

HIGH COURT OF SINDH, KARACHI

Before Muhammad Shafi Siddiqui, J

Messrs AL-AHRAM BUILDERS LIMITED---Plaintiffs

Versus

**PAKISTAN DEFENCE OFFICERS' HOUSING AUTHORITY through
Secretary/Managing Director---Defendant**

Suit No.1003 of 1979, decided on 2nd October, 2014.

(a) Specific Relief Act (I of 1877)---

---S.12---Specific performance of agreement---Indoor management, doctrine of--
-Applicability---In terms of doctrine of indoor management, plaintiff cannot be
made to suffer for any deficiency on the part of defendant to follow informal
procedure internally adopted by it.

Pechs v. Mst. Anwar Sultana PLD 1969 Kar. 474 and UBL v. Pak Wheat
Products Limited PLD 1970 Lah. 235 rel.

(b) Qanun-e-Shahadat (10 of 1984)---

---Art. 129---Two presumptions---Applicability---Where there are two
presumptions and both are equally claimed to be balanced, court must yield for
one which best accords with facts.

(c) Qanun-e-Shahadat (10 of 1984)---

---Art. 129 (g)---Civil Procedure Code (V of 1908), Os.XI & XVI---Withholding
of evidence---Presumption, raising of---Principle---In order to raise presumption
under Art.129(g) of Qanun-e-Shahadat, 1984, it is not necessary to follow
procedure of giving notice for production of documents under O.XI, C.P.C. or to
summon documents under O. XVI, C.P.C.

(d) Specific Relief Act (I of 1877)---

---S.12---Qanun-e-Shahadat (10 of 1984), Art.114---Suit for specific
performance of agreement to sell---Agreement---Proof---Estoppel, principle of--
Applicability---Claim of plaintiff was that earlier suit was withdrawn subject to
conditions mentioned under letter dated 17-6-1974---Plea raised by defendant
society was that the letter in question was result of fraud---Validity---Plaintiff, as
per its plaint had unequivocally accepted offer contained in letter in question and
further withdrew proceedings initiated by it---Although details of earlier suit filed
by plaintiff did not come on record during evidence but such averment had been
reaffirmed by plaintiff's witness in his deposition---Nothing was on record from
the side of defendant to controvert such assertion of plaintiff and defendant was
estopped in law from turning its back and resiling from commitment made
through letter dated 17-6-1974---Defendant invited offers for transfer of plot in
question in response thereto plaintiff submitted offers and the same were accepted
by Managing Committee of defendant society and unconditional offer was
communicated to plaintiff without any reservation---Such was an unqualified
acceptance and constituted valid contract for transfer of subject property by
defendant to plaintiff---Defendant failed to point out any illegality or irregularity
in allotment made in favour of plaintiff, therefore, it could not cancel the same---
Suit was decreed in circumstances.

PLD 2005 Kar. 188 distinguished.

Syed Hamid Rehmani and 7 others v. Hussain Bhai and 27 others Civil Appeal No.K-82 of 1972; Messrs M.A. Khan and Co. v. Pakistan Railway Employees Cooperative Housing Society Limited 2006 SCMR 721; Messrs Habib Bank Limited v. Abdul Wahid Khan 1996 CLC 698; Ziauddin v. DHA 1999 CLC 723; Rehan Hassan Naqvi v. DHA 2000 CLC 1535 and DHA v. Muneer Ahmed Ghulam Mustafa Akhtar 2006 SCMR 178 rel.

Mushtaq A. Memon along with Ishtiaq A. Memon for Plaintiff.

Amir Malik for Defendant.

Dates of hering: 17th, 28th April and 22nd May, 2014.

JUDGMENT

MUHAMMAD SHAFI SIDDIQUI, J.---This suit for specific performance is filed by the plaintiff against Pakistan Defence Officers Cooperative Housing Society Limited, which was then formed under the provisions of Cooperative Societies Act, 1925.

2. That the plaintiff being private limited company on 14-4-1973 has offered to purchase a plot of land bearing No.3-AA measuring 2846 square yards situated in Phase-II of the Society for construction of Super Market and Multi-Storeyed apartment on terms specified and has forwarded a pay order of Rs.33,000 dated 11-4-1973 drawn on Habib Bank Limited. On 15-5-1973 the plaintiff sent another letter in continuation wherein the price was revised for the aforesaid plot.

3. It is pleaded by plaintiff that on 28-5-1973 the defendants accepted the aforesaid letter of offer and accepted the pay order and subsequently it followed by issuance of a certificate dated 2-7-1973 specifying therein the permission granted to the plaintiff for putting up a sign board by the plaintiff. Learned counsel contends that in pursuance of such acceptance the plaintiff started preparing scheme and invested huge sums of money. Subsequently, the plaintiff contends that the defendants came up with an idea that Super Market with parking space alone shall be constructed on the subject plot, which letter was replied on 10-10-1973 for its reconsideration, however, the earnest money was returned.

4. On this return of earnest money, the plaintiff sent a notice under section 70 of Cooperative Societies Act, 1925 followed by Suit for Declaration and Injunction which was subsequently withdrawn on account of the approval of Super Market and Multi- Storeyed apartment vide letter dated 17-6-1974 which was intimated by the Managing Committee of the defendant. The said permission was conditional subject to withdrawal of the suit. Such suit was withdrawn and the defendants were intimated vide letter dated 18-7-1974.

5. That after the withdrawal of the suit learned counsel contends that the plaintiff requested to execute a lease keeping in mind that after construction of apartment and market further sub leases were to be executed to the buyers which request was not adhered to. The plaintiff also vide letter dated 22-4-1075 enclosed a pay order of Rs.2,87,446 towards full payment of the subject land which was returned by the defendants with the observations that the entire transaction stood cancelled, relying on letter dated 7/10-4-1975 which plaintiff claimed to have never received.

6. That again on 5-5-1975 the plaintiff served notice under section 70 of the Cooperative Societies Act, 1925. Subsequently a meeting was arranged between plaintiff and the defendants and the defendants agreed to withdraw their illegal termination and cancellation and agreed to a time period of two years for the completion of Super Market and Multi-Storeyed apartment subject to exclusion of three months extended period. Learned counsel submits that in fact said period

was to commence from the date of approval of the plan by the competent authority and handing over vacant possession of the plot which terms were incorporated in the registered letter dated 10-3-1976. Learned counsel for the plaintiff submit that subsequently, on 4-11-1976 the pay order in the sum of Rs.2,87,446 dated 22-4-1975 was returned for revalidation which was revalidated on same date along with covering letter dated 4-11-1976. It is contended that the said pay order encashed by the defendants being full price of the subject plot and receipt was dispatched to the plaintiffs on 16-12-1976 followed by the allotment order dated 27-1-1977. It is further contended that the plaintiff reminded on 28-5-1977 for the issuance of site plan and hand over of vacant possession of the said plot and to get the 'C' lease registered. It is claimed that possession of subject plot was handed over on 7-6-1977 however, the 'C' lease was not yet executed at the relevant time when the possession of the subject plot was handed over. It is averred that the plaintiff on 14-7-1977 forwarded such plans to the Karachi Cantonment Board and were pending on account of the execution of the 'C' lease despite issuance of several reminders and notices, ultimately a legal notice was then on 3-7-1979 with a request for execution of the aforesaid 'C' lease. However, it is contended that on 28-8-1979 the plaintiff was intimated that the allotment of the subject plot was cancelled and the payment was being refunded which was again followed by a legal notice on behalf of the plaintiff on 3-9-1979. Hence the plaintiff yet again served a notice under section 70 of the Cooperative Societies Act, 1925 followed by this Suit for Specific Performance.

7. After the service of notices and summons, the defendants filed their written statement wherein they have taken some preliminary objections that the suit as framed and filed is misconceived. It is contended that the Pakistan Defence Officers Cooperative Society stood dissolved with effect from 9-8-1980 and instead of Society an Authority as Pakistan Defence Officers Housing Authority was established under Pakistan Defence Housing Officers Society Act, 1980 which authority succeeded all the rights and obligations of the dissolved society. Learned counsel for the defendants submits that the Managing Committee of the said society had approved the plot in question only for construction of Super Market. He added that Annexure C & D to the plaint were not issued by the lawful authority nor were in accordance with the Bylaws or decision of the then committee and the Senior Engineer was not competent to issue letter such as Annexure C & D dated 28-5-1973 and 2-7-1973 respectively. It is contended that the Managing Committee at the relevant time when it was functioning had not accepted offer of the plaintiffs for the construction of Super Market along with Multi-Storeyed apartment and neither any permission to display the sign board to the above effect was granted and if at all such permission was granted it was without any authority and is in violation of the decision of the Managing Committee.

8. Learned counsel argued that on realizing mistake, the Senior Engineer issued letter dated 17-9-1973 and 16-12-1973. It is pleaded that the plaintiffs have managed to obtain the letters C & D referred above in collusion. He further submitted Annexure-H to the plaint which is a letter dated 17/18-7-1974 has no legal effect and on realizing the mistake and error on the part of Senior Engineer the letters dated 7/10-4-1975 and 28-4-1975 were issued and the pay order was returned. Learned counsel for the defendants has submitted that the Senior Engineer was neither competent to restore the allotment nor in any case competent for the registration of the lease of the plot in question and that the encashment of pay order and issuance of the receipt was unlawful act on the part of the Engineer without sanction and approval of the Managing Committee.

9. He submits that without execution of lease neither any Site plan could be given nor vacant possession could be handed over. It is contended that by illegal means the plaintiff obtained the purported handing-over taking-over certificate. However, he maintained that the possession of the plot in question at the relevant time was with the dissolved society and it continued to remain with Pakistan Defence Housing Officers Society. Learned counsel submits that the allotment in question was rightly cancelled and the amount refunded as the payment made by

the plaintiff was not in accordance with the schedule of the payment and they failed to get the long term lease by 28-7-1979 as the building was required to be completed within the stipulated period.

10. Learned counsel relied upon PLD 2005 Karachi 188 with regard to the allotment obtained by fraudulent means. Learned counsel submitted that the plaintiffs hence in view of the above are not entitled to the specific performance of the execution of 'C' lease as claimed in the instant suit. It is contended that the plaintiffs were not interested in the plot in question for themselves but only for the construction of Super Market and Flats to be given to public concerned. It is also contended that in view of the above, plaintiffs are also not entitled to claim damages and no cause of action has accrued to the plaintiffs.

11. On the basis of pleadings, the following issues were framed on 5-3-1989:--

(1) Whether the letter of acceptance dated 28-5-1973 (Copy annexure 'C') accepting plaintiff's letter of offer dated 14-4-1973 (Copy annexure 'A') for purchase of Suit plot and for construction over it of a Super Market and a Multi- Storeyed Building, was not issued with Lawful authority or was issued in violation of the Bye Laws or was issued by the Senior Engineer was not competent to issue the same?

(2) Whether the Certificate dated 2-7-1973 (Copy annexure 'D') granting permission to the plaintiff to put his signboard at the suit plot, was issued without lawful authority by the Senior Engineer who was not competent to issue the same?

(3) Whether Managing Committee of the Pakistan Defence Officers Cooperative Housing Society Limited, under the letter dated 28-5-1973 accepted offer of the plaintiff for purchase of the suit plot bearing No 3-AA National High Way at Karachi, only for the limited purpose of plaintiff's constructing a Super Market over it?

(4) Whether the said Housing Society induced the plaintiff to withdraw his suit for declaration etc. in consideration of getting approval for construction of a multi-storeyed apartments building over the suit plot?

(5) Whether defendant issued the allotment order dated 27-1-1977 after realizing amount of the pay order dated 22-4-1975 and after getting the said Pay Order revalidated?

(6) Whether possession of suit plot continued to remain with the defendant despite obtaining of certificate of handing over and taking over, about it by the plaintiff through illegal means and without lawful authority?

(7) Whether cancellation of the transaction about sale of the suit plot to the plaintiff by the defendant, was illegal, void, unjustifiable and improper?

(8) Whether the defendant agreed to withdraw cancellation of the transaction?

(9) Whether the acts of the parties constituted a contract to be specifically enforced?

(10) Whether the suit is not maintainable and bad in law?

(11) Whether the Senior Engineer and the Secretary of the defendant Society are in collusion with the plaintiff?

(12) Whether this suit is not properly valued?

(13) What should the decree be?

12. Apart from above issues, two more additional issues were framed, which are as under:--

(1) Additional Issue No.1 framed on 12-2-1989.

(2) Whether the defendant had violated the ad-interim injunction order dated 27-11-1979, confirmed on 17-5-1981?

(3) Additional Issue No.2 framed on 17-11-2003.

(4) Whether the suit has been instituted by the authorized person? if not, what is the effect?

13. After the settlement of issues, the matter was fixed for recording evidence. The plaintiff has examined its Managing Director, Syed Abid Ali Zaidi, as Exh.5, whereas defendant has examined its Deputy Director Land, namely, Major (Rtd.) Moeenuddin Humayon as Exh.6.

14. I have heard the learned counsel and perused the material available on record including the evidence adduced by the parties. My findings, on the above issues with reasons are as under:-

FINDINGS

Issues Nos.1 and 11	:	In negative
Issue No.2	:	In negative
Issue No.3	:	In negative
Issue No.4	:	In affirmative
Issue No.5	:	In affirmative
Issue No.6	:	In negative
Addl. Issue 1	:	Answered accordingly
Issues Nos.7 and 8	:	In affirmative
Issue No.9	:	In affirmative
Issue No.10	:	In negative
Addl. Issue 2	:	In affirmative
Issue No.12	:	Already answered.
Issue No.13	:	Suit decreed

REASONS

Issues Nos.1 and 11.

15. These issues can be dealt with together. The burden to prove that the subject letters of acceptance (dated 28-5-1973) in reply to plaintiff's letter of offer dated 14-4-1973 was not issued by the competent authority, was on defendant since it is claimed that such acceptance was in violation of DHA bylaws as mentioned in paragraph 5 of the written statement. The witness of defendant in his affidavit-in-evidence has asserted that:--

"the allotment letter purportedly signed by the Senior Engineer is a forgery as the said officer was not authorized to sign the allotment letter."

16. This assertion of the witness, as incorporated in his affidavit-in-evidence, is contrary to the written statement as well as to other portions of the evidence of Major (Rtd.) Moeenuddin Humayon. It is admitted in the written statement in para 4 that the allotment of the subject plot having been approved by the Managing Committee of the dissolved society. Similarly, in the cross-examination the witness has also stated as under:--

"(a) The plot was allotted to the plaintiff under the decision of the Managing Committee of defendant authority.

