

THE HIGH COURT OF SINDH, KARACHI

Execution No. 58 of 2004

[M/s. A.H. Services versus Province of Sindh and another]

Decree Holder : M/s. A.H. Services through Mr. Badar Alam, Advocate.

Judgment Debtor 1 : Province of Sindh through M/s. Syed Aley Maqbool Rizvi & Pervez Ahmed Mastoi, A.A.G.

Judgment Debtor 2 : Karachi Development Authority through Mr. Usman Tufail Shaikh Advocate.

Dates of hearing : 22-08-2019, 18-09-2019 & 26-09-2019.

Date of decision : 10-01-2020.

ORDER

Adnan Iqbal Chaudhry J. - In the year 1973, the Decree Holder had paid Rs. 17,000/- to the Karachi Development Authority (KDA, the JD) as 10% down payment for the allotment, from the erstwhile builders' quota, of 20 residential plots measuring 400 square yards each @ Rs.14 per square yard in KDA Scheme 24, Gulshan-e-Iqbal, Karachi. The Decree Holder had filed suit for specific performance of the said contract in the year 1998 after the lifting of a ban on allotments. The suit was decreed against the KDA (succeeded by the CDGK which was again succeeded by the KDA). The decree dated 15-10-2003 is as follows:

- “i) That the plaintiff be allotted residential plots to the extent of an aggregate area of 8000 sq. yards in Scheme 24 of Gulshan-e-Iqbal, out of the builders' quota, if available, on the terms and conditions as stated in Ex. P/5.
- ii) In case no area is available in Scheme 24, Gulshan-e-Iqbal, an aggregate area of 8000 sq. yards be allotted to the plaintiff in any of the forthcoming Schemes of Karachi Development Authority or its successor Authority, as the case may be, at the prevailing price fixed by the authority.
- iii) The sum of Rs.17,000/- along with interest at the rate of 10% per annum will be adjusted towards payment of the cost of

such plots that plaintiff will be allotted as stated at (i) and (ii) above.

- iv) In the alternative, the plaintiff is entitled to damages to the extent of 10% of the price of the 20 plots in addition to refund of the sum of Rs.17,000/- together with interest thereon at the rate of 10% from the date of payment till the date of refund.
- v) Cost of the suit in favour of the plaintiff against the defendant.”

2. Vide Statement dated 30-05-2005, the CDGK/KDA offered the Decree Holder 20 residential plots of 400 square yards each (total 8000 square yards) in Scheme 41, Surjani Town, Karachi, @ Rs. 3150/- per square yard being the price determined at the last auction, so as to satisfy the decree in terms of clause (ii) thereof. However, that offer was declined by the Decree Holder on grounds that the price fixed was more than the market price, and that 6.08 acres of land (32,912 square yards) was available with the CDGK/KDA in Scheme 24, Block 17, Gulshan-e-Iqbal, between the KDA Rest House and KDA Pump House, out of which 8000 square yards could be allotted to the Decree Holder to satisfy the decree in terms of clause (i) thereof. To that end, the Decree Holder moved CMA No. 1584/2005 praying for execution of the decree in terms of clause (i) thereof; for a temporary injunction to restrain the KDA from creating third-party interest in 6.08 acres situated between the KDA Rest House and KDA Pump House; and for a direction to the officers of the CDGK/KDA to file affidavits supported by documents if they deny that 6.08 acres pointed out by the Decree Holder was not available for allotment in Scheme 24. The CDGK/KDA filed counter-affidavits to state that residential plots were not available with it in Scheme 24 for allotment to the Decree Holder; that land of 6.08 acres pointed out by the Decree Holder was beyond the boundary of Scheme 24 and was reserved for the KWSB; the offer to allot 20 residential plots in Scheme 41, Surjani Town, was reiterated; and in the alternative, the CDGK/KDA offered to make compensation in terms of clause (iv) of the decree.

3. A further narration of the proceedings with regards to the land of 6.08 acres situated between the KDA Rest House and KDA Pump

House is not relevant in that, subsequently, the Decree Holder pursued another tract of land measuring 5.46 acres (mentioned as 5.06 acres elsewhere) which he claimed was available with the KDA in Scheme 24 for satisfaction of the decree in terms of clause (i) thereof. Per the Decree Holder, that land of 5.46 acres adjoined Block-A Extension of the KDA Officers Housing Society, near the old KDA Pipe Factory in Block-17, Gulshan-e-Iqbal, Karachi.

4. By CMA No. 678/2008, the Decree Holder prayed for the attachment of 8000 square yards out of the aforesaid 5.46 acres adjoining Block-A Extension of the KDA Officers Housing Society; and by CMA 961/2009 the Decree Holder sought to restrain the CDGK/KDA from creating third party interest in the said 5.46 acres. By counter-affidavits and statements the CDGK/KDA contended that the land sought to be attached/stayed was initially within the boundary of the old KDA Pipe Factory, but subsequently on 31-05-2008 it was allotted by the CDGK/KDA to the KDA Officers Housing Society in lieu of land the possession of which could not be given to the said Society since 1990 due to encroachment. By a counter-affidavit dated 27-05-2013, CDGK/KDA reiterated that there were no residential plots available in Scheme 24 for allotment to the Decree Holder from the builders' quota; that the CDGK/KDA was ready to allot the Decree Holder plots in Scheme 41, Surjani Town in terms of clause (ii) of the decree, or in the alternative to compensate the Decree Holder in terms of clause (iv) of the decree.

5. Mr. Badar Alam, learned counsel for the Decree Holder submitted at the outset that in view of intervening events, he confines his submissions to land of 5.46 acres which according to him is available with the KDA (JD) in Scheme 24, Gulshan-e-Iqbal for satisfaction of the decree in terms of clause (i) of the decree. Learned counsel pointed to a 'Revised Proposed Layout Plan' (page 1039) said to be part of 5.46 acres in Scheme 24 which shows residential plots thereat and submitted that such layout plan demonstrated that the required land was available with the KDA. He submitted that the explanation offered by the KDA that it had allotted the said 5.46 acres

to the KDA Officers Housing Society was false inasmuch as the record shows that the pay-order dated 10-06-2008 given by the KDA Officers Housing Society towards the price of the said land was never encashed; thus sufficient land was available with the KDA (JD) in Scheme 24 to satisfy the decree in terms of clause (i) thereof; but that the KDA has been evading clause (i) of the decree for *malafide* reasons. He submitted that by order dated 31-01-2019 passed in this Execution, this Court has already directed the KDA to issue allotment orders to the Decree Holder in terms of clause (i) of the decree, i.e, allotment orders of 20 plots of 400 sq. yds. each in Scheme 24 from within the said land of 5.46 acres; and therefore this Execution is now at a stage where the order dated 31-01-2019 needs to be enforced and implemented. Regards the alternate modes of satisfaction of the decree contained in clauses (ii) and (iv) thereof, Mr. Badar Alam Advocate submitted that those alternate modes could be resorted to only if the decree could not be satisfied in terms of clause (i) thereof.

6. Mr. Usman Tufail Shaikh, learned counsel for the KDA (JD) submitted that the Decree Holder was misconstruing the decree; that the decree could be satisfied by the JD under clause (ii) or clause (iv) thereof; that clause (i) of the decree was conditioned on the availability of land in Scheme 24 from the 'builders' quota'; that the builders' quota had been abolished in the year 1981; that the land of 5.46 acres pointed out by the Decree Holder for the satisfaction of the decree is not the property of the KDA; that such land had been allotted by the KDA to the KDA Officers Housing Society and that very land was presently under litigation in Suit No.586/2007 and C.P. No. D-3458/2012. He submitted that the pay-order dated 10-06-2008 given by the KDA Officers Housing Society to the KDA towards the price of the said 5.46 acres had not been encashed for the reason that the payment made thereby was incomplete. He submitted that since the offer of alternate plots in Scheme 41, Surjani Town, was not accepted by the Decree Holder, the JD is willing to satisfy the decree by compensating the Decree Holder in terms of clause (iv) thereof.

