

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1007 of 2000

[Mrs. Uzma Moinuddin v. Pakistan Defence Officers Housing Authority]

Dates of hearing : 08.02.2018 and 15.02.2018
Date of Decision : 03.07.2018.
Plaintiff : Mrs. Uzma Moinuddin, through Mr. Muhammad Raghیب Baqi, Advocate.
Defendant : Pakistan Defence Officers Housing Authority, through M/s. Raja Sikandar Khan Yasir and Asif Rasheed, Advocates.

Case law relied upon by Plaintiff's counsel

1. 1996 S C M R page-336
[*Binyameen and another v. Chaudhry Hakim and another*]
(Binyameen's case)

1999 C L C page-723
[*Ziauddin v. Pakistan Defence Housing Authority*] (Ziauddin's case)
2. 2013 M L D page-1449
[*Amir Liaq Khgan A. Sharfaraz Jehan*]

Case law relied upon by Defendant's counsel

- Law under discussion:**
1. The Pakistan Defence Officers Housing Authority Order, 1980 (the "Governing Law")
 2. Evidence Law (Qanun-e-Shahadat Order, 1984.)
 3. Civil Procedure Code, 1908 ("CPC")

J U D G M E N T

Muhammad Faisal Kamal Alam, J: Through the present action at law, the Plaintiff has challenged the decision of Defendant-Defence Housing Authority, cancelling a residential plot No.356, at 37th Street, Phase-VIII, DHA, Karachi-**the Suit Plot**, which was earlier allotted to Plaintiff's father. Following relief has been claimed_

- (A) *DECLARE that the cancellation Order dated 8-6-2000 (Annexure "Z") and subsequent Order dated 8-7-2000 (Annexure Z/2) in respect of Plaintiff's residential plot No. 356, 37th Street, Phase-VIII, Defence Housing Authority, are malafide, illegal and in complete derogation and violation of the order of the Hon'ble High Court passed in Suit No:1283/97 on 5-3-99 (Annexure "X") and having no force in law.*
- (B) *DECLARE that the Allotment Order dated 25-8-1976 (Annexure "D") issued in favour of the deceased father of the plaintiff in respect of the suit plot and subsequent mutation/transfer letters dated 24-12-89 (Annexure "H") 31-8-96 (Annexure P") issued to the other legal heirs are valid and legal.*
- (C) *MANDATORY INJUNCTION be issued against the defendant Authority directing them to effect mutation/transfer the suit plot in the exclusive name of the plaintiff on the basis of the documents submitted by the other Co-sharers relinquishing their shares in the plot in favour of the plaintiff (Annexure "Q" and "R") and issue the same to her.*
- (D) *DECLARE that the Publication in Daily "DAWN" dated 6-8-2000 (Annexure Z/3) a notice for ballot for Allotment of residential Plot Phases I to VIII which includes the plot of the plaintiff based on the illegal cancellation order dated 8-6-2000 and subsequent order dated 8-7-2000, in equally illegal and violative of the Court Order dated 5-3-99.*
- (E) *PERMANENT INJUNCTION be issued against the defendant and all persons acting through or under the restraining them from transferring by way of ballot-allotment as published in Daily "DAWN" dated 6-8-2000 (Annexure Z/3) or taking any further action on the basis of the illegal cancellation order dated 8-6-2000 (Annexure "Z") and subsequent Order dated 8-7-2000 (Annexure Z/2) or taking any further action*

prejudicial and adverse to the interest of the plaintiff over the suit plot bearing No:356, 37th Street Phase-VIII, measuring 2000 square yards, situated in Defence Officers Housing Authority, Karachi, on which the Plaintiff has subsisting legal right.

