

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 622 of 2003

[Major Rtd. Sheikh Abdul Naeem v.

Pakistan Defence Officer Housing Authority and another]

Date of hearings : 11.01.2018.

Date of Decision : 23.01.2018.

Plaintiff : Major Rtd. Sheikh Abdul Naeem, through Mr. Zahid Marghoob, Advocate.

Defendant No.1 : Pakistan Defence Officers Housing Authority, through Mr. Nazar Hussain Dhoon, Advocate.

Defendant No.2 : Nemo (Plaint struck off)

Case law relied upon by Plaintiff's Counsel

1. P L D 1981 Karachi page-537
[*Muhammad Mujibur Rahman Siddiqui v. Abdul Bari and others*]
2. P L D 2005 SC page-792
[*Pakistan Defence Officers Housing Authority, Karachi v. Shamim Khan and others*]
3. 2008 S C M R page-611
[*Mustafa Lakhani v. Pakistan Defence Officers Housing Authority, Karachi*]
4. P L D 1989 SC page-360
[*Col. (Ret.) Maqbul Ilahi v. P.D.O.H.A*]

Case law cited by private Defendants' Counsel

1. P L D 2005 Karachi page-188
[*Mustafa Lakhani v. Pakistan Defence Officers Housing Authority, Karachi*]
2. 2008 S C M R page-611
[*Mustafa Lakhani v. Pakistan Defence Officers Housing Authority, Karachi*]
3. P L D 1984 C L C page-1729
[*Syed Ghulam Ali Shah v. The Deputy Commissioner & Incharge, Settlement Cell, Sanghar and others*]
4. 2009 M L D page-810
[*Capt. Muhammad Iqbal v. Federation of Pakistan and another*]

- Law under discussion:**
1. Specific Relief Act, 1877.
 2. Civil Procedure Code, 1908 (“CPC”)
 3. Presidential Order No.7 of 1980 (Pakistan Defence Officers Housing Authority Order, 1980).
 4. Qanun-e-Shahadat Order, 1984 (Evidence Act, 1872); Evidence Law.

JUDGMENT

Muhammad Faisal Kamal Alam, J: - Through this present action at law, the Plaintiff has challenged the decision of Defendant No.1 [Pakistan Defence Officers Housing Authority-DHA] about cancellation of plot earlier allotted to Plaintiff. Plaintiff contains the following prayer clause_

- A. *Decree Declaring that the alleged letter of cancellation dated 2nd October, 2000 bearing Reference No. DHA/A-14208 and A-3476- PD issued by defendant No.1 being approved cancellation of allotment of Plot No. 233, 18th Street Phase-VIII, measuring 1000 Sq.yards (resident) is illegal, ultra vires having no legal force being factually incorrect is void abinitio having been approved and issued on the strength of / basis of By Law No. 10 of D.H.A. not applicable to the Plaintiff’s case and is therefore not binding upon the Plaintiff.*

FURTHER declaring that the aforesaid plot still stands in the name of the plaintiff and alternatively the plaintiff is entitled to be compensated / allotted Plot of Equivalent area and location or the payment of Rs.80 Lacs in lieu thereof payable by the defendant No.1 to the Plaintiff.

- B. *Decree for permanent injunction restraining the defendant No.1, their men, servants, agents, employees, sub attorneys and or anybody else claiming through or under them in any capacity form allowing, assigning, conveying Plot No. 233, 18th Street, Phase-VIII, measuring 1000 Sq.Yards (resident) D.H.A. to any body else with or without consideration.*

C. Decree For Damages in the Sum of Rs.80,00,000 (Eighty Lacs) in favour of Plaintiff against Defendant No.1 towards special and general damages with 22% Profit from the date of cancellation of Plot i.e. 2.10.2000 still its recovery.

D. Cost of the suit.

E. Any other relief or reliefs.

2. On issuance of summons, the Defendant No.1, which is contesting Defendant in the matter, has filed its Written Statement. Defendant No.2 never came forward to contest the matter, whereas, the plaint was struck off against the Defendant No.2 under Rule 128 of Sindh Chief Court Rules for non-payment of process fee.

3. The crux of the stance of Plaintiff is that the *suit plot* No.233, 18th Street, Phase-VIII, P.D.O.H.A. Karachi, was sold out to Defendant No. 2 through the Agreement of Sale dated 15.11.1974 (Exhibit P/2), whereas, he was allotted another commercial Plot measuring 200 Sq. Yards, bearing No. 36-C in Peninsula Commercial Lane No. 19, Phase VIII, Pakistan Defence Officers Housing Authority, which was sold to one Khawar Abbas vide an agreement of sale dated 15.11.1993 (Exhibit P/3). This subsequent commercial plot was given to the Plaintiff as per his service entitlement in Pakistan Army. The Plaintiff further maintains that when the suit plot was allotted to him through ballot on 11.07.1976, at that relevant time he did not have any other property in Defendant No.1, and therefore, the show cause notice dated 31.03.1997 (Exhibit P/4) and the impugned Cancellation Order of 02.10.2000 (**Exhibit P/6**) is a nullity in the eyes of law; *whereas*, the stance of Defendant No.1 is that way back in the year 1967, the Plaintiff got a plot No. 36, 1st Gizri Street Phase-IV measuring 2000 Sq. Yds on the basis of Membership No. DS/N/A-3476 (Exhibit D/1); this Plot No.36 be

referred to as the '**First Plot**'. Thus, subsequently the Plaintiff in the Application Form submitted to Defendant (DHA)-Exhibit D/2, for the suit plot did not disclose this fact about this earlier plot.

4. On 06.05.2005, this Court while dismissing the injunction application of Plaintiff and application for rejection of plaint of Defendants, framed the following Issues_

1. *Whether suit as framed is maintainable?*
2. *Whether the Plaintiff is entitled for more than one residential plot under the bylaws of the Defendant?*
3. *Whether the allotment of 2nd residential plot made in favour of the Plaintiff is in accordance with the bylaws of Defendant No.1?*
4. *Whether the cancellation of the plot by the Executive Board of the Defendant through letter dated 2.10.2000 is illegal, void and of no effect?*
5. *What is the effect of dismissal of application under Order 39 Rule 1 & 2 CPC in Suit No. 632/1997?*
6. *To what relief Plaintiff is entitled to?*

5. Evidence was led by both the contesting parties by examining one witness each. Plaintiff examined himself as PW-1 and the then Deputy Director Land of the Defendant No.1 appeared and was cross examined by the Plaintiff.

6. Mr. Zahid Marghoob, learned counsel for the Plaintiff, has contended that on flimsy ground the suit plot was cancelled, because the Plaintiff at the relevant time did not hold any other plot / land, and the defence by Defendant No.1 [Pakistan Defence Officers Housing Authority] about the double allotment is frivolous, which is taken on the basis of the

prohibitory Byelaw No.10 of the Byelaws of the Pakistan Defence Officers Co-operative Housing Society Ltd., Karachi-4 (the “Byelaws”).

7. On the other hand, Mr. Nazar Hussain Dhoon, learned counsel for the Defendant No.1, has contended that on the strength of the documentary evidence, the suit plot was cancelled by Defendant No.1 [DHA] and this matter was also agitated in the previous litigation, which was filed by Plaintiff in the shape of Suit No. 632 of 1997. The learned counsel for the Defendant No.1, has referred to the order dated 04.02.2002 passed in the above suit, which is available at page No. 93 of the Court file, in which, *inter alia*, while refusing the present Plaintiff the relief of interim injunction, it has been observed that in terms of above Byelaw No. 10, a Member having one share cannot have more than one plot of 1,000 Sq. Yards

8. Arguments heard and record perused.

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

Issue No.1	_____	Affirmative.
Issue No.2	_____	Negative.
Issue No.3	_____	Negative.
Issue No.4	_____	Negative.
Issue No.5	_____	As under.
Issue No.6	_____	Suit dismissed with costs.

