

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No. 1011 of 2014

Mohammad Ibrahim-----Plaintiff.

Versus

**Sindh Industrial Trading
Estates Ltd (SITE-----Defendant.**

Date of hearing: 17.01.2018.

Date of Judgment 06.02.2018

**Plaintiff: Through Mr. Obaid-ur-Rehman,
Advocate.**

Defendant: Mr. Mansoor Ali Ghanghro, Advocate.

J U D G M E N T

Muhammad Junaid Ghaffar, J. This is a Suit for Declaration, Mandatory Injunction, Cancellation and Compensