

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.816 of 2008

[Mrs. Nuzhat Irfanv.....Karachi Development Authority & others]

Date of Hearing : 14.10.2021

Plaintiff : Mr. Asif A. Memon, Advocate.
Mr. Shahid Ali Ansari, Advocate.

Defendants : Ms. Afsheen Aman, Advocate for KDA
a/w Mr. Muzafar Ali, Advocate.

Mr. Muhammad Rashid Hussain,
Additional Director (Commercial),
KDA.

JUDGMENT

Zulfiqar Ahmad Khan, J:-Through this suit, the plaintiff brings on record defendants' deference by not handing over possession of commercial plot No. SB-10, Block No.1-A, KDA Scheme No.36, Gulistan-e-Jauhar, Karachi admeasuring 400 sq. yds. (the "said plot") to her despite receiving entire payment and value of occupancy of the said plot. Background of the case is that the plaintiff was allotted the said plot vide allotment order No.KDA/COMCELL/88/SB-10/1-A/36/271 dated 26.02.1989 on the basis of open auction held on 27.10.1987 which was approved by Governing Body through Resolution No.7 dated 27.02.1988. It is alleged in the plaint that the plaintiff was issued site plan in due course and all installments of occupancy price were duly paid and the final installment towards occupancy value was paid on 07.10.1989. Plaintiff further alleged that having paid the entire price of the said plot, she and her representative visited the office of the defendants for possession of the said plot but she was kept on hollow hopes uptil 2007 and having lost all hopes she sent a legal notice through her counsel on

10.04.2008 but even thereafter possession of the said plot was not given to her, therefore, she has filed the present suit making the following prayers:-

“1). Declaration that having paid full occupancy value, the plaintiff is entitled physical possession and lease of suit plot No. SB-10, Block I-A, KDA Scheme No. 36, Gulistan-e-Johar, Karachi measuring 400 square yards;

2). Possession of suit plot with developed infrastructure; ALTERNATIVELY possession of similar plot of identical value for commercial use with compensation/damages in the sum of Rs.55.00 million being present market value of the suit plot with further increase commensurate with the market value of the suit plot at the time of decree with mark up at the rate of 64 paise per day per thousand rupees or 2% above bank rate;

3). Mesne profits/compensation at the rate of Rs.30,000/- per day from the date of complete payment of occupancy value until delivery of possession of the suit plot with markup at bank rate;

4). Injunction restraining the Defendants from disposing of commercial plots of land in KDA Scheme No.36, Gulistan-e-Johar, Karachi;

5). Cost of the proceedings; and

6). Any other, further or better relief(s) as may be considered appropriate by this Honourable Court in the circumstances of the case;”

2. Having admitted the case, notices were issued to the defendants and in deference of the Court's notice, the defendants filed their written statement raising objection as to the maintainability of the suit and that the suit was barred, as well as having no cause of action, but in the later part admitted that the plaintiff participated in the auction proceedings and paid four installments towards occupancy value of the said plot, thereafter, allotment order dated 14.03.1989 was issued to the plaintiff. Apart

from above, the defendants alleged in their written statement that the University of Karachi is claiming the land of the KDA i.e. Scheme 36 by overreaching its territory which claim of the University is malafide and in this respect the University filed Suit No.353/2010.

3. Record shows that on 10.01.2018, issues were framed and the matter was referred to the learned Commissioner for recording evidence. The issues settled by this court are as under:-

- “1. Whether the suit is maintainable?
2. Is the plaintiff entitled to physical possession and lease of plot No. SB-10, Block-1-A, KDA Scheme No.36, Gulistan-e-Johar, Karachi, measuring 400 sq. yds?
3. Is the plaintiff entitled to grant of compensation/damages with mark-up? If so, how much and at what rate?
4. Is the plaintiff entitled to mesne profit in respect of the suit plot? If so, what amount
5. What should the decree be?”