(b) The plot in question was allotted to the plaintiff for the purpose of construction of super market at the price of Rs.101 per sq. yard initially. I see Exh.5/19 and it is correct to suggest that it is not mentioned in the said exhibit that the plot in question will be used for super market, however, the plaintiff was required to submit building plan approved by the defendant authority."

17. The plaintiff throughout is consistent regarding the offer and the acceptance in terms of Exhs.5/1 and 5/2. Similarly, the allotment order itself (Exh.5/19) dated 27-1-1977 is also clear in its terms. Such allotment order is not questioned as it has been undisputedly issued and signed by the then Secretary of the defendant pursuant to the meeting of managing committee. Though it is not relevant for this particular issue but the handing- over and taking-over certificate dated 7-6-1977 is not only signed by the Planning Officer/Executing Engineer, Draftsman and Chief Engineer of the defendant, but also bears counter-signature of the then Secretary who had issued the allotment order in pursuance of the Managing Committee's decision dated 25-5-1973. It is also very important factor that the plaintiff has been writing since 14th April, 1973 and on 4-11-1976 (Exh.5/6) the defendant was pleased to encash the Pay Order submitted to them along with letter dated 4-11-1976 (Exh.5/17). These correspondence such as Exhs.5/1, 5/2, 5/3, 5/4, 5/6 and so on till the issuance of the allotment order were not denied by the witnesses. There is no cavil to this submission that the power to sell or let-out the property was vested with the Managing Committee and it was only the decision of the Managing Committee which was forwarded and communicated through Exh.5/3 and it was not the unilateral decision of the Senior Engineer who signed the said letter. There is a difference between the acceptance of the proposal and the issuance of letter confirming the acceptance by the competent authority, which has been done in this case. Thus, Exh.5/3 is in fact a communication of the decision, not the decision itself. Such statement and assertion that the plot was allotted by the Managing Committee was always a stand in the pleading/written statement as well as in the plaint, as highlighted above. Thus, since the acceptance of offer and the allotment is established, therefore, the communication of decisions in this regard cannot become a basis of violating any terms or bylaws. It may be submitted that in terms of doctrine of indoor management the plaintiff cannot be made to suffer for any deficiency on the part of defendant to follow the informal procedure internally adopted by it. If any reference is required one may look at the decisions reported in *Pechs v. Mst. Anwar Sultana* (PLD 1969 Karachi 474 relevant page 289), *UBL v. Pak Wheat Products Limited* (PLD 1970 LAHORE 235 relevant page 248). The issues Nos.1 and 11, therefore, are decided in negative.

Issue No.2.

18. The certificate dated 2-7-1973, annexure "D" to the plaint and Exh.5/5 also reflects the same storey and the burden lies upon defendant. This issue is all about fixation of the signboard at site as site for super market and multi-storied apartments etc. This permission appears to be in consonance and in line with the above acceptance and the signboard only reflects such decision of managing committee. The revised offer vide letter dated 15-5-1973 is prior to acceptance. The restriction against the Construction of upper storeys regarding its height was communicated by the defendant No.1 for the first time through letter dated 17-9-1973 (Exh.5/6), thus the certificate dated 2-7-1973 (Exh.5/5) was issued at the time when DHA had not decided to restrict the number of storeys proposed to be constructed on the subject plot.

19. It is also significant that most of the correspondence on behalf of defendant was done under the signatures of its Senior Engineer. The letter dated 17-9-1973 (Exh.5/6) and letter dated 16-12-1973 (Exh.5/8) through which Pay Order of earnest money was returned to the plaintiff had also been signed by the same

officer on behalf of the defendant. The defendant by these contradictory pleadings disown certain documents issued by the Senior Engineer, which did not find favour for them while relying on number of other correspondence signed by the same officer on behalf of the defendant which find favour for them. This is not only apparently mala fide but also inconsistent stand. The Secretary apparently has signed four documents i.e. Exh.5/9, 5/19, 5/20 and 5/32, whereas rest of the correspondence was made by their authorized persons including Senior Engineer on behalf of the defendant. The defendant thus cannot be allowed to approbate and reprobate in the same breath. It thus cannot be said that such certificate dated 2-7-1973 was issued without lawful authority. Issue No.2 is also decided in negative.

Issue No.3.

20. The burden to prove this issue is also on the defendant. The defendant in paragraph 8 of its written statement has averred that "the plaintiffs were, aware that on the plot in question only a Super Market had to be constructed and not the Multi-storeyed apartments." The above allegation is contradicted by documentary evidence contained in the letter of offer dated 14-4-1973 (Exh.5/1) and the revised offer dated 15-5-1973 (Exh.5/2). The plaintiff had clearly offered the price for construction of Super Market with multi-storeyed apartments thereon. The defendant has not produced minutes of meeting dated 25-5-1973 of its Managing Committee when the revised offer of plaintiff was accepted.

21. Indeed the request for the production of such documents should have come from plaintiff's side, however, the defendant being burdened to prove critical and important issues and in possession of the record of meetings of Managing Committee has chosen not to produce the same for discharge of burden. The failure on the part of plaintiff to have summoned the defendant's witness for production of said documents is not as fatal as it is for defendant under Article 129. The presumption in terms of Article 129(g) of Qanun-e-Shahadat Order, 1984, therefore, will be to the effect that production of such minutes would have negated the case of defendant. The defendant has nowhere denied that the Managing Committee held meeting on 25-5-1973 and resolved to allot the subject property to the plaintiff despite clear offer in letters referred above. When there are two presumptions and both are equally claimed to be balanced, a Court must yield for one which best accords with facts. When evidence which could matter, if not produced, especially by party relying on it, the inference is that if produced, it would be unfavourable to the person who withholds it. In order to raise presumption under Article 129(g) it is not necessary to follow the procedure of giving a notice for production of documents under Order XI, C.P.C. or to summon the documents under Order 16, C.P.C. The only important condition laid down is that party should prove that the document is in existence and is in possession of opposite party against whom inference is to be drawn. In this case decision of managing committee is admitted but for reasons best known to defendant, has not produced the same. The letter of acceptance dated 28-5-1973 (Exh.5/3) and the letter dated 17-6-1974 (Exh.5/9) leave no doubt that construction of multi-storeyed building over the subject property was not prohibited by the Managing Committee, initially. It is pertinent to mention that the letter dated 17-6-1974 (Exh.5/9) is signed by Secretary of the defendant and not by its Senior Engineer. It is true that acceptance of terms of letter dated 17-6-1974 (Exh.5/9) by the plaintiff through its reply dated 18th July, 1974 (Exh.5/ 10) amounts to waiver of claim for construction of more than six upper floors consisting of apartments. The letter of acceptance dated 28-5-1973 (Exh.5/3) does not purport to limit construction over the subject plot merely up to ground floor. Since the decision of managing committee is admitted, therefore, provisions of Article 103 of Qanun-e-Shahadat Order; 1984, would come to rescue as it prohibits any evidence being admitted in contravention of the document. This issue, therefore, is decided in negative.

Issue No.4.

22. The burden to prove this issue is upon the plaintiff who has averred in paragraphs 11, 12 and 13 of the plaint that on account of return of pay order through letter dated 16-12-1973 (Exh.5/8) the plaintiff had resorted to proceedings under section 70 of the Cooperative Societies Act, 1925 and filed a suit for declaration and injunction against the defendant. It is further averred that the defendant had subsequently approved revised scheme for construction of Super Market and multi-storeyed building thereon through letter dated 17-6-1974 (Exh.5/9) subject to the condition of withdrawal of civil proceedings filed against it. The plaintiff, as per paragraph 13 of the plaint, had unequivocally accepted the offer contained in the said letter dated 17-6-1974 (Exh.5/9) and further withdrew the proceedings initiated by it. Although, the details of civil suit for declaration and injunction have not come on record during evidence but such averment has been reaffirmed by the plaintiff's witness in his deposition (Exh.5). There is nothing from the side of defendant to controvert the above assertion. The effect of above is that the defendant is estopped in law from turning its back and resiling from the commitment made through the letter dated 17-6-1974 (Exh.5/9). Reference can be drawn from the judgment pronounced by Hon'ble Supreme Court of Pakistan dated 2-9-1981 passed in Civil Appeal No.K-82 of 1972 (Syed Hamid Rehmani and 7 others v. Hussain Bhai and 27 others) in the following terms:-

"10. The four principles recognized for giving effect to estoppel, and relevant for the purposes of this case are, firstly that the fact recited should be essential for the deed creating the rights and obligations; secondly the suit must be based on the deed or concerning a right and of it; thirdly that it should have prompted the other side to an action to its prejudice; and fourth that the estoppel should not be utilized for making something legal which in fact, is illegal, offending against a statutory provision concerned with public policy."

23. Applying the above principle, the defendant is estopped in law from what they have pleaded as against facts came through letter dated 17-6-1974 (Exh.5/9). To put it in different words, no locus poenitentiae was left in the defendant to avoid implementation of the contract for transfer and lease of the subject plot in favour of plaintiff. The issue, in view of the above, is answered in the affirmative.

Issue No.5.

24. The burden to prove this issue is on the plaintiff who has alleged in the plaint that Allotment Order dated 27-1-1977 (Exh.5/19) was issued in its name by the defendant after payment of entire price of the subject property in the sum of Rs.287,446.00 through pay order. The plaintiff's witness has produced letter dated 10-3-1976 (Exh.5/15) which was addressed to the Secretary of the defendant and reads as under:--

"We shall be obliged if our request is considered favourably. In the meantime we are pleased to enclose herewith our Pay Order No.OAF 917344 dated 22nd April 75 for Rs.287,446 in full and final payment of the price of the subject plot. Kindly acknowledge the receipt."