(F) *DECREE be awarded in the sum of Rs.30,00,000/- (Rupees Thirty Lacs) for mental and material loss.*

(G) *COST of the suit be awarded.*

(H) *Any other relief or reliefs which this Hon'ble Court may deem fit and proper in the circumstances of the case be awarded.*

2. From the pleadings of the parties, the following Issues were framed_

1. *Whether the suit is maintainable?*
2. *Whether the Allotment Order dated 28-8-1976 issued in favour of the deceased father of the plaintiff in respect of plot No. 356, 37th Street, Phase-VIII, DHA and subsequently Mutation / Transfer letter dated 24-12-1989 dated 31-8-1996 issued to the other legal heirs are valid and legal?*
3. *Whether the Plaintiff is entitled exclusively in her name for the mutation / transfer of the suit plot on the basis of the document submitted to the Defendant?*
4. *Whether the action of the Defendant for cancellation of the suit plot is illegal and against the rules of the Defendant?*
5. *Whether the Defendant Authority after expiry of more than 25 years of the Allotment of the Suit plot can cancel the Allotment of the Suit plot in the circumstances of the case.*
6. *Whether the father of the Plaintiff got the disputed plot allotted without disclosing that he had got allotted a residential as well as the commercial plot?*
7. *Whether the Plaintiff is entitled to relief as prayed?*
8. *What should the decree be?*

3. By the consent Order dated 4.2.2002, a following Issue number 6(a) was added:

6(a) Whether the defendants by issuing of letter of cancellation dated 08.06.2000 and order dated 08.07.2000 failed to decide the matter without proper adjudication resulting in violation of the judgment dated 05.03.1999 in Suit No.1283/1997 constituting contempt of Court?

4. Both parties led the evidence and mainly relied upon the documentary evidence in support of their respective stance.

5. The Issue-wise finding is mentioned herein under:

Issue No.1	_____	Affirmative.
Issue No.2	_____	Affirmative.
Issue No.3	_____	As under.
Issue No.4	_____	Affirmative.
Issue No.5	_____	Negative.
Issue No.6	_____	Negative.
Issue No.6(a)	_____	As under.
Issue No.7	_____	As under.
Issue No.8	_____	Suit Decreed.

6. **Discussion / Reasons of the Issues.**

ISSUE NO.1:

7. After conclusion of the evidence, the undisputed scenario is that the Suit Plot was admittedly allotted to the deceased father of Plaintiff, who was an officer in the Pakistan Army. The Suit Plot was allotted vide an Allotment Letter dated 18.03.1976 (Exhibit P-3), issued by DHA and was eventually cancelled vide a correspondence of 8th July, 2000 (Exhibit P-37). The Defendant has not disputed that Subject Plot was twice transferred in the name of legal heirs of deceased Lt. Col. Kanwar Shaukat Ali Khan, firstly vide Transfer Order dated 24-12-1989 (*Exhibit P-11*) and secondly, when the mother of present Plaintiff passed away, in the name of Plaintiff and her siblings vide

Transfer Order of 31-8-1996 (*Exhibit P-19*). With these undisputed facts, the Plaintiff does have a legal character as envisaged in Section 42 of the Specific Relief Act, 1877, to bring a suit of the nature. In addition to this, earlier also the Plaintiff had instituted a suit being Suit No.1283 of 1987, which was disposed of on 05.03.1999, by directing the Plaintiff to appear before the Defendant's Managing Committee in respect of the Show Cause Notice, which was impugned in the above *lis*. In this order, it is mentioned that the Plaintiff would be entitled to file a fresh suit after the decision of Defendant's Committee. Since no Appeal was preferred by any party against the above order and the Defendant passed the impugned cancellation order, which is challenged in the present *lis*, therefore, Issue No.1 is answered in **Affirmative** that the present suit as framed is maintainable.

ISSUES NO.4, 6 and 6(a):

8. These Issues are pivotal and finding on them will be material for deciding other Issues.

9. The burden to prove that allotment of suit plot was wrongly cancelled by the Defendant through the impugned decision, is on Plaintiff, inter alia, in view of Article 129, clause (e); statutory presumption that official acts are regularly performed. The Plaintiff has categorically stated and also testified that deceased father did not obtain the allotment of Suit Plot through concealment. It has been further pleaded and testified that Defendant in all these years, approximately for more than two decades kept silent about allotment of another Plot-7/B, 5th E Street, DHA Karachi (for the sake of reference be referred to as the "**Second Plot**"), which was made the basis for cancelling the Suit Plot. This second part of Plaintiff's pleading is not disputed. The only reason Defendant has pleaded in their Written Statement is that the latter

(Defendant-DHA) came to know about the double allotment when the record and system of the Defendant was recently computerized. It is also undisputed factual and legal position that the deceased father was entitled to two plots; one residential and one commercial, but the crux of the stance of Defendant is that the deceased father while applying to Defendant for the allotment of residential / Suit Plot did not disclose the fact that he was already holding the allotment of the above Second Plot. In paragraph 2 of their written statement it is stated that afore referred Second Plot was obtained on 16.1.53 and the commercial plot No.31-C, Tariq Commercial Street No.4 (100 Sq. yards) on 4.2.1999 in lieu of Phase IX plot exchanged.

