

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1608 of 2014

Plaintiff : Syed Farrukh Mateen, through Mr. Rafiq Ahmed Kalwar, Advocate.

Defendant No.1 : Province of Sindh, through Mr. Jan Muhammad Khuhro, Asst. Advocate General.

Defendant No.1 : The Member Land Utilization, through Mr. G. N. Qureshi, Advocate

Dates of hearing : 11.11.2019 and 19.11.2019

ORDER

YOUSUF ALI SAYEED, J – The Suit pertains to 10 Acres of land from Sector 26-B, Scheme No.33, District Malir, Karachi, that had been allotted to the Plaintiff for commercial purpose vide Allotment Order No.PS/MBR(LU)/1842/95 dated 08.10.1995 at the rate of Rs.100 per sq. yards (the “**Suit Land**”), which was then the subject of proceedings under the Sindh Government Lands (Cancellation of Allotments, Conversions and Exchange) Ordinance 2001 (the “**2001 Ordinance**”) whereby, following payment of an amount of Rs.10,648,000/- (the “**Malkano**”) assessed by the Sindh Government Lands Committee (the “**Committee**”) constituted for that purpose, the allotment of the Suit Land was then regularized vide Letter No. 01-87-02/SO-I/172/12 dated 20.11.2012 (the “**Regularization Letter**”) issued by the Land Utilization Department, Government of Sindh, under the signature of the Secretary, Land Utilization, as was then cancelled vide Letter No.01-258-02/SO-1/713, dated 19.11.2015 (the “**Impugned Memorandum**”) under the signature of the same functionary.

2. The Suit was filed on 23.11.2015, disclosing the manner in which the Suit Land had come to be acquired and it being pleaded *inter alia* that the Plaintiff had been threatened by persons attached to the office of the Member, Land Utilization (i.e. the Defendant No.2) with cancellation of the allotment in respect thereof unless their demand for gratification was met.

3. On 25.08.2014, an ad-interim was made on CMA No.11015/14, being the Plaintiff's initial Application under Order 39, Rules 1 and 2 CPC, whereby the parties were directed to maintain status-quo in respect of the Suit Land. Be that as it may, during subsistence of such Order, the Impugned Memorandum nonetheless came to be issued, the operation of which was since suspended vide the Order of 24.11.2015 made on the Plaintiff's further Application for injunctive relief, bearing CMA No. 17054/15, which remains in the field. Whilst an Application under Order 6, Rule 17 CPC seeking permission to amend the plaint due to such changed circumstances has also subsequently been filed, in light of the directive of a learned Division Bench of this Court in Constitutional Petition Nos. D-7388/15 and D-7652/17 for expeditious disposal of the stay Applications, it is those two particular Applications that have been proceeded on and which fall to be determined accordingly.

4. The salient facts, as are relevant for appraisal of the matter in proper perspective can be discerned from the very contents of the Impugned Memorandum, wherein the sequence of events leading up to the Regularization Letter as well as the rationale for its withdrawal/cancellation have been stated, the substantive part of which reads as follows:

“To

The Deputy Commissioner, East,
Karachi.

**Subject: WITHDRAWAL/CANCELLATION OF LETTER
NO. 01-87-02/SO-I/172/12, DATED
20.11.2012.**

The land admeasuring **10-00 acres i.e. 04-00 acres** land in **Sector-51/A & -06-00 acres in Sector-49/A**, Scheme 33, at the rate of Rs.100/ per sq yd to **M/s Zeeshan Builders & Developers** for Commercial purpose vide order **No.PS/MBR/LU/974/95, dated 04.06.1995**. Despite non-payment of occupancy price, the allottee requested for **alternate site / land in Sector - 26/B** Scheme-33, whereupon the then Chief Minister Sindh had been pleased to minuted “Request Allowed”, through letter **No.PS/MBR/LU/1842/95, dated 08.10.1995**, an alternate site of **10-00 acres** land from **Sector-26/B**, Scheme-33, Karachi, subject to availability of land in favour of **applicant**. The applicant **failed to deposit** the occupancy price at the time of allotment as provided under **Condition No.9(iii) & (iv)** read with **Condition No.10(4)** of statement of conditions notified on 12.05.1975 & **Section 10(4)** of the Colonization of Government Lands Act 1912, **the land stand automatically cancelled.**

2. In compliance of the decision dated 03.03.2012 of the Sindh Government Lands Committee, the offer letter bearing No. 01-87-02/SO-I/132/12, dated 16.07.2012 and Challan No.132, dated 16.07.2012 were issued and deposited on 16.08.2012. The land in question stands regularized under letter No.01-87-02/SO-I/172/12, dated 20.11.2012.

