

THE HIGH COURT OF SINDH, KARACHI

Constitution Petition No. D-4022 of 2024

Present: Mr. Justice Muhammad Junaid Ghaffar
Mr. Justice Mohammad Abdur Rahman

Petitioner: Pakistan Defence Officers Housing
Authority through Mr. Shahzeb
Akhtar, Advocate.

Respondent No.1. Province of Sindh through Mr. Abdul
Jalil Zubedi, Advocate.

Respondent No.5. Mr. Rauf Jamal through Mr. S. Faraz
Akbar Shah, Advocate.

Date of hearing: 19.12.2024

Date of Order: 19.12.2024

ORDER

Muhammad Junaid Ghaffar, J: Through this petition, the Petitioner has sought various relief(s); however, while arguing learned Counsel submits that primarily the relief sought is contained in prayer clause “v”, which reads as under:-

“v. Without prejudice to the above and in the alternative, declare that the Petitioner is not bound by any terms of the Order and Decree 17-06-2006 and 24-06-2006 which, even otherwise has been procured on the basis of fraud and blatant misrepresentation, and, therefore is not under any obligation to transfer / mutate the Subject Land in the name of the Respondent No.4.”

2. Heard learned Counsel for the parties and perused the record. The Petitioner is a Housing Authority and maintains record of rights of all properties in Defence Housing Authority Karachi. It is case of the Petitioner that pursuant to order dated 20.07.2024 passed in Execution Application No. 06-A of 2007 by the VIIIth Senior Civil Judge, Karachi South, the Petitioner is being compelled to carry out the transfer of the property in question, whereas, according to the Petitioner, the seller's name (Respondent No.5) in their record is different. It appears that Respondent Nos.4 & 5 had filed a Civil Suit bearing No. 389 of 1996 against Respondent No. 2 & 3 along with the

Petitioner and by way of a compromise entered between the private parties (Respondent No.2,3,4 & 5), the said Suit has been decreed vide order dated 17.06.2006, of which execution is being sought. It is an admitted position that the petitioner was not a party to the compromise so entered between the private Respondents in terms of Order XXIII Rule 3 CPC. It is also a matter of record that in the written statement the Petitioner had raised objection as to the ownership of the Seller i.e. Respondent No.2. Notwithstanding this, the courts below have not only decreed the suit; but the Petitioners application under Section 12(2) CPC also stands dismissed. The only question is whether such a compromise decree is binding on the Petitioner or not. A learned Division Bench of this Court in **Abdul Hafeez**¹ has dealt with identical facts and law wherein DHA, Karachi (Petitioner) was being asked to implement a compromise decree between private parties to which DHA was not a signatory. The relevant finding of the learned Division Bench of this Court reads as under:-

“We have heard the learned counsel for the respective parties and have perused the record as well as the case-law cited at bar.

The admitted position as it emerges from the record is that all what the respondent No.2 had was just an intimation of allotment, admittedly issued by the respondent No 1 on 3-3-1976 and after receipt of this intimation of allotment the respondent No.2 never contacted the respondent No.1 for either payment of dues or perfecting his title even he did not bother to get an allotment order, all what he did was to execute an unregistered Power of Attorney on 9-11-1976 (if proved) and then totally disappeared. The scrutiny of the sale agreement between the respondent No.2 and the appellant further reflects that it records the entire payment which in fact turns this document into a sale deed and for want of stamp duty liable to confiscation. Besides it is also very strange that the sale agreement even does not specify the mode of payment i.e. as to whether it was made by cash or through cheque. Notwithstanding, it also needs to be explained that once the appellant had made the entire payment of plot in the year 2001 then why he had to wait for 10 years for getting it transferred in his name and on the top of it when the suit is filed after 10 years a decree is obtained within 30 days in order to have a free ride on the

¹ Abdul Hafeez through Attorney and another v. Pakistan Defence Officer Housing Authority through Secretary and another (PTD 2015 Sindh 336)

process of this Court for getting the subject plot mutated in favour of the appellant which otherwise the respondent No.1 would have never mutated. We wonder what made the appellant to purchase a plot which had no title document nor even an allotment order that too on the basis of a 25 years old unregistered power of attorney and then to sleep over it for a period of 10 years. In our opinion a man of ordinary prudence before making payment of such a huge amount for purchasing a property which even had no allotment order ought to have asked for the allotment order and its transfer in his name. The observation hereinabove precludes us from assuming the bona fide of the appellant. Additionally, the appellant has totally failed to take due care required for claiming the status of bona fide purchaser for valuable consideration.