Discussion / Reasons of the Issues;

ISSUE NO. 1:

10. Since issue No.1 relates to the maintainability of the present *lis* as it is argued by Defendant’s side that earlier proceeding-Suit No.632 of 1997

was between the same parties about the same suit plot, therefore, present *lis* is barred by law. The learned counsel for the Plaintiff relied upon the record available of earlier Suit No. 632 of 1997, to show that in the earlier litigation, only grievance of Plaintiff was with regard to the issuance of show-cause notice [afore-referred], but when the Defendant No.1 issued the impugned Cancellation Order of 02.10.2000 (Exhibit P/6), the earlier suit which was in the intervening period transferred to the District Court and re-numbered as Civil Suit No. 1686 of 2002, was withdrawn by the Plaintiff, but after filing of the present *lis*. He further states that causes of action in both suits are different from each other and present suit is not hit by any provision of law including Order 2 Rule 2 of CPC.

11. There is substance in the arguments of learned counsel for the Plaintiff, because it is a settled rule that if the cause of action in two cases are different from each other for which an independent and separate evidence is to be laid on the different set of facts, then the subsequent suit is not barred. Therefore, Issue No. 1 is answered in **Affirmative** and in favour of the Plaintiff that instant *lis* (Suit) is maintainable.

ISSUES NO. 2, 3 AND 5:

12. The defence witness has filed official documents relating to the case including the allotment Order of 09.04.1967 (**Exhibit D/1**), through which the Plaintiff was earlier allotted the afore-mentioned first plot No.36 (of 2000 Sq. Yards). This allotment is made to Plaintiff under his Membership No.DS/N/A-3476 as written against the reference number of this document, which is undisputed. The next document is **Exhibit D/2**, which is the 'Form of Application' and was filled-up by the Plaintiff and it is of 04.02.1976. This Form was submitted to Defendant No.1 when admittedly Plaintiff was serving in the Pakistan Army, as is also mentioned on the document. Its Condition 11-b categorically spells out an undertaking / certification that the

signatory of this form, in the instant case the present Plaintiff, had never before applied for or had been allotted a Residential plot in the Defence Society. The next document is (Exhibit D/3), through which the suit plot was allotted to Plaintiff under a different Membership No. N/A-14208, as is mentioned on this allotment letter of 29.06.1976. In his cross examination, the Plaintiff has admitted that earlier he was allotted the above Plot No. 36 measuring 2000 Sq. Yrds on 09.04.1967 against the Membership No.D-S/N/A/3476, which he subsequently sold out. He has further admitted that he did not disclose about this allotment while filling-up the form about the present suit plot in 1976. He did not deny when suggested that second membership was allotted to Plaintiff when he applied for the suit plot. Though he denied the suggestion that he did any wrong by not disclosing the allotment of first plot, but his stance is that it was due to his ignorance. He has also not disputed the suggestion that he left blank the Column No.7 of the above document / Application Form (Exhibit D/2), which requires a person / member to disclose other immoveable properties, which one held (owned) in Pakistan, at that relevant time. To a specific question, he acknowledged that the suit plot though was disposed of (sold), but was never got transferred by Defendant No. 1 in the name of Defendant No. 2.

13. Mr. Zahid Marghoob, Advocate, has laid much emphasis on the fact that when there was a consent order dated 09.12.1998 in earlier Suit No. 632 of 1997, that the Defendant No. 1 will not cancel the subsequent commercial plot No. 36-C in Peninsula Commercial Lane No. 19, Phase VIII, Pakistan Defence Officers Housing Authority, and with regard to the suit plot, the Executive Board of DHA (Defendant No.1) will give a hearing to the Plaintiff, then the impugned cancellation by the Defendant No.1 is in violation of the above judicial order as well as the norms of natural justice, as the Plaintiff has been condemned unheard. The above order passed in the

earlier Suit No. 632 of 1997 is available in the evidence file and is a matter of record. It is further argued that no byelaws were existing when the suit plot was allotted in 1976 as the present Defendant No.1 has been established through a Presidential Order No.7 of 1980 (*ibid*).