4. Counsel introducing the plaintiff contended that rights of the plaintiff are constitutionally protected vide Article 24 of the Constitution, 1973. Having reiterated the contents of the pleadings of the suit, counsel contended that the defendants admitted in their written reply claim of the plaintiff who paid the entire amount claimed by the defendants in respect of the said plot. While concluding his submissions, he vociferously argued that the present action at law ought to had been decreed upon admission of the defendants in early 2011 as mandated under Order XII Rule 6 CPC.

5. Conversely, representative of the defendants did not deny the participation of the plaintiff in the bid, depositing entire bid amount of the said plot to the KDA by the plaintiff being the highest bidder and allotment order having been issued by the defendants but she submits that University of Karachi is overreaching its precincts by claiming land in Scheme 36 of KDA which claim of the University is illegal and for this purpose the University had also filed a suit No.353/2010 which is pending adjudication in this Court. To a query raised by this Court as to whether defendants admit to the claim of the plaintiff to the extent of allotment of said plot in her favour, the learned counsel could not controvert and admitted that said plot was allotted to the plaintiff upon the payment of entire amount to the defendants by the plaintiff.

6. Heard the arguments and examined the evidence. **Issue No.1** is germane to the maintainability of the suit. The pleadings of the plaintiff suggest that soon after allotment of the said plot, she and her representative visited the office of the defendants for possession of the said plot and she was assured by the official concerned that the said plot would be handed out to the plaintiff but to no avail. It is considered pertinent to record here that the plaintiff in order to have possession of the said plot given to her wrote approximately 29 letters as exhibit X/3 to X/34 (available in evidence file at page 39 to 107) and finally she wrote a legal notice to the defendants in the year 2008 through her legal counsel beseeching for the possession of the said plot but to no avail too. It is an established position that accrual of “cause of action” and that a “suit is barred by law” are two distinct attributes and characteristics. It is not necessarily meant

that nonexistence of cause of action concomitantly means that the suit is also barred by law. The expression “cause of action” means a bundle of facts which if traversed, a suitor claiming relief was required to prove for obtaining judgment. Nevertheless, it does not mean that even if one such fact, a constituent of cause of action was in existence, the claim could succeed. It is a well understood position now that not only a party seeking relief is to have a cause of action with regards the transaction or the alleged act having been done, but also at the time of the institution of the claim. A suitor is required to show that not only a right had been infringed in a manner to entitle him to a relief, but also that when he approached the court the right to seek relief was also in existence.

7. An austere look to the substratum of the above deliberation, unequivocally demonstrates and confirms that the plaintiff could have filed the instant civil suit in the present form for alleviation of her grievances, therefore, the Issue No.1 is answered in affirmative.

8. Issue No.2. Onus to prove this issue is on the plaintiff. In order strengthen and validate her claim, plaintiff produced overwhelming documentary evidence during her examination-in-chief. Exh. X is notice of auction, auction program is marked as Exh. X/1, Bank Challan of Rs.480,000/- as Exh. PW/2. Letter dated 01.11.1998 addressed to the plaintiff for depositing installments as Exh. PW/3. Bank Challan of Rs.960,000/- being second and third installments of the said plot as Exh. PW/4, Site Plan of the said plot as Exh. PW/5, Bank Challan of Rs.480,000/- being fourth installment of the said plot

as Exh. PW/6, Allotment Order dated 26.02.1984 as Exh. PW/7 and letters addressed by the plaintiff to the defendants for possession of the said plot which are available in evidence file.

9. The plaintiff was put to the test of lengthy cross-examination by the defendants' counsel but nothing came out favourable to the defendants. Apart from this, the defendants in their written statement admitted the claim of the plaintiff to the extent of allotment of said plot. It is considered pertinent to reproduce the relevant constituent of the written statement filed by the defendants which is delineated hereunder:-

“...That as regard contents of the plaint, it is submitted that the suit plot i.e. commercial plot No. SB-10, Block-1/A, Scheme No. 36, had been disposed of through open public auction held by the defunct KDA on 26.10.1987, the bid for Rs.4800/- was knocked down in favour of the plaintiff. 25% cost of plot has been recovered at the fall of hammer, the then Governing Body of the defunct KDA now CDGK has approved its bid vide Resolution No.7, dated 27.02.1988, accordingly the bidder has made 2nd 3rd and 4th installments of the occupancy value/cost of the plot vide challan dated 31.07.1988, 22.02.1989 and 07.10.1989 and the allotment order has been issued on 14.03.1989...”

10. It is gleaned from appraisal of the foregoing that the defendants neither denied the claim of the plaintiff to the extent of allotment of said plot nor deposit of occupancy value of the said plot and that the defendants acknowledged to have received all occupancy value of the said plot. It is settled principle that right in immovable property itself is a right in rem and in this case clearly a right in rem in respect of the plot has passed to the allottee i.e.

plaintiff¹. Furthermore, a right in rem corresponds to a duty imposed upon persons in general while a right in personam corresponds to a duty imposed upon determinate persons. Apart from above, Rights in *Rem* or *Jus in Rem* means every person entering into a contract has rights in rem. This is right available to him or her against the entire world. It protects a person's property from the entire world, whereas, right in *Personam* or *Jus in Personam* is the opposite of right in *rem*. Right in *personam* gives the person rights against one person or party to the contract. It generally will correspond with a duty imposed on the said person or party.

11. Reverting to the merits of the issue under discussion, defendants produced Muhammad Mairaj Ahmed, Additional Director, Land Department, KDA as their witness and having produced the relevant documents as Exh. DW/1 to DW/2, the said witness admitted the suggestions of the learned counsel for the plaintiff during his cross examination. It is considered illustrative to highlight relevant constituent of the cross-examination of the latter which is reproduced as under:-

“According to the record of the defendant physical possession of the subject plot does not appear to have been given to the allottee or take by her from the concerned department of the defendant.”

“It is correct that the plaintiff had deposited the entire occupancy value of the subject plot in four (04) installments”.

“I am shown Exh. PW/2, Exh. PW/4 and PW/6 and say that the same shows payment of entire occupancy value and no surcharge of the late payment or penalty is shown therein.”

¹ Per. Muhammad Haleem & Z.A. Channa.JJ in the case of Haji Noor Muhammad & others v. KDA & others (PLD 1975 Karachi 373)

“It is correct that after payment of entire occupancy value, site plan and allotment-cum-possession the concerned department of defendant is liable to hand over physical possession to the allottee.”

12. It is crystal clear from appraisal of the foregoing that the defendants never negated the auction of the said plot, the plaintiff being highest bidder of the said plot, deposited entire occupancy value of the said plot and that the plaintiff is entitled for the possession of the said plot. The defendants admitted the participation of the plaintiff in the auction proceedings, further admitted that the plaintiff was declared as successful bidder and payment of occupancy value of the said plot and issuance of allotment order by them in favour of the plaintiff. It is settled principle that admitted documents and admitted facts do not need to be proved. In the case of **Muhammad Bachal v. Muhammad Arif Memon (2019 YLR 1040 rel. at page 1643-1644) (authored by me)**, I have went on to hold the similar principle. Furthermore, it is a golden principle of Qanun-e-Shahadat Order, 1984 as mandated vide Article 113 that facts admitted need not to be proved. For the ease of reference, Article 113 of the Qanun-e-Shahadat Order, 1984 is reproduced as under:-

“113. Facts admitted need not be proved. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they redeemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

13. Article 23 of the Constitution provides that every citizen shall have the right to acquire, hold and dispose of property in any part of

Pakistan and such right is one of the fundamental rights enshrined by the Constitution, and guarantee for protection of the right has been provided by Article 24(1) of the Constitution. Article 24 of the Constitution recognizes right of a person to hold the property and ordains that no person shall be compulsory deprived of the property and it applies to every person, natural or artificial. Furthermore, Article 24 of the Constitution, 1973 is not confined in its application to citizens only, it will also apply to corporation and it is the indefeasible right of every citizen to be treated in accordance with law he fulfills the requirement as to knowledge, skill and moral standard prescribed by law and actions of the defendants in not handing over possession of the said plot is against the said Fundamental Right.