3. In the instant case, the applicant had failed to pay the occupancy price at the time of allotment, hence, as per Section -10(4), the applicant cannot be treated as a tenant or to have any right or title in the allotted land to him until such a written order has been passed and he has taken possession of the land with the permission of the Collector.

4. The regularization letter No. 01-87-02/SO-I/172/12, dated 20.11.2012, is hereby withdrawn/cancelled.

5. You are requested to cancel the entry and subsequent entries made in VF-II, if any, and retrieve the precious Government land. Also supply the colour attested copy of the original entry alongwith compliance report to this department within three (03) days positively.

SECRETARY TO GOVERNMENT OF SINDH
LAND UTILIZATION DEPARTMENT.”

5. Whilst the Impugned Memorandum cites Section 10(4) of the Colonization of Government Lands Act, 1912 (the “**COGLA**”) and, indeed, even the Counter-Affidavit submitted in response to CMA No. 17054/15 contains a similar reference and in fact reproduces that very subsection, on being queried by the Court as to the relevance and applicability of that provision, learned counsel for the Defendant No.2, conceded that such reference was inadvertent and Section 10(4) was not the correct provision, which, per learned counsel, was in fact Section 10(5), with the ensuing arguments from both sides then being directed accordingly such provision of the COGLA stating as follows:

“(5) If a person who has been granted, allotted or leased out, land after applicability of this Act to the Province of Sindh, or a person who may be granted land under this Act hereinafter for specific purpose has –

- (a). failed to deposit the occupancy price within a period of [six months] after the issuance of offer letter or allotment letter regarding grant, allotment or lease of land, such offer letter or allotment letter shall automatically stand withdrawn and shall not be restored; provided that the grantee, allottee or lessee may apply afresh for grant, allotment or lease of the land and the Competent Authority may make a fresh grant, allotment or lease as the case may be; and
- (b). failed to use the land for the purpose for which it was granted or allotted or converted or leased out and the period of [five years] from the date of grant, allotment, conversion or lease has expired, the grant, allotment, conversion or lease of the land shall automatically stand cancelled and the amount deposited shall stand forfeited :

Provided that the competent authority may extend the period for one year more in the justified cases on payment of ten percent (10%) of the occupancy price [:]

[Provided further that the Chief Minister may extend the period of completion of projects in respect of land granted for education and health purposes in the cases where the delay in completion of project is not on account of any negligence on the part of grantee.]].”

6. Learned counsel for the Plaintiff pointed out from the Impugned Memorandum that the cancellation/withdrawal was predicated solely on the allegation that the Plaintiff had not paid the occupancy price of the Suit Land at the time of allotment, as said to have been required under Condition No.9(iii) & (iv) read with Condition No.10(4) of the Statement of Conditions notified on 12.05.1975, hence Section 10(5) being invoked as against the Plaintiff.
7. In this regard, he submitted that following the initial allotment, the Plaintiff had addressed letters dated 05.03.1996 and 27.11.1996 to the Assistant City Survey Officer seeking to pay the occupancy price of the Suit Land and the issuance of the requisite challan for such purpose, but no response had been forthcoming, until promulgation of the 2001 Ordinance and implementation of the regularization process envisaged thereunder.
8. Learned counsel emphasised that it was apparent from the very face of the Impugned Memorandum that proceedings under the 2001 Ordinance had admittedly ensued in respect of the Suit Land and the Plaintiff's allotment/title had been formally regularized in terms of the Regularization Letter, following the prescribed process entailing payment of the Malkano assessed by the Committee at its meeting held on 03.03.2012.
9. On this note, attention was drawn to the Minutes of the meeting of the Committee held on 03.03.2012 (the "**Minutes**"), during the course of which the subject of the Suit Land had been taken up as part of the agenda as Issue No.9, and addressed as follows:

“Issue No.9 Request from M/s. Zeeshan Builders & Developers, Proprietor, Syed Farrukh Mateen for regularization of alternate land admeasuring 10-00 acres from Sector 26-B, Scheme-33 Karachi leased out vide Order No.PS/MBR/LU/924/95, dated 04.06.1995 & No.PS/MBR/LU/1842/95, dated 08.10.1995.