7. In rebuttal, Mr. Badar Alam Advocate submitted that the KDA was estopped from arguing that the builders' quota was abolished when it had never refunded the down-payment made by the Decree Holder as it did to other builders; and that Suit No.586/2007 and C.P. No. D-3458/2012 have nothing to do with the land of 5.46 acres pointed out by the Decree Holder.

8. Heard the learned counsel and perused the record.

The question whether 5.46 acres land pointed out by the Decree Holder is available with the KDA in Scheme 24 to satisfy the decree in terms of clause (i) thereof, is a disputed question of fact. The KDA has denied the availability of such land. The Revised Proposed Layout Plan (page 1039) relied upon by the Decree Holder to show plotting by KDA at said land is a plan not signed by any authority. Mr. Badar Alam, learned counsel for the Decree Holder had submitted that by order dated 31-01-2019 this Court has already directed the KDA to issue allotment orders to the Decree Holder to allot 20 plots in Scheme 24 from the said 5.46 acres to satisfy clause (i) of the decree. But with respect to learned counsel, that is not what that order states. The order dated 31-01-2019 had directed the KDA "to bring requisite allotment order in pursuance of order dated 18-09-2018 or clarify his position". The order dated 18-09-2018 in turn shows that the allotment order required by the Court to be produced was the one the KDA claimed to have issued to the KDA Officers Housing Society in respect of the said 5.46 acres. Such order was passed so that the Court could see whether KDA's claim was correct. In any case it is absurd to suggest that the Court ordered the issue of allotment orders to the Decree Holder when the price for such plots has yet to be ascertained and deposited by the Decree Holder. Under cover of a Statement at page 747, the KDA has produced an Acknowledgment of Possession Order dated 05-06-2008 in respect of the allotment of the said 5.46 acres to the KDA Officers Housing Society to support its claim that such land was allotted by the KDA to the KDA Officers Housing Society. Mr. Badar Alam Advocate had then drawn attention of the Court to a public notice dated 08-11-2016 to argue that the said 5.46 acres allotted by the KDA to the KDA Officers Cooperative Housing

Society had been cancelled in the wake of a NAB inquiry into such allotment, and thus such land was still available with the KDA. But that public notice shows that it was published at the instance of the KDA Officers Housing Society to cancel allotment of plots made by it to its members from the said land of 5.46 acres, and not by the KDA to cancel the allotment made by it to the KDA Officers Housing Society.

9. In other words, the record does go to reflect that the land of 5.46 acres pointed out by the Decree Holder had been allotted by the KDA to the KDA Officers Housing Society, and therefore even assuming that such allotment was unlawful, or that the said Society had not paid the KDA for the 5.46 acres, as contended by Mr. Badar Alam Advocate, or that subsequently the allotment of plots thereat by the said Society to its members was cancelled, those are disputes/matters between the KDA and the KDA Officers Housing Society, and between the said Society and its members which are alien to this Execution.

10. In view of the above, I am not inclined to embark on a probe that the Decree Holder desires the Court to conduct into the allotment of 5.46 acres by the KDA to the KDA Officers Housing Society, especially when the decree provides for other modes of satisfaction. In my view, the foremost question in this Execution is one of interpretation of the decree. The submission of Mr. Badar Alam Advocate is essentially that the alternate modes of satisfaction of the decree contained in clauses (ii) and (iv) thereof can only be resorted to by the JD if and when the Executing Court determines that the decree cannot be satisfied in terms of clause (i) thereof by the allotment of plots in Scheme 24. On the other hand, per Mr. Usman Tufail Shaikh, clause (i) of the decree was conditional, and that the decree gave the JD the option to satisfy the decree under clause (ii) thereof by allotting plots in another Scheme, or under clause (iv) thereof by paying compensation.

11. In stating “That the plaintiff be allotted residential plots ... out of the builders’ quota, if available ...”, clause (i) of the decree manifests that it was conditioned not only on the availability of residential plots in Scheme 24, but also on the availability of the ‘builders’ quota’. That is so because in passing the judgment the Court had not given a categorical finding on the availability of the builders’ quota in Scheme 24, nor was such an issue framed in the suit. In fact, in passing the decree the Court was conscious that since it was enforcing a contract 30 years old, it may well be that the same has become incapable of performance on its specific terms. That is why the decree provided for compensation in the alternative in the form of plots in another Scheme [clause (ii) of the decree], or in the form of money [clause (iv) of the decree]. Had the intent been that the decree could only be satisfied under clause (i) thereof then there was no need to provide for alternate modes of satisfaction. In other words, the question under clause (i) of the decree is not only whether residential plots are available for allotment in Scheme 24, but also whether such plots are available from the ‘builders’ quota’. That ‘builders’ quota’ was envisaged under Rule 2 of the KDA (Disposal of Land) Rules, 1971 which were framed under the KDA Order, 1957. Under the said Rules, 35% residential plots (other than flat sites) ranging between 121 and 400 square yards in a KDA Scheme were reserved for construction companies and benevolent trusts eligible under the said Rules. But there is nothing to show that at the time the decree was passed in 2003, the provision for the builders’ quota continued to subsist. In fact, it appears that after the promulgation of the Sindh Disposal of Plots Ordinance, 1980, the provision for a builders’ quota was not continued. Nonetheless, assuming that the provision for the builders’ quota was intact at the time of the decree, there is nothing on the record to show that the land of 5.46 acres pointed out by the Decree Holder was ever reserved in Scheme 24 for allotment to construction companies from the builders’ quota, or that such builders’ quota in Scheme 24 (the thickly populated Gulshan-e-Iqbal) remained unexhausted even after 3 decades.

12. There is yet another aspect of the matter. The fact that the Court had decreed clause (iv) as an alternate to clauses (i) and (ii) of the decree, that signifies that the Court had intended clause (iv) of the decree to be a mode equally sufficient in itself to satisfy the decree. Therefore, I agree with Mr. Usman Tufail Sheikh Advocate that clause (iv) of the decree is not a choice given to the Decree Holder, rather it is an option for the JD, *ergo* there is no reason to deny clause (iv) to the JD if it is willing to satisfy the decree in those terms.

13. Having observed that the conditions to clause (i) of the decree are not met, and that the decree itself provides for other modes for its satisfaction, this is not a case that requires treating the Execution as a suit under section 47 CPC to determine a disputed question of fact. Here, I observe again that the mode of satisfaction of the decree provided by clause (ii) of the decree by allotment of plots in another KDA Scheme is not based on the builders' quota, but is in the nature of compensation to the Decree Holder.

14. In view of the foregoing, the prayer of the Decree Holder to treat this Execution as a suit under section 47 CPC is rejected. Resultantly, CMA No. 1584/2005, CMA No.138/2013 and CMA No.465/2017 are dismissed. Since the Decree Holder had refused to accept satisfaction of the decree in terms of clause (ii) thereof, i.e. by the allotment of plots in Scheme 41, Surjani Town, the KDA (JD) shall satisfy the decree by making payment in terms of clause (iv) of the decree, such amount to be deposited with the Nazir of the Court within 30 days along with details/documents of its computation, failing which this Court will issue coercive process.

15. By CMA No.838/2009 the Decree Holder prays for a direction to the KDA to disclose the sale price of residential plots in Scheme 24. By CMA No. 678/2008 the Decree Holder prays for the attachment of 8000 square yards out of the said 5.46 acres. By CMA No. 961/2009 the Decree Holder seeks to restrain the KDA from creating third party interest in the said 5.46 acres. By CMA No. 253/2011 the Decree

Holder prays for initiating contempt proceedings against the officers of the CDGK/KDA for allegedly disobeying orders to implement the decree in terms of clause (i) thereof. All of the said prayers are in connection with clause (i) of the decree. Having ordered the KDA to satisfy the decree in terms of clause (iv) thereof, CMA No.838/2009, CMA No. 678/2008, CMA No. 961/2009 and CMA No. 253/2011 are also dismissed.

JUDGE

Karachi
Dated: 10-01-2020