 173 of the Constitution, the President would not be deemed to have accorded approval for the sale of the suit property through the Federal Government. The High Court had therefore rightly concluded that being bereft of its executive nature, the Sale Deed had been obtained without the approval of the Federal Government and was therefore illegal and *void-ab-initio*.

14. In light of what has been discussed above, we find that the judgment of the High Court is well-reasoned and has arrived at the correct conclusion after taking into consideration all the material available on the record. No misreading or non-reading of the evidence has been pointed out by the Learned Counsel for the Appellants nor has he been able to point out any ground to take a view different than the one taken by the High Court. As a result, we do not find any merit in this appeal. It is dismissed. All miscellaneous applications are also accordingly dismissed.

ISLAMABAD, THE

4th of August, 2022

Khan Sahibzada 1926, LC*/-

NOT APPROVED FOR REPORTING*