The second most important question involves in this appeal is that as to whether an object which cannot be achieved directly could be achieved indirectly. The respondent No.2, the alleged vendor, if was not entitled to the allotment of a plot or had obtained such allotment fraudulently, then the respondent No.1 under the bye-laws was competent to cancel such allotment which process the respondent No.2 could not defeat by transferring the "subject plot to a third party as the Mr. Dhoon has rightly referred to the case of Capt. Muhammad Iqbal (supra) wherein a Division Bench of this Court had observed that *where foundation of the allotment is resting on misinterpretation then a person cannot be allowed to retain ill-gotten gain and the Court will not come to aid a person to retain a benefit or privilege to which he was not entitled at the very inception.* It was further ruled:-

"From the basis of allotment being illegal, void ab initio, consequently no legal right was conveyed as such payment and execution of 'A' lease in favour of petitioner was illegal void ab initio hence of no effect and would not create any right or privilege in favour of petitioner in respect of said plot, therefore the respondents were quite competent to cancel the allotment of plot under proviso (1) of Article 17(h) of the President's Order No. 7 of 1980"

Lastly, the submission of Mr. Dhoon that since the respondent No.1 was not a party in the suit, therefore, is not bound by the decree obtained by the appellant against respondent No.2 through concession is also not without substance. A Division Bench of Peshawar High Court in the case of Syed Kamal Shah v. Sher Baz Khan (1994 MLD 2334) held that any person who was not a party to the suit would not be bound by the ultimate decree. In our opinion even otherwise, a decree passed on the basis of a compromise by and between the parties is essentially a contract between the parties which derives sanctity by the Court super- adding its seal to a contract and since the compromise even after it is super- added with the seal of the Court has almost all the ingredients of a contract, therefore, it can be set aside on any of the ground on which a contract could be attacked such as fraud, mistake or misrepresentation. Beside, since only the parties who are signatory to the contract are bound by the terms and conditions so recorded and agreed upon between likewise, the Court would not while enforcing the terms and conditions so agreed between the parties to the contract notwithstanding that such contract is

superadded with the seal of the court and turned in a consent decree would compel a third party to obey unless a fiduciary relationship between the judgment debtor and such third party is established.

In view of what has been discussed above, no case for interference with the impugned order has been made out. The appeal therefore, is dismissed.”

3. From perusal of the aforesaid finding of the learned Division bench, it reflects that in such a situation, the regulator or an authority like the Petitioner, cannot be mandatorily compelled to accept and implement the compromise entered between the private parties to which the regulator / authority or any other third party is not a signatory. It is also settled law that a consent decree is a kind of agreement / contract between the two parties with a superadded command of the court, but it would not bind a third party who was not a party the suit or the compromise². It may also be of relevance to observe that when a compromise decree is being passed based on consent of the parties, while doing so, the Court shall either dismiss the Suit against the party who was not a signatory to it; or in the alternative, the Suit must remain alive and continue against the said Defendants. It can't be, in any circumstances decreed against a Defendant who has not signed the compromise application nor has consented to it. And lastly, if the said Defendant has stated something in its written statement which to the plaintiff appears to be a concession, then the only recourse available is under Order 12 Rule 6 CPC by way of a decree on admission. In the instant matter, this is not the case and therefore, the Courts below, including the executing court have failed to appreciate the law, as well the precedent already set by a learned Division Bench of this Court in **Abdul Hafeez (Supra)**.

² Muhammad Iqbal v Khair Din (2014 SCMR 33)

4. Before parting we may observe that the Courts below are required to be well versed with law, including a binding precedent of High Court in terms of Article 201 of the Constitution, and if they remain vigilant and careful, then a lot of fresh cases of like nature can be curtailed before this Court enabling it to decide statutory Appeals. Let copy of this order be issued to the presiding officers of the Courts below who have passed the orders in question for their guidance and proper appreciation of law.

5. In view of the above settled proposition of law this petition is hereby allowed to the extent of the above prayer by holding that the compromise entered between the parties does not require the Petitioner to act accordingly and the Executing Court cannot compel the Petitioner to transfer the property in question.

JUDGE

JUDGE

Ayaz P.S.