14. The above arguments have been controverted by Mr. Nazar Hussain Dhoon, learned counsel for the Defendant No.1, by contending that the relevant Byelaws of Defence Housing Authority were in vogue since the erstwhile The Pakistan Defence Officers Cooperative Housing Society Ltd., was established and a relevant abstract is already available and filed with Affidavit-in-Evidence of defence witness as (Exhibit P/9). Learned counsel for the Defendant has also provided a complete set of Byelaws of The Pakistan Defence Officers Cooperative Housing Society Limited. This being an official document contains the certificate of Registration as well, issued by Joint Stock Registrar on 23.03.1953. These Byelaws being the public document, thus presumption of its genuineness, under Article 90 of the Evidence Law is there. More so, the authenticity of these Byelaws was never questioned. Hence, the conclusion is that when the earlier plot was allotted to the Plaintiff, subject Byelaws were existing and in force. Byelaw No.10 is reproduced herein under for reference_

Bye-Law No. 10

“Every member must hold at least one share of Rs.100/- in the Society. Members holding one share will be entitled to apply for a plot measuring not more than 1,000 sq. yards. Applicants for a plot of 1,500 sq. yds. Of thereabout must hold at least two shares, and those wishing to apply for a plot of 2,000 sq. yds. Must hold at least 3 shares.”

15. The main defence of Plaintiff is that he did not violate any of the Byelaws and cancellation of suit plot is illegal. Here, the two factors go to

the root of the entire controversy; (i) prohibitory Byelaw No. 10 (*ibid*) and (ii) Clause 11 (b) of the Application Form dated 24.02.1976 (**Exhibit D-2**), which was admittedly submitted by the Plaintiff to Defendant No.1 for allotment of another plot and consequently the suit plot was allotted through balloting. Clause 11 (b) is also reproduced herein_

“I had never before applied for or been allotted a Residential Plot in the Defence Society.”

16. If the Plaintiff wants to wriggle out from the purview of Byelaw No. 10, then onus is on him to prove, *inter alia*, that he was holding more than one share of Rs.100/- in the Defendant No. 1 when it was a Society at that relevant time; in the year 1976, because if the Plaintiff did not have more than one share then he was not entitled to be allotted more than one plot of 1,000 square yds. Admittedly, the Plaintiff has not even mentioned in his pleadings or led the evidence about his shareholding in the erstwhile Society-Defendant No.1, as it then was, before promulgation of the afore-referred Presidential Order No.7 of 1980. Thus, the case of Plaintiff falls within the ambit of above Byelaw No.10 coupled with all consequences.

17. In addition to this, the Defendant's witness in his cross-examination could not be shaken about material aspect of the case, *inter alia*, particularly, his testimony about the First plot, which was subsequently bifurcated into two plots of 1000 each and the first plot was sold in 1976, whereas the second portion of the (first plot) being a bifurcated plot-Plot No.36/2 was sold in 1998. If this deposition is analysed with that of Plaintiff, the fact has been proved that when the Plaintiff has filled up and submitted his Application Form (Exhibit D/2), he knowingly suppressed the fact about the said first plot (No.36), which was / is a clear violation of Condition 11-b of the said document-Exhibit D/2, therefore, I answer Issues

No.2 and 3 accordingly. Both Issues No.2 and 3 are replied in **Negative** and against the Plaintiff, that, Plaintiff was not entitled to more than one residential plot under the Byelaws and the second allotment (impugned here) of the suit plot is / was in violation of the Byelaws of Defendant No.1.

18. As far as Issue No.5 is concerned, there is substance in the arguments of learned counsel for Defendant No.1, that though the afore-referred order of 04.02.2002 passed on the injunction application of Plaintiff was tentative in nature, but it was not appealed against. This order has also discussed a legal proposition with regard to Byelaw No.10 vis-à-vis allotment of suit plot and, therefore, this act of Plaintiff for not challenging the aforesaid order also goes against him and his pleadings. The said order of 04.02.2002, if carefully examined, shows that the Plaintiff did not dispute the earlier allotment of plot No.36 (the first plot). Obviously, for this undisputed position, no appeal was preferred against the said order. In addition to what has been discussed hereinabove, the Issue No.5 is answered accordingly, that it carries an adverse effect to the present case of Plaintiff and his pleadings.