10. To rebut the above defence of the Defendant, which they have taken for cancellation of the Suit Plot vide aforementioned impugned letter of 08.07.2000 (**Exhibit P-37**), which has conveyed the decision of the Executive Board of the Defendant, the Plaintiff's witness has produced the entire set of documents relating to the Suit Plot starting from the communication of ballot result, vide correspondence of 18-3-1976 {**exhibit P/3**} by Defendant to the deceased father of Plaintiff, that the suit plot was allotted to the deceased father till the same was cancelled through the impugned decision. These documents have been exhibited as **Exhibit-P/3 to 37**, authenticity whereof was never questioned by the Defendant, as most of these documents are in fact of Defendant's office. **Exhibit P-6** is the allotment order dated 25.08.1976 for the suit plot in favour of deceased father (Lt. Col. Kanwar Shaukat Ali Khan) of Plaintiff. Admittedly, the dispute about the Suit Plot between the parties hereto arose in the year 1997, when first time the Defendant issued Show Cause Notice dated 25.09.1997 (**Exhibit P-29**), alleging that deceased father of Plaintiff already had allotment of the Second Plot, which was

transferred in the name of Mrs. Sadia Khatoon on 16.10.1975. This was categorically refuted by the Plaintiff through her response of 02.09.1997 (**Exhibit P-30**). In her response / reply to Show Cause Notice, the Plaintiff has taken almost the same stance, which was pleaded in the afore-referred earlier *lis* and the present proceedings, *inter alia*, that the Defendant never raised any objection about alleged double allotment for two decades and during the life time of deceased father, who passed away in the year 1988, the Defendant admittedly recovered development charges in respect of the Suit Plot on different occasions and the suit plot was transferred twice in favour of legal heirs of above named deceased, which transfer was not possible unless the Defendant has scrutinized its own record. Mr. Raghil Baqi, Advocate, while representing the Plaintiff, has cited the Ziauddin's case (*supra*) handed down by the learned Division Bench of this Court. In the said case, the present Defendant cancelled a commercial plot of the Petitioner (*of the reported case*), which was set at naught.

11. On the other hand, the documentary evidence produced by the sole witness of Defendant did not contain the allotment order of the said Second Plot in favour of above named deceased father of Plaintiff and the other documentary evidence, such as Sub-lease and transfer order in the name of one Mst. Saida Khatoon (in respect of the said Second Plot) on the strength of which the Defendant is justifying its impugned action of cancellation, did not mention that the said deceased father as direct sub-lessee or transferor, respectively. Further discussion on these documents is mentioned in the later part of the decision.

12. In view of the above undisputed factual aspect of the case, in my considered view, the burden to prove that the deceased father got the allotment of the suit plot by suppressing the fact that he was already

holding the second plot, which is a violation of the byelaws applicable at the relevant time, shifts on to the Defendant-DHA. Witness / representative of Defendant in his Affidavit-in-Evidence/ examination-in-chief has pleaded facts relating to the history of allotment of Second Plot in favour of deceased father and its further transfer, which were never mentioned in the Written Statement

Most significant and material documents required to prove the case of Defendant against the Plaintiff are the original Allotment Letter, Sub-Lease and the Transfer Order / Letter issued in favour of above named lady, on the request of late father. The Sub-Lease in Form-A is **exhibited as 'I'**, available at page-165, and is of 5th June, 1957, issued by Defendant **in favour of one Abdul Bari**, who has been shown as 'Attorney for Captain Kr. Shaukat Ali Khan'; whereas, it has been mentioned in the Written Statement / pleadings of Defendant that the Second Plot was allotted to the above named deceased father of Plaintiff on 16.01.1953, **but no original Allotment Order** (as discussed above) in favour of deceased father of Plaintiff has been produced. The next document produced by the Defendant's witness is the afore referred Transfer Order of 16.10.1975-Exhibit-J, at page 171 of the Evidence File, issued in the name of one 'M. Aslam Khan', attorney of Major Kanwar Shaukat Ali Khan (the deceased father of Plaintiff). It is mentioned in this Transfer Order that it has been issued on the request of said M. Aslam Khan. By this transfer order, the Second Plot was purportedly transferred in favour of Mrs. Saida Khaton. Interestingly, in the said Transfer Order, in paragraph-3, the transfer fee has been fixed at Rs.3 per square yard, which is for a **commercial shop**. Once again the Defendant witness did not produce from its record the said request letter to prove its case, that the above transfer/mutation in the name of said lady was done on the request of the