The facts of the case are that after approval of the competent authority an area of 10-00 acres land from 51/A (04-00 acres) & 49/A (06-00 acres) Scheme-33, Karachi was leased out on 99 years lease in favour M/s. Zeeshan Builders & Developers at the rate of Rs.100/- per sq. yards for Commercial purpose vide Order No.PS/MBR/LU/924/95, dated 04.06.1995. Later on, Mr. S. Farrukh Mateen for Zeeshan Builders & Developers made an application to the Honourable Chief Minister Sindh requesting therein that his regularized land does not exist on site and had been already allotted to other person and further requested for alternate site in Sector 26-B, Scheme-33, Karachi, the Honourable Chief Minister Sindh minute “Request allowed” on application.

An area of 10-00 acres land in Sector 26-B, Scheme-33, Karachi was leased out vide No.PS/MBR/LU/1842/95, dated 08.10.1995 by Land Utilization Department, Government of Sindh Karachi. The lessee has failed to deposit the occupancy price.

The Committee/Cabinet has determined the highest market value of Rs.10,64,800/- per acre.

The Committee unanimously decided to regularize an alternate site admeasuring 10-00 acres land situated in Sector 26-B, Scheme-33, Karachi in favour of M/s. Zeeshan Builders & Developers, Proprietor, Syed Farrukh Mateen at the rate of Rs.10,64,800/- per acre as loss caused to the Government. Subject to condition, that the land in question is available on site and the lease money may be deposited into Government Treasury in the relevant Head of Account by the depositor at his own risk. In case any irregularity as false information / concealment of facts / pending litigation / stay of any court is noticed hereafter on part of depositor, the malkano amount paid to this effect shall be forfeited to Government and all expenditure on future litigation shall be borne on the shoulder’s of depositor.”

10. With reference to the Minutes, learned counsel drew attention to the fact that the Secretary, Land Utilization Department as well as the Senior Member, Board of Revenue at the time had both been members of Committee, which also comprised of a retired Judge of this Court as well as the Secretaries of the Law Department and Finance Department of the Government

of Sindh, and pointed out that it was evident from what been recorded in respect of Issue No.9 that non-payment of the occupancy price was a factor known to the Committee, which, having considered such aspect, had then determined the highest market value of Rs.10,64,800/- per acre, so as to encompass the unpaid occupancy price, with the Malkano computed on this basis then being paid accordingly.

11. It was also pointed out with reference to the other Issues encapsulated in the Minutes that analogous cases of several other allottees had similarly come up before the Committee at that meeting, with their respective allotments being regularized notwithstanding that the occupancy price had not been paid. It was submitted that no action had since been taken against such persons, and the Plaintiff had discriminatorily been singled out vide the Impugned Memorandum being issued in respect of the Regularization Letter, whereas the regularizations undertaken in respect of such similarly placed persons had not been subjected to such treatment.

12. It was averred that in view of the proceedings that had taken place in respect of the Suit Land under the 2001 Ordinance, the action taken in terms of the Impugned Memorandum, whether under purported exercise of powers under Section 10(4) or 10(5) of the COGLA was unwarranted, *mala fide* and also *de hors* that enactment. It was submitted that the Plaintiff had established a prima face case, the balance of convenience was in favour of the injunction being confirmed as in the alternative, without there being any authoritative determination, the Plaintiff would be divested from the Suit Land which had since been sub-divided into 6 portions with lay out plans being submitted accordingly, resulting in irreparable loss.

13. Conversely, learned counsel appearing for the Defendants merely reiterated the rationale set out in the Impugned Memorandum and fell back on the contents of the counter-affidavit submitted on behalf of the Defendant No.2 to CMA NO.17034/2015, referring to Condition No. 9 (iii) & (v) and Condition 10 of the Statement of Conditions of 1975, which state as follows:-

CONDITION NO.9 (iii) & (v)

“(iii) The lessee shall pay the occupancy price determined by the D.C within four months of the confirmation of lease by the Board of Revenue, provided that the Deputy Commissioner, may in suitable cases extend the period upto twelve months from the date of confirmation of lease.”

(iv) If the lessee failed to pay the price by due date or within the period extended by the Deputy Commissioner, the lease shall be cancelled and all liabilities incurred and loss if any sustained by Government shall be recovered from the lessee as arrears of Land Revenue.”

CONDITION NO.10.

“The possession of plot shall be delivered after the occupancy price has been paid in full.”

14. It was submitted that whilst the 2001 Ordinance had been promulgated to recover the loss caused at the time of allotment, and envisaged regularization of an allotment following determination of the differential Malkano and recovery thereof, in the instant case the occupancy price had not been paid, which constituted a violation of the terms and conditions. It was contended that such a case was beyond the spirit of the 2001 Ordinance and under such circumstances, no *prima facie* case for an injunction stood made out. It was also emphasised that the Plaintiff was being investigated by the National Accountability Bureau (the “**NAB**”), it being contended that such investigation was what had given rise to the aforementioned Constitutional Petitions.

15. Exercising his right of reply, in response to the contention raised on behalf of the Defendants with reference Condition No. 9 (iii) & (v) and Condition 10, learned counsel for the Plaintiff pointed out in support of his argument as to inapplicability of Section 10(5) of the COGLA that Condition 27 of the Statement of Conditions is, of its own terms, relatable to S.24 of the COGLA and envisages an opportunity of hearing being afforded prior to any definitive action being taken for a breach of any of the Conditions, whereas such opportunity had been denied to the Plaintiff in the instant case. Additionally, it was stated that the investigation commenced by the NAB had apparently extended only to the Plaintiff without probing or calling into question the acts of the Committee or any other public functionary, which, per learned counsel, was paradoxical, for even it was considered for the sake of argument that there had been any impropriety, it was axiomatic that the Plaintiff could not have been responsible single-handedly and that, primarily, it was such public functionaries who had sanctioned the regularization of the Suit Land who were culpable. He questioned the *modus operandi* of the NAB and alleged that the exercise being carried out was *mala fide*.

16. Having considered the arguments advanced and examined the material on record, as referred, it merits consideration that no precedent was cited where an allotment that had been regularized under the 2001 Ordinance had then been summarily subjected to cancellation/withdrawal on the touchstone of Section 10(5) of the COGLA. Whether such a case would fall within the scope of Section 10(5) is a question that would properly fall to be determined at the final stage following further proceedings on the main case. Suffice it to say at present that the tenor of that provision appears to suggest otherwise. Furthermore, an arguable

case even otherwise appears to arise as to the contention of the Plaintiff that non-payment of the occupancy price was known to the Committee during the course of proceedings under the 2001 Ordinance and covered through determination of the Malkano at the highest market value per acre. Indeed, the counter-affidavit of the Defendant No.2 itself also alludes to this, in as much as paragraph 2 thereof under the heading of 'Brief Facts' reads as follows:

"The case was placed before the Sindh Government Lands Committee through working paper in its meeting held on 03.03.2012, whereas it was pointed out that the lessee has failed to deposit the occupancy price. However, the Committee desired to regularize the land, subject to payment of differential malkano and also recovered the occupancy price of the land. After recovery of differential malkano, the land stands regularized."

(Underlining added)

17. Furthermore, on query posed as to whether similar cancellation had been undertaken in respect of other persons whose allotments had been regularized without their having paid the occupancy price, learned counsel for the Defendant No.2 merely submitted that to the best of his knowledge this was the case, but when queried further as to whether either the Secretary or Member Land Revenue would confirm as much vide a statement under their signature, was non-committal in that regard.

18. Under the circumstances, where the initial allotment and proceedings under the 2001 Ordinance culminating in the Regularization Letter stand admitted and an issue as to the propriety/*vires* of the Impugned Memorandum arises, which is yet to be determined, a *prima facie* case for injunction stands made out. The Plaintiff has apparently

been in long standing possession of the Suit Land and the balance of convenience is in favour of the continuation of the injunctive relief already extended until final determination of the Suit, as irreparable loss would most likely be otherwise caused by the resumption and resultant divestiture of the Suit Land in the intervening period.

19. The mere fact that an investigation is pending on the part of the NAB in relation to the Suit Land, as was emphasised by counsel for the Defendants, is not of itself of relevance from the standpoint of the Applications under reference. As such, it is not necessary for present purposes to dilate any further on this aspect, and as the investigation is neither the subject of the Suit nor the NAB a party, it would not be appropriate to make any further comment at this stage in relation to that matter.

20. For the reasons stated, the Plaintiff has succeeded in making out a case on CMA No.11015/14 as well as CMA No. 17054/15, which are allowed, with the operation of the Impugned Memorandum remaining suspended and the parties being directed to maintain status-quo in respect of the Suit Land until final determination of the Suit.

21. In view of the Orders made in Constitutional Petition Nos. D-7388/15 and D-7652/17, the Office is directed to place a copy of this Order in the files of those Petitions.

JUDGE

Karachi
Dated _____