14. In view of the rationale and deliberation, the **Issue No.2 is answered in affirmative.**

15. **Issue Nos. 3 & 4** will be discussed simultaneously and in the same breath. Plaintiff introduced on record her grievances that having allotted the said plot in her favour by the defendants, she and her representative approached the defendants for the possession of the said plot but they were kept on hollow hopes. According to her, soon after allotment order issued her favour in the year 1989, she addressed a communication to the defendants on 28.03.1989 for possession of the said plot but neither the said letter was replied by the defendants nor possession of the said plot was handed out to the plaintiff. It is considered pertinent to record here that the plaintiff in order to have possession of the said plot wrote approximately 29

letters as exhibit X/3 to X/34 (available in evidence file at page 39 to 107) but she could not get fruits and having aggrieved with the acts of the defendants since inception of allotment till the year 2007, finally she wrote a legal notice to the defendants in the year 2008 through her legal counsel beseeching for the possession of the said plot but to no avail too. Having suffered this agony at the hands of defendants, the plaintiff beseeched for the award of compensation. A glance over the defendants' witness, it unfurls that the defendants' witness admitted amid cross-examination that husband of the plaintiff requested to the defendants many times through several communications/letters for handing over of the physical possession of the said plot and that the said witness also admitted to have received these communications/letters by the plaintiff. The said defendants' witness went on to further admit that the occupancy value of the said plot deposited by the plaintiff with the defendants has been utilized by the KDA/defendants. In order to reach at right and just conclusion of the issues under discussion, it would be significant to reproduce the relevant constituent of the cross-examination of defendants' witness namely Muhammad Mairaj Ahmed which is delineated hereunder:-

“I am shown Articles X/3 to X/10 and X/14 to X/34 which show that the husband of plaintiff had requested KDA/Director Land and Management Cell for delivery of physical possession.”

“I See Article X/35 which is a legal notice dated 10.04.2008, sent to various officers of KDA on behalf of the plaintiff and confirm the same to have been received.”

“It is correct to say that the money deposited by the plaintiff with KDA has been utilized by KDA.”

“It is correct to say that the defendant KDA has never offered the plaintiff any compensation in terms of money or land.”

“It is correct to say that KDA has not taken any steps to compensate the plaintiff for the loss sustained by her”

[underlined added for emphasis]

16. It is gleaned from appraisal of the foregoing that the defendants’ witness admitted to have received several communication/letter of entreatment for the possession of said plot but, nonetheless, the plaintiff was kept away from her fundamental right to acquire property and which right is constitutionally protected vide Articles 23 & 24 of the Constitution. The said witness went on to admit further that the occupancy value paid by the plaintiff had been utilized by the defendants and even neither the said plot was handed out to the plaintiff nor the money was refunded back to the plaintiff, therefore, in my humble view, the plaintiff is entitled for the damages/compensation. During course of arguments, learned counsel for the plaintiff vociferously contended that owing to the acts of the defendants in not handing over physical possession of the said plot despite receiving entire occupancy value of the said plot, the plaintiff mentally suffered a lot such as loss of health, loss of valuable time, mental torture, mental agony/shock, extreme physical pain and financial loss. It is fact that mental shock, agony and torture imply a state of mind. Such state of mind can be proved only by a positive assertion of one who experiences the same².

17. It is a common knowledge that damages can be classified into two types such as “general damages” and “special damages”. The

² Pakistan International Airlines Corporation v. Syed Ali Raza Rizvi (1996 CLC 627)

difference between general damages and special damages is that the former is initially quantified by the person making the claim, while the latter is assessed by the court. Court cases relating to civil claims usually involve a claim for damages. In some cases, a party may be seeking what is referred to as specific relief. This may be in terms of an order to prevent the performance of an act or compelling the performance of a specific act. In the majority of instances, the claim is eventually a monetary one. From the point of view of an individual, all that matters is that the money awarded is received, unless specific relief is sought and money is not an important consideration to the claimant. By virtue of the Specific Relief Act 1950, it is stated that specific relief is given by taking possession of certain property and delivering it to a claimant or by ordering a party to do the very act which he is under an obligation to do or by preventing a party from doing that which he is under an obligation not to do, and finally by determining and declaring the rights of parties otherwise than by an award of compensation. Otherwise, it matters little to the aggrieved person as to whether it is general or special damages.