deceased father. The said defence witness produced the General Power of Attorney in favour of the above named attorney Muhammad Aslam Khan, on whose request the above-referred Transfer Order was issued. This Power of Attorney is at page-173 and is of 16.01.1964. The significant contradiction in the evidence of Defendant is that the Sub-Lease, when executed in favour of Abdul Bari, then the General Power of Attorney should also have been in favour of said Abdul Bari, but no such General Power of Attorney has been produced by the Defendant to substantiate the chain of transaction as deposed by its witness.

Secondly, on what basis the second plot was transferred from one attorney Abdul Bari to another so-called M. Aslam Khan; nothing on this aspect has been testified by Defendants' witness nor any document has been produced. Invoking Article 84 of the Evidence Law, relating to comparison of the signature by the Court, if the signature on the said General Power of Attorney is compared with the deceased's signature on the Form of Application for allotment of plot (**Exhibit D/11**), which is an admitted document and produced by the Defendant's witness, then there is a marked difference in the signature itself. The documentary evidence produced by the Defendant contradicts its own case and testimony. Plaintiff's late father does not figure in any of the aforementioned documents relating to the Second Plot, viz. sub-lease and transfer order. These documents also lack authenticity. In addition to the above, the Defendant's witness has attempted to improve the case by introducing some new paragraphs in his Affidavit-in-Evidence, in particular 6 to 10, which is not permissible, as these paragraphs relate to factual aspect of the case and not on point of law. The reported decision of the Honourable Supreme Court in

Binyameen's case (*ibid*) is attracted in the present case. The relevant paragraph of the reported case is reproduced herein under_

“.....It is also a well-settled principle that no evidence can be led or looked into in support of a plea which has not been taken in the pleading. A party is required to plead facts necessary to seek relief claimed and he would be entitled to produce evidence to prove those pleas. Variation in pleading and proof is not permissible in law. A party pleading an oral agreement cannot prove it by producing a document which does not speak of the oral agreement but speaks of a written agreement. This would amount to substituting a completely new plea which had not been pleaded. As proof cannot be different from pleading respondent No.1 should not have been allowed to produce a document to prove a completely different fact and different plea. The Trial Court was competent to decide whether a such circumstances respondent No. 1 could be allowed to produce this document which could' not have proved the oral agreement and was introducing a completely new case without amending the plaint.”

13. Consequently, Defendant has failed to discharge the burden to prove that Plaintiff's late father (Lt. Col. (R) Kanwar Shaukat Ali Khan) got the allotment of disputed plot / Suit Plot without disclosing about existence of afore-referred Second Plot in his name. Issue No.6 is answered in **Negative** and in favour of the Plaintiff.

Reverting to Issue No.4. Order dated 05.03.1999 passed in earlier Suit No.1283 of 1997 is quite specific, rather it would not be out of place to observe that the earlier *lis* of Plaintiff was disposed of, while recognizing the authority of Defendant to take action in a matter, that whether or not the allotment of Suit Plot has been obtained or made in violation of the governing law and byelaws of Defendant-DHA; but at the same time, it is an established principle, that when a Government functionary or statutory body is vested with vast discretionary powers then there is an inbuilt public duty also to exercise such discretion in a structured manner and powers should be exercised in

a fair, just and reasonable manner. Another well-recognized rule is that principles of natural justice should be read as part of every statute, unless expressly excluded.