25. Though this letter is not denied but as a proof of dispatch and delivery of the said letter the plaintiff has produced postal receipt as Exh.5/15/2 and the acknowledgement due as Exh.5/15/1. The delivery of pay order dated 22-4-1975 for Rs.287,446.00 is further confirmed from letter dated 4-11-1976 (Exh.5/16) whereby the defendant had returned the said pay order for revalidation. As per letter dated 4-11-1976 (Exh.5/17), the revalidated pay order for Rs.287,446.00 was sent back by the plaintiff and apart from the postal receipt (Exh.5/17/1) and AD receipt Exh.5/17/2), the plaintiff has produced printed receipt dated 16-12-1976 issued by the defendant as Exh.5/18 acknowledging receipt of the said pay order for Rs.287,446.00. In view of all the above documents the defendant's allegation about collusion or fraud in offer and subsequent issuance of Allotment Order dated 27-1-1977 (Exh.5/19) is not tenable. Copy of Allotment Order

(Exh.5/19) appears to have been endorsed to the Military Estate Officer Karachi as well as the Planning Officer of the defendant. The fact that the said pay order dated 22-4-1975, revalidated on 4-11-1976, was encashed by the defendant is established from issuance of Cheque No.375334 dated 27-8-1979 for Rs.287,446.00 in favour of plaintiff by the defendant which was enclosed with the letter dated 28th August, 1979 (Exh.5/32), whereby cancellation of allotment of the subject property was ultimately, communicated to the plaintiff under the signature of its Secretary. Same Cheque, according to the uncontroverted pleadings and the legal notice dated 3rd September, 1979 (Exh.5/33), was returned to the defendant. In the circumstances, I have no difficulty in reaching the conclusion that allotment order dated 27-1-1977 (Exh.5/19) was issued by defendant after realizing the sum of Rs.287,446.00 which is the full amount of consideration for the subject property measuring 2846 Sq. Yds. calculated at the rate of Rs.101 per sq. yd at the relevant time. It is pertinent to mention that in paragraph 2 of the affidavit-in-evidence of Major (Rtd.) Moeenuddin Humayun (Exh.6), it is averred that "the allotment letter purportedly signed by the Senior Engineer is a forgery as the said officer was not authorized to sign the allotment orders". The Allotment Order dated 27-1-1977 (Exh.5, 19), ex facie, is not signed by the Senior Engineer of defendant but by its Secretary who is fully competent to sign all documents or receipts on behalf of the defendant by virtue of Bylaw No.62. The defendant's sole witness Major (Rtd.) Moeenuddin Humayun, in his cross-examination, has candidly admitted that the plot in question was allotted to the plaintiff and the Allotment Order (Exh.5/19) did not mention that the subject property will be used only for super market. In view of the above, this issue decided in the affirmative.

Issue No.6 and Additional Issue No.1.

26. These issues can be dealt with together. According to paragraph 6 of the plaint, the defendant had issued Certificate dated 2-7-1973 (Exh.5/5) allowing it to put signboard at the subject plot signifying "Site for super-market and multi-storeyed apartments building". In paragraph 24 of the plaint, it is specifically averred that the defendant had handed over charge of the subject property to it on 7-6-1977 which was duly evidenced through the Handing-over/Taking-over Possession Certificate (Exh.5/22). The above averments are dealt in the written statement in paragraphs 5 and 17. In paragraph 5 of written statement, the defendant has not denied issuance of Certificate (Exh.5/5) but has pleaded that the Senior Engineer could not grant such permission in violation of decision of the Managing Committee. Defendant has not produced decision of the Managing Committee which was allegedly violated by granting permission to display the signboard (Exh.5/5). As regards Handing-over/Taking-over Possession Certificate, it is alleged in paragraph 17 of written statement that it was obtained "through illegal means and without lawful authority". It is further asserted by the defendant that vacant possession of commercial plots could not be given without the execution of lease in favour of allottees and that the possession of subject property has remained with the defendant. In this regard the defendant has not cited any rule or bylaw to substantiate the assertion to the effect that possession of commercial plots could not be handed over without execution of lease more importantly when entire consideration was paid. Similarly, the defendant has not specified any rule or authority which could render the execution of Handing-over/Taking-over Possession Certificate (Exh.5/20) illegal or in excess of authority. The said documents, as already stated, undeniably signed by five officers of the defendant including its Secretary. Thus issuance of the same is not denied by the authority.

27. On 27-11-1979, the plaintiff had filed application for interim injunction under Order XXXIX, Rules 1 and 2, C.P.C. being C.M.A. No.4629 of 1979 praying for interim injunction to restrain the defendant from interfering with its possession of the subject property. On 27-11-1979, through ad interim order, the defendant was restrained from taking forcible possession of the subject property from the plaintiff. The 'matter was fixed in Court for hearing the said application on 5-12-1979 when the defendant was represented by its learned Advocate in whose

presence the ad- interim order was extended. On 17-5-1981 the ad-interim order was confirmed, by consent.

28. In terms of pleadings, on 11th February, 1988, the Managing Director of plaintiff discovered some activity over the subject property and found a bulldozer operating in all directions for levelling the land. It was further found that several truck-loads of stone, belonging to the plaintiff and lying on the subject property, were missing. Upon enquiry, it was divulged by the workers that the work was being done by them on behalf of the defendant. Therefore, the plaintiff immediately filed an application under Order XXXIX, Rule 2(3) C.P.C. being C.M.A. No.1040 of 1988 seeking punitive action against the defendant with further direction for restoration of status-quo ante. The application was supported by affidavit. On 24-9-1988, the defendant filed counter- affidavit denying violation of interim order with further averment that the subject plot was vacant and the filth and other rubbish lying over it was being removed on account of its location in front of Masjid-e-Tooba.

29. The additional issue about disobedience of interim injunction or otherwise was framed in the above circumstances since the matter required evidence. The transfer of physical possession of subject property to the plaintiff is being claimed to have been confirmed from the contents of Handing-over/Taking-over Certificate, (Exh.5/20). Apart from such documentary evidence, both the parties have orally supported their respective pleadings referred hereinabove. However, the deposition of Syed Abid Ali Zaidi about handing over physical possession of subject property at the time of execution of Handing-over/Taking-over Possession Certificate (Exh.5/20) has remained unshattered. The defendant in its pleadings and the defence witness in his deposition has maintained that physical possession of subject property had always remained with it. However, by virtue of orders passed on C.M.A. No.4629/1979 and when such interim orders were confirmed restraining the defendant from taking forcible possession tend to show that such was the position at the relevant time. Consequently, the possession of the subject property is proved to have remained with the plaintiff. However it is a matter of facts that once the suit of plaintiff was dismissed which was restored subsequently. It is significant to point out that the sole witness of defendant in his cross-examination has stated as follows:--

"It is not in my knowledge that till June 1996 plaintiff was in possession of the plot in question. The possession of the plot in question was taken over by the defendant-Authority after the dismissal of the suit."

30. The admission of having taken possession of subject property from plaintiff, in the above terms, is significant. According to the record, the above suit was dismissed for non- prosecution on 19-3-1998 but was restored through judgment dated 26-9-2000 passed in Intra Court Appeal upon payment of Rs.50,000 as costs. Contents of cross of defendant witness and defence taken in counter-affidavit to contempt application are contrary. The defendant, therefore, is liable to restore the physical possession of subject property to plaintiff in terms of Order 39, Rule 2(3), C.P.C. The issue No.6 is, therefore, decided in negative and the additional issue No.1 is answered accordingly.

Issues Nos.7 & 8.

31. These issues arise out of allegations that after insistence by plaintiff through letter dated 10-10-1973 (Exh.5/7) to construct super market on ground floor of the subject plot with multi-storeyed building thereon, the defendant through letter dated 16-12-1973 (Exh.5/8), had returned back the pay order for Rs.30,000 (earnest money) un-encashed. The plaintiff, as observed under Issue No.4, had initiated proceedings against the defendant due to its refusal to honour the decision for allotment of subject property taken by Managing Committee of the defendant on 25-5-1973 and communicated through letter dated 28-5-1973 (Exh.5/3). The defendant had subsequently agreed to fulfil the contract to make allotment of subject property upon submission of revised plan for construction of

super market and multi-storeyed building thereon subject to withdrawal of proceedings, earlier initiated by the plaintiff. Such decision was explicitly conveyed through letter dated 17-6-1974 (Exh.5/9) which was signed by Secretary of the defendant. Certainly the defendant had invited offers for transfer of subject plot and in response thereto, the plaintiff had submitted offers on 14-4-1973 (Exh.5/1) and 15-5-1973 (Exh.5/2). The offer was accepted by the Managing Committee of defendant on 25-5-1973 and the unconditional acceptance of offer was communicated to the plaintiff on 28-5-1973 (Exh.5/3) without any reservation whatsoever. This being an unqualified acceptance, constituted valid contract for transfer of the subject property by defendant to the plaintiff. Such principle, if any reference is needed, is affirmed by judgment of Hon'ble Supreme Court in Messrs M.A. Khan and Co. v. Pakistan Railway Employees Cooperative Housing Society Limited (2006 SCMR 721) relevant portion at page 729) and Division Bench judgment of this Hon'ble Court in Messrs Habib Bank Limited v. Abdul Wahid Khan (1996 CLC 698 relevant portion at page 703). Moreover, these issues have become redundant since the defendant had subsequently, withdrawn cancellation of the transaction through letter dated 17-6-1974 (Exh.5/9) which was further acted upon by both the parties and after payment of full amount of consideration, Allotment Order dated 27-1-1977 (Exh.5/19) was issued to the plaintiff. The issues Nos.7 and 8 are, therefore, answered in affirmative.

Issue No.9.

32. This is a material and core issue in the present suit and its burden is upon the plaintiff. As already stated, the plaintiff had submitted its offer on 14-4-1973 (Exh.5/1) and 15-5-1973 (Exh.5/2) which was considered by the Managing Committee of defendant in its meeting dated 25-5-1973 and accepted. The acceptance of plaintiff's offer by the Managing Committee, as above, was communicated to the plaintiff through letter dated 28-5-1973 (Exh.5/3) in unqualified terms. Although, the defendant had tried to resile from the concluded contract reached between the parties and returned the pay order for Rs.30,000 (earnest money) without encashment on 16-12-1973 (Exh.5/8), the parties had renegotiated and were ad idem about the terms of contract which is reflected from the defendant's letter dated 17-6-1974 (Exh.5/9). This was followed by payment of entire sale consideration in the sum of Rs.287,446.00 which was pocketed by the defendant through encashment of pay order. Eventually, Allotment Order dated 27-1-1977 (Exh.5/19) was issued which had the effect of creating vested right in rem in favour of the plaintiff. The plaintiff, apart from the constitution of valid and enforceable contract, became entitled to protect its right in respect of subject Property upon issuance of Allotment Order (Exh.5/19) dated 27-1-1977. A number of correspondence addressed thereafter by the plaintiff requesting for execution of 'C' Lease and approval of building plan over the subject plot clearly establishes that the plaintiff had all along and persistently pursued specific performance of the contract for transfer/lease of subject property in its favour. The sudden cancellation of allotment through letter dated 28-8-1979 (Exh.5/32) appears to be unjustified, arbitrary and unlawful.

33. According to Bylaw No. 54(q), allotment of land can be cancelled only when an allottee or member "fails to pay development charges or any other dues of the society after due notice". The various grounds pleaded in the letter dated 28-8-1979 (Exh.5/32) are stranger to the bylaws and do not justify cancellation of allotment nor empowers the defendant to deny the rights which came to vest in the plaintiff. Such principle is also affirmed by this Hon'ble Court in the cases of Ziauddin v. DHA (1999 CLC 723 relevant at page 729) and Rehan Hassan Naqvi v. DHA (2000 CLC 1535 relevant at page 1542). The defendant had not specified any lawful breaches by plaintiff.

34. The plaintiff's offer was clearly for construction of Super Market and Multi-Storeyed Building thereon. Therefore, the allegation about the offer being only for construction of Super Market is unfounded and not contrary to the letter of plaintiff and subsequent acceptance. The plaintiff had submitted building plan for

construction of Super Market and Multi-Storeyed Building over the subject property which was initially forwarded by the defendant to Karachi Cantonment Board and returned only for want of Lease Deed. Obviously, the construction over the subject property could not be made until approval of building plan by the defendant and the concerned Cantonment Board. The plaintiff may not be made to suffer on this score as plaintiff is not to be blamed. The plaintiff had paid entire amount of consideration, and therefore, the allegation of failure to make payment in accordance with time schedule is baseless and unfounded. Similarly, the defendant had failed to execute 'C' Lease in favour of plaintiff despite repeated reminders which are produced as Exh.5/21 to Exh.5/31. The plaintiff and the defendant having entered into a valid and lawful contract, are bound to fulfil the same. The defendant has no authority nor any justification to resile from its commitment for lease of the subject property in favour of plaintiff with the right to raise construction thereon in accordance with law and the regulations.

35. The defendant has relied on the judgment reported in PLD 2005 Karachi 188 to contend that an allotment fraudulently obtained, does not create any right. It is submitted that in the reported case decided under writ jurisdiction, it was found that the Managing Committee of the defendant had not passed any resolution or taken decision to make allotment. In the present case, the decision to allot the subject plot was taken by the Managing Committee in its meeting held on 25-5-1973 and the decision was communicated on 28-5-1973 through Exh.5/3 the allotment order dated 27-1-1977 (Exh.5/19) also refers to the decision taken by Managing Committee of the defendant for allotment of subject plot in favour of plaintiff. The defendant has not pointed out any illegality or irregularity in the allotment made in favour of plaintiff, and therefore, it cannot cancel the same. If any reference is needed one may look at the case of DHA v. Muneer Ahmed Ghulam Mustafa Akhtar (2006 SCMR 178 relevant pages 181 and 182). The issue is accordingly answered in the affirmative.

Issue No.10 and Additional issue No.2.

36. The burden to prove these issues is on the defendant. The only objection taken by the defendant about maintainability of the suit is based on Order XXIX, Rule 1, C.P.C. In his evidence, recorded on 17-11-2003, the plaintiff's Managing Director has produced minutes of meeting of its Board of Directors dated 22-10-1979 as Exh.5/35 authorizing him to file civil suit against the defendant for restoration of the plaintiff's rights in respect of subject property. The suit has, thus, been filed through an authorized person and no legal defect or impediment is shown by the defendant there against. Accordingly, the issue No.10 is answering in negative, while the additional issue No.2 is decided in affirmative.

Issue No.12.

37. This issue has been answered vide order dated 22-9-1996 passed on C.M.A. No.4375 of 1996.

Issue No.13.

38. In view of above, the suit of the plaintiff is decreed as prayed.

MH/A-138/Sindh

Suit decreed.