

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1713 of 2012

[Sharif Ahmed Qureshi v. Wing Cdr.(R) Mazhar Mirza and others]

- Date of hearing : 03.05.2019.
- Date of Decision : 03.05.2019.
- Plaintiff : Sharif Ahmed Qureshi, through Ms. Shamim Akhter, Advocate.
- Defendants 1 and 2 : Wing Cdr.(R) Mazhar Mirza and Wing Cdr. Abdul Baseer, through Mr. Muhammad Islam Leghari, Advocate.
- Defendants 3,4 and 7 : The Army Housing Directorate, Military Estate Officer and the Federation of Pakistan, through Mr. Aminullah Siddiqui, Assistant Attorney General along with M/s. Hassan, UDC and Muhammad Shoaib, LDC.
- Defendants 6 and 8 : The Sub-Registrar and the Province of Sindh, through Ms. Mehmooda Suleman, State Counsel along with Wali Muhammad Shaikh, Sub-Registrar, Shah Faisal Town, Karachi.

Decisions relied upon by Plaintiff's Counsel

Case law relied upon by Defendants' Counsel

Other precedents

1. Constitutional Petition No. D – 1913 of 2017
[Gulzar Ahmed v. Province of Sindh and others]
2. 2015 S C M R page-21
[Muhammad Iqbal v. Mehboob Alam] – Iqbal Case

- Law under discussion:**
1. Specific Relief Act, 1877.
 2. Civil Procedure Code, 1908 (“CPC”)
 3. Registration Act, 1908.
 4. General Clauses Act, 1897.
 5. Constitution of the Islamic Republic of Pakistan, 1973.

JUDGMENT

Muhammad Faisal Kamal Alam, J: - The present suit for Specific Performance, Declaration, Damages and Permanent Injunction has been filed by the Plaintiff. Plaintiff contains the following prayer clause_

- “A) *Specific Performance of the Contract against the Defendant No. 1 & 2 with the directions to get the Sale Deed dated: 20.9.2006 regarding suit property bearing House No. SD-86, Malir Cantonment, Karachi, measuring 308.33 square yards registered from the Defendant No.6 of production of the N.O.C. from the Defendant No.3 as required by the Defendant No.6. In case they failed in their contractual obligation the Defendant No.3 be directed to issue the required N.O.C. in favour of the Plaintiff for the registration of the said Sale Deed.*
- B) *Declaration that the Plaintiff being the legal and lawful Vendee / transferee of the suit property bearing House No.SD-86, Malir Cantonment, Karachi, measuring 308.33 square yards is entitled for its transfer in his name by registration of the Sale Deed, dated: 20.9.2006 by the Defendant No. 6.*
- C) *Declaration that the production of N.O.C. from the Defendant No. 3 for the purpose of registration of Sale Deed in not the legal and lawful requirement as per the Provisions of Section 17 of Registration Act, 1908 and the appropriate directions to the Defendant No. 6 for the registration of the Sale Deed dated: 20.9.2006 pertaining to the suit property, which is lying with him as “ADJOURNED”.*
- D) *Declaration that the non-issuance of N.O.C. by the Defendant No. 3 in favour of the Plaintiff for the purpose of registration of the Sale Deed by the Defendant No.6, is illegal, unlawful, improper, unfair, malafide and abusive of lawful authority.*
- E) *Alternatively in case the prayer clause No. A & B are not granted, the recovery of RS.14.0 Million against the*

defendant No.1 & 2, in favour of the plaintiff being the present market value of the suit property along with the compensation in view of the devaluation of Pak Rupees, with profit at bank rate till the realization of the decretal amount.

- F) *Recovery of the Damages of Rs. 20.0 Million against the defendant No. 1 & 2 jointly and severally with interest at the bank rate till the realization of the decretal amount.*
- G) *Permanent Injunction restraining the Defendants specially the Defendant No. 1 & 2, their Servants, Executants, Agents, Administrators, Sub-Ordinates, and any other person(s) acting on their behalf from creating third party interest to, alienating, transferring, disposing of and mutating the suit property i.e. House No. SD-86, Malir Cantonment Karachi measuring 308.33 square yards and from dispossessing the plaintiff from it, except in due course of law.*
- H) *Costs.*
- I) *Any other relief(s) deemed to be fit under the special circumstance of the case.”*

2. Mr. Akhtar Saeed Ishaq, Advocate, who is representing Defendant No.3 (the Army Housing Directorate, G.H.Q., Rawalpindi) in some other matter, was on the last date of hearing directed to coordinate for obtaining requisite No Objection Certificate (“NOC”); but, today, the above named learned counsel has filed his Statement along with his Affidavit, basically showing his helplessness in the matter. The Statement is taken on record.

3. Arguments heard on behalf of the learned counsel for the parties and the learned Law Officers representing the Federation and Government of Sindh (Official Defendants).

4. After going through the pleadings of the parties, that is, plaint and the Written Statement of the Private Defendants and Official Defendant No.4 (MEO), following undisputed position emerges from the record_

- i. That Defendant No.1 [**Wing Cdr.(R) Mazhar Mirza**] is the lawful owner of the House No.SD-86, Malir Cantt., Karachi, measuring 308.33 Square Yards (the “**Suit Property**”), in terms of Allotment Letter dated 27.06.1995, issued by Defendant No.3 (General Headquarters, Housing Directorate, Army Housing Scheme, Islamabad) and subsequent registered 99 years Lease in Schedule IX-B, issued by the President of Pakistan, through the Military Estate Officer, Karachi Circle, that is, Defendant No.4 (*herein*) in favour of the above named Defendant No.1. This title document in favour of Defendant No.1 has been further confirmed by Defendant No.4 (MEO, which is the statutory custodian of Military Lands) in his Written Statement; in paragraph-10, it is stated that no interest of the government is involved and the said Defendant No.4 will abide by the decision of the Honourable Court.
- ii. That earlier a sale transaction was entered into between the above named previous owner / Defendant No.1 and one Squadron Leader(R) Zahid Magfoor, but the said sale transaction could not be completed / materialized, but interestingly the Defendant No.3 (Army Directorate) has issued a NOC for sale, which is annexed with the plaint as annexure P-3, and the same has not been disputed by private and Official Defendants in their Written Statements.
- iii. That Defendant No.1 executed a registered General Power of Attorney in favour of Defendant No.2 (Wing Cdr. Abdul Baseer) for, *inter alia*, disposition of the Suit Property. The said Power of Attorney is also appended with the plaint as annexure P/4 and has been acknowledged by the private and the official Defendants.
- iv. That present Plaintiff and Defendant No.1 through Defendant No.2 (as attorney) entered into a sale transaction in respect of the Suit Property vide an Agreement of Sale dated 18.09.2006 for a total sale consideration of Rs.80,00,000/- (Rupees Eighty Lacs only) and subsequently after payment of amount, the vacant peaceful possession of the Suit Property has been handed over to present Plaintiff and the latter is residing at the

Suit Property. In the intervening period and in order to complete the sale transaction, a Sale Deed was also executed between the parties hereto; Plaintiff and private Defendants, but said Sale Deed could not be registered for want of sale NOC from Defendant No.3 (Army Directorate). Copies of the Agreement of Sale and the Sale Deed of the Suit Property are filed as annexures P-7 and P-8, respectively, with the plaint, which have been acknowledged by the private Defendants as well as Official Defendant No.4 and Defendant No.6 – Sub-Registrar (Government of Sindh).

5. For the past many years, Plaintiff, who is a senior citizen, is running from pillar to post for obtaining the requisite sale NOC from Defendant No.3 and Defendant No.4 (MEO), so that the Sale Deed can be properly registered and further formalities in favour of Plaintiff can be undertaken, *including*, that of mutation. Due to this undisputed factual and legal aspect, cause of action still subsists in favour of the Plaintiff, because his genuine grievance has not been addressed so far.

6. Today, the learned State Counsel, who is present with the Sub-Registrar, has brought the original Sale Deed, and it is stated that the Sale Deed was adjourned, *merely*, due to the reason that no NOC from Defendants No.3 and 4, are available with the concerned Sub-Registrar (Defendant No.6) and thus the other formalities in respect thereto, including the registration, could not be completed. Original Sale Deed has been seen and returned to the Sub-Registrar.

7. Mr. Muhammad Islam Leghari, learned counsel representing Defendant No.2, has recorded his no objection that if NOC is issued by the Official Defendant No.3, then other formalities, if any, may be completed and private Defendants will cooperate. However, Mr. Muhammad Islam Leghari, Advocate, seriously disputes the monetary claim of the Plaintiff

and referred to the relevant paragraphs of the Written Statement of private Defendants.

8. It is the contractual obligation of Vendors / private Defendants to cooperate with Plaintiff in order to perfect the title of Plaintiff in respect of the Suit Property. About the damages claim of Plaintiff, even otherwise, the monetary claim in the plaint, particularly in the prayer clause, has been sought as an alternate remedy, if at all in view of any legal impediment, the Suit Property is not transferred in the name of the Plaintiff or NOC is not issued. Therefore, the decision, which is to be followed in the subsequent paragraphs, otherwise makes the monetary claim / damages as redundant.

9. On the last date of hearing, certain observations were made in the case, that if a Housing Scheme is announced by Defendant No.3, *primarily*, for Military Personnel, then either there should be a complete embargo on transferring of land to the civilians, or, if the same embargo is not in place and civilians / citizens can purchase in a housing scheme launched by Defendant No.3, then the policy and formalities of Defendant No.3 should be equitable and fair and no one should be discriminated against. It is understandable that there are security issues, for which NOC and other formalities are to be completed, but the security concern cannot be allowed to be misused, or, under the garb of security issue, rights of citizens cannot be compromised. Proprietary rights are guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973; *inter alia*, in terms of Article 24 and hence, if there is no other legal impediment in transferring of the Suit Property, then it should not have been prevented in such a manner as is done in the present case.

10. No reason has been stated by Official Defendants to justify withholding of sale NOC by Defendants No.3 and 4, in particular,

Defendant No.3. Even for the arguments' sake, if there is potential security issue or preventive safety measures are required to be taken, then though the official Defendants are the competent authority to take appropriate steps in this regard, but their policy, action(s) or defence (if any) **on the basis of security and administrative issues(s) have to be justified on the basis of plausible reason.** In a very recent Judgment handed down by the learned Division Bench of this Court in Constitutional Petition No. D – 1913 of 2017; Gulzar Ahmed v. Province of Sindh and others, it has been held, *inter alia*, that the good governance is directly related to the accountability. In the same Judgment, the decisions of the foreign jurisdictions have also been considered, in which it has been held that Executive actions based on the premise of national security are justiciable on the basis of “Rationale Basis Test”.

11. It is settled rule that fact admitted, *inter alia*, in the Written Statement does not need further proof. This has been reiterated in a reported decision of Iqbal Case (*supra*) [2015 S C M R page-21], wherein it is held that *“It is a settled principle of law that a fact admitted needs not proof, especially when such admission has been made in the written statement (see P L D 1975 SC 242), and it is also settled that no litigant can be allowed to build and prove his case beyond the scope of his pleadings.”*

12. In view of the above discussion, it is quite apparent that the parties are not at issue, *particularly*, the parties concerned to the sale transaction, that is, Plaintiff and Defendants No.1 and 2; thus the present Judgment.

13. The upshot of the above discussion is that the Official Defendants cannot deprive the Plaintiff of his ownership rights and interest vis-à-vis the Suit Property, when the entire transaction is not disputed, rather admitted by the private Defendants as well as Official Defendants, including the fact

that the Plaintiff is residing in the Suit Property. If earlier, the Defendant No.3 had issued a NOC in respect of the cancelled Sale Transaction of the Suit Property, then the Official Defendants No.3 and 4 cannot withhold the issuance of NOC on any extraneous ground. The irony is that Defendant No.3 has not even contested the claim of Plaintiff. It is a well- established legal principle, which now forms part of the statutory provision, that is, Section 24A of the General Clauses Act, 1897, that the government functionaries and authorities have to act and exercise discretion in a reasonable, fair, just manner and for advancement of the purpose of the enactment. However, in the present case, the non-action on the part of Defendants No.3 and 4 is violative of the above statutory provision. *Thus*, requirement of NOC cannot be given that degree of importance or significance, that it can be allowed to impinge upon a statutory and fundamental right of ownership of a citizen, who is a lawful and *bona fide* transferee of a property, situated in a Housing Scheme of Official Defendants. Therefore, this suit is decreed in the following terms_

- i. That the Official Defendants No.3 and 4 will issue NOC to the Plaintiff after completing their requisite formalities within two weeks from today and it is expected that no unnecessary impediment will be caused in implementation of the Court's order;
- ii. Private Defendants No.1 and 2 will fully cooperate with the Plaintiff, in order to perfect the ownership / title of Plaintiff in respect of the Suit Property.
- iii. The concerned Sub-Registrar – Defendant No.6, after receiving the NOC from Defendants No.3 and 4, will release the Sale Deed after completing codal formalities as per Registration Act, 1908, and relevant Rules, in favour of the Plaintiff; but, in the event, the NOC from Defendants No.3 and 4 is / are not received within the time frame given above, the Defendant No.6 (Sub-Registrar) shall issue / release the

Sale Deed after registering it, while fulfilling other codal formalities;

- iv. The Defendants will cooperate and the Official Defendants will ensure that the entitlement of the Plaintiff in respect of the Suit Property has to be made perfect and no impediment is created on some “extraneous factors”.

14. The suit stands decreed only in terms of prayer clause(s) A, B, D and G. and applications, if any, are disposed of having become infructuous. Parties are left to bear their own costs.

15. Copy of this decision should be immediately communicated to Mr. Aminullah Siddiqui, Assistant Attorney General and learned Advocate General Sindh, for taking immediate action(s).

Judge

Karachi Dated: 03.05.2019.

Riaz / P.S.