14. After appraisal of the evidence, it is not a disputed fact that after passing of the above order in the earlier *lis*, the Plaintiff wrote a letter dated 14.03.1999 to the Defendant, which was responded to **after a year**, through Defendant's hearing Notice of 19.04.2000, which is produced by the Plaintiff's witness as **Exhibit P-34**, when the then Secretary of Defendant called upon the Plaintiff to attend the hearing before the Scrutiny Committee on 29.04.2000. Thereafter, vide their correspondence of 08.06.2000 (**Exhibit P-35**) the Defendant communicated to Plaintiff about cancellation of the allotment of the Suit Plot. It is mentioned in this letter that since the late father of Plaintiff had following three plots in his name and the Second Plot and the commercial plot were transferred during his life time, therefore, allotment of Suit Plot has been cancelled_

1. Plot No.7/B, 5th East Street, measuring 1000 Square Yards on 16th January, 1953.
2. Plot No.356, 37th Street, Phase-VIII, measuring 2000 Square Yards on 25th August, 1976.
3. Plot No.31-C, Tariq Commercial Street No.4, Phase-VIII, (Extn) 100 Square Yards on 4th August, 1999.

15. On the next day-09.06.2000 (**Exhibit P-36**), the Defendants cancelled / withdrawn "for the time being" its above cancellation letter of 08.06.2000. After one month, on 08.07.2000, eventually, afore-mentioned impugned correspondence / order about cancellation of Suit Plot was issued, it is produced as **Exhibit P-37**.

16. The impugned cancellation letter has merely conveyed the decision of the Executive Board of the Defendant to the Plaintiff

in two lines. By looking at this impugned letter / decision of 08.07.2000, it can be easily concluded that it has been issued without application of fair and judicious mind and considering the basic principle of law, as mentioned in the foregoing paragraphs. The impugned letter does not mention that whether the documents produced in the present proceeding by the witness of Defendant were shown to Plaintiff during her hearing before the Scrutiny Committee and that the Plaintiff was ever confronted with those aforementioned documents, containing the signature(s) of her late father. It is an established rule that when on the basis of documents a penal action is to be taken by the authority against a person, then that person (in the present case, the present Plaintiff) should be confronted with those documents, which are otherwise in the public domain and not confidential.

17. In view of the above discussion Issue No.4 is replied in **Affirmative** that the action of the Defendant for cancelling the Suit Plot is illegal, **whereas**, Issue No.6(a) is answered accordingly, that though the Defendant did not adjudicate the matter in the light of order dated 05.03.1999 passed in Suit No.1283 of 1997, but a lenient view is taken by holding that the impugned action of cancellation does not constitute contempt of Court.

ISSUES NO.2, 3 AND 5:

18. Findings on the above issues lead to the conclusion that the Allotment Order dated 28.08.1976 (**Exhibit P-6**) in favour of deceased father of the Plaintiff was a valid document and the subsequent mutation / transfers in favour of legal heirs vide Transfer letter of 24.12.1989 (**Exhibit P-11**) and 31.08.1996 (**Exhibit P-19**) were done by Defendant after fulfilling its requisite requirement and such transfers in favour of legal heirs of deceased father including the Plaintiff are valid and legal

thus Issue No.2 is answering in **Affirmative** and in favour of the Plaintiff. The *ratio decidendi* of the above mentioned Ziauddin's case for setting aside the cancellation of allotment of plot was that the impugned action was hit by doctrine of promissory estoppel as well as the principle of *locus poenitentiae* as the cancellation was done after passage of eighteen long years. The rule laid down in the said Zianuddin's case is fully attracted to the facts of present *lis*, because **there is no fraud or illegality** found in the allotment of the Suit Plot to the Plaintiff's deceased father.

With regard to Issue No.3, the application for transferring of suit plot exclusively in her name, which is pending with Defendant and has been produced in the evidence as **Exhibit P-26** will be considered by the Defendant in accordance with its prevailing rules and byelaws and the findings mentioned in the foregoing paragraphs.

The Issue No.5 in the present circumstances is also answered in **Negative** and against the Defendant, because the Defendant has wrongly cancelled the allotment of the Suit Plot.

ISSUES NO. 7 AND 8:

19. The upshot of the above discussion is that Plaintiff is only entitled to the relief(s) mentioned in prayer clause(s) (A) to (E), because the Plaintiff has not brought any evidence to prove the pleaded loss and mental anguish, therefore, Plaintiff is not entitled for any damages, hence, the relief of damages as prayed for is rejected.

20. In the above terms, the suit is decreed. However, parties will bear their own costs.

Judge

Karachi, Dated: 03.07.2018.