19. It is not necessary to discuss each and every cited decision in the matter after handing down the findings as mentioned hereinabove. The first case cited by the learned counsel for the Plaintiff, viz. ***Shamim Khan***, is not relevant for the present controversy as in that matter, the plot was allotted to the Respondent (Shamim Khan), which was cancelled on non-deposit of development charges and even the cancellation was conditional. Similarly, the reported case of ***Col. (Ret.) Maqbul Ilahi***, which was decided by the learned Division Bench of this Court is clearly distinguishable because in that reported case, Lease Deed was also executed in favour of the Petitioner Col. Maqbul Ilahi and it was cancelled because he did not raise

construction within the stipulated time. In this context the learned Division Bench has held that cancellation was not valid. Here the situation is entirely different. What is applicable to the facts of present case is the reported decision of Mustafa Lakhani [2008 S C M R page-611 (*supra*)] in which about the cancellation of plot of the Petitioner (of that reported case), the Honourable Supreme Court has *held*, that if the very basis of allotment is based on fraud, forgery and contravention of Byelaws of the Society, that allotment would lose its validity, as the entire structure built thereupon will fall to the ground. It was further held that even issuance of a lease in favour of such allottee / Petitioner (of the reported case), was of no consequence, while holding that the Executive Board of the Defendant No.1 was quite competent to cancel the allotment of plot under Proviso (i) of Article 7(h) of the Presidential Order No.7 of 1980. This is what has happened here. Appraisal of the evidence cannot result in any other conclusion that when the suit plot was allotted to Plaintiff, he already had an earlier allotment in his favour in the shape of 'First' plot, which was disposed of / sold by him in due course of time, as discussed herein above. The Plaintiff with his Affidavit-in-Evidence has also appended a list of members, allotted 2000 square yards plots, as Exhibit P/8. At serial No.348, name of the Plaintiff is also mentioned. It is yet another admission of illegality committed by the Plaintiff.

ISSUE NO. 4:

20. With regard to the main objection of Plaintiff's side that the latter (Plaintiff) was condemned un-heard, learned counsel for the Defendant No.1 has referred to the Minutes of Meeting (Exhibit P/7), and the show cause notice of 06.02.1999 (Exhibit D/5), calling upon the Plaintiff to appear before the Scrutiny Committee at 1300 hours on 09.02.1999 in order to give Plaintiff a personal hearing with regard to the allotment of suit plot.

The counsel also referred to Exhibit D/6, another document which is extract of the noting sheet of Defendant No.1, to show that office note-5 has recommended the issuance of show-cause notice, as after scrutinizing the case of the Plaintiff, the Management of Defendant No.1 was of the opinion that it is a definite case of fraud.

It has been reiterated by the learned counsel for the Defendant No.1 [DHA] that no appeal was preferred against the above order of 04.02.2002, whereby, this Court refused the relief of interim injunction to Plaintiff, on the ground that more than one residential plot in terms of afore-referred Byelaw No. 10 cannot be allotted to Plaintiff.

21. It is argued by Mr. Zahid Marghoob, Advocate, that the cancellation powers exercised by Defendant No.1 in terms of the Presidential Order No.7 of 1980 and the issuance of the impugned cancellation letter, cannot be exercised retrospectively because at the relevant time when the suit plot was allotted in the year 1976, the above Statute-Presidential Order was not in the field. The above stance of the Plaintiff does not carry any weight; for the reasons, that in the year 1976, the aforementioned Byelaws were holding the field and the case of Plaintiff is covered by Byelaw No.10, which is prohibitory in nature regarding which already findings have been given in the foregoing paragraphs.

22. The case of Plaintiff primarily hinges on the issue that whether his personal participation in the meeting of the Executive Board of Defendant No.1, in which decision to cancel the suit plot was taken, was mandatory.

23. As per the arguments of Plaintiff's side that when the order dated 09.12.1998 was passed by consent, the Executive Board or the Scrutiny Committee of Defendant No.1 was bound to grant personal hearing to Plaintiff with regard to the suit plot and, hence, cancellation of the same

(suit plot) without granting the personal hearing is an act which is void *ab initio*. This contention is obviously controverted by the legal team of Defendant No.1 (DHA), *inter alia*, on the ground that hearing notice (Exhibit D/5) was issued to Plaintiff but he did not turn up to attend the meeting. This aspect cannot be disproved by Plaintiff in the evidence that the said hearing notice (Exhibit D/5) was issued to the Plaintiff. *Secondly*, Exhibit D/7 is the relevant extract of the proceedings of the Executive Committee (of Defendant No.1) to show that the impugned action of cancellation was taken after considering all the aspects of the case and it is not a decision which was passed in a mechanical manner.

24. *Thirdly*, the consent order of 09.12.1998 was later merged with the order dated 04.02.2002, in which application / prayer for grant of injunctive relief was refused on the basis of Byelaw No.10. *Fourthly*, the Defendant No.1 did not violate their undertaking, which was given earlier and mentioned in the order dated 09.12.1998, as another allotment to Plaintiff in respect of commercial plot No.36/C, Peninsula Commercial Lane-19, was never cancelled; this is an admitted position. *Fifthly*, it is now a proven fact that while obtaining purported allotment of the Suit plot, Plaintiff concealed the material facts from Defendant No.1 and the allotment in question of the Suit plot was illegal as it was violative of Byelaw No.10 as well condition No.11-b of the Application Form (Exhibit D/2). Thus, the dicta laid down in the reported decisions of Hon'ble Supreme Court in the case of Mustafa Lakhani (*ibid*) and Muhammad Iqbal's case (*supra*) handed down by the learned Division Bench of this Court and relied upon by the learned counsel for Defendant No.1, are applicable to the facts of present case, as the present allotment in question of the suit plot was also obtained through misrepresentation of facts. *Sixthly*, the ground taken by Plaintiff's legal team about violation of principle of natural justice, as the Plaintiff was not heard by the Scrutiny Committee or the Executive Board of Defendant

No.1, has hardly any force. Reason is, and also held in the above Iqbal's case, that no person can be allowed to retain ill-gotten gain and Court will not come to aid of a person to retain a benefit or privilege to which he was not entitled to at the very inception. This rule is based on the well-established legal maxim 'that no one is allowed to reap benefit of one's wrong'. Although, from the testimony of Defendant's witness, it can be concluded that Plaintiff did not appear personally before the Scrutiny Committee, but the entire process and the impugned cancellation order cannot be set aside merely on this ground. In this particular case, in which illegality on the part of Plaintiff has been proven, the rule about personal hearing cannot be stretched that far, which on the contrary can extend benefit to the Plaintiff to continue with his illegal act. Even otherwise, the grievance of Plaintiff about non-appearance before the Scrutiny Committee or the Executive Board of Defendant No.1 has been addressed in the present proceeding, when the Plaintiff has been given ample opportunity to plead his case and lead evidence and the impugned decision of cancellation has been subjected to the judicial scrutiny. After appraisal of the evidence, particularly, when the credibility of the Plaintiff is impeached during his deposition, in my considered view, the Plaintiff was given a chance to appear before the Scrutiny Committee of Defendant No.1, when he was issued hearing notice, but he failed to avail that opportunity; thus even it cannot be said or held that Defendant No.1 is guilty of violating any of the principles of natural justice. The defence setup by Plaintiff in his evidence that he was ignorant about such legal formalities, is devoid of merits, because again it is a settled rule that ignorance of law is not an excuse. At that relevant time the afore-referred Byelaws of Defendant No.1, were the applicable law and the legal formalities, *inter alia*, as / is an express Condition 11(b) contained in the Application Form itself (Exhibit No.D/2).

Plaintiff admittedly serving in Pakistan Army as its Officer, at the relevant time, cannot be expected to be such a naive person.

25. The upshot of the above discussion is that, I answer Issue No.4 in **Negative** and against the Plaintiff, because the record shows that the members of the Executive Board as well as those of Scrutiny Committee considered the undisputed factual aspect of the case and after applying their mind to it, they have issued the impugned cancellation order, which is in line with Proviso (i) of the Article 17(h) of the above named President Order No.7 of 1980. It is also necessary to discuss here that damages can only be granted when the Plaintiff has shown or proven any negligent or illegal act on the part of Defendant No.1. Since Defendant No.1 has acted within the parameters of law, therefore, the claim of damages of Plaintiff is also baseless.

ISSUE NO. 6:

26. Consequently, Issue No.6 is answered accordingly. Plaintiff is not entitled to any relief and the present suit being meritless is dismissed with costs.

JUDGE

Karachi Dated: 23.01.2018.

*Riaz / P.S**