18. In the case at hand, the plaintiff did not claim a fixed amount of damages in lieu of her suffering owing to the contemptuous acts of the defendants jointly and severally but left herself at the mercy of this Court so that the Court having seen the agony of trial faced by the plaintiff and acts of the defendants in not handing over the physical possession of the said plot, award damages/compensation. It is settled exposition of law that, the onus of proof for damages lies on the shoulder of claimant/plaintiff and without discharging such onus, damages of course, cannot be granted straightaway more

particularly even a fixed amount of damages cannot be granted, until and unless, the quantum of loss[es] / damages, actually suffered is proved through sufficient evidence. Damages, not doubt firstly to be pleaded and thereafter to be proved by leading reliable, trustworthy and cogent evidence as well. The Hon'ble Supreme Court in the case of Sufi Muhammad Ishaque v. The Metropolitan Corporation Lahore (PLD 1996 S.C 737) held that *"...the damages for mental torture, nervous shock etc, fall in the category of general damages for which no standard or method of proof can be laid down with precision. The claim of such nature is difficult to estimate. The Courts, therefore, in assessing such damages employ a guess work which can only meet the test of a reasonable assessment by a man of ordinary prudence...."*

19. In the circumstances at hand, I tend to agree with the submissions of learned counsel for the plaintiff that in an epoch when the buyer is deprived from his/her valuable property right which is constitutionally protected vide Article 24 of the Constitution, 1973 and put the street into quest, justice. Having observed the agonies of the plaintiff such as agony of trial, mental stress, loss of valuable livelihood, mental shock, loss of valuable money which has been admitted by the defendants, reduction in quality of life and the later all are kinds of general damages, therefore, in my unpretentious view, the plaintiff is entitled for general damages in the sum of Rs.3,000,000/- (rupees three million only) and the same would be apportioned to the plaintiff in shape of compensation. As far as mesne profit in concerned, it hasn't been introduced on record that the defendants are in illegal possession of the said plot. It is a basic

ingredient to award mesne profit that plaintiff has to prove that the defendants are in illegal possession of the property and that acquiring illegal benefits from it, therefore, the issue of mesne profit is answered in negation.

20. What I perceived and sensed from the tenor and sagacity of the effect of above discussion that the plaintiff is entitled for physical possession of the said plot but it has brought on record that the said plot is in pending litigation in suit No.353/2010 between the Karachi University and the KDA. A close look at the substratum of the cross examination of the defendants, it manifests that the said defendants' witness admitted that due to inability of defendants to deliver physical peaceful possession of plot to plaintiff, defendants can allot and give possession of an alternate plot but they would be in possession to allot/give an alternate plot subject to the Order/Decree of the Court (the said admission of the defendants' witness is available at page 149 to 151 of the evidence file). It is an admitted position that the plaintiff was allotted the said plot but the same is in litigation. The Hon'ble Supreme Court in the case of **Dr. Faisal Masud v. Umer Rasool, Director General, Lahore Development Authority (2017 SCMR 287)** has been pleased to held that in case of unavailability of allotted plot an alternate plot may be granted, therefore, keeping in view the said dictum of the Hon'ble Supreme Court, the defendants are directed to allot an alternate plot to the plaintiff to be equal in size and equal in location and neighborhood in lieu of said plot and this allotment would satisfy the rule of fundamental right to property as enshrined by Article 23 of the Constitution of the Islamic Republic of Pakistan, 1973.

21. So far as **issue No.5** is concerned, sanguine to the set of circumstances and ramification as well as connotation of statues, the plaintiff is entitled to the decree in view of the foregoing. Office is directed to prepare the decree in terms settled in para-19 & 20, whilst parties are left to bear their own costs.

Karachi
Dated:05.01.2023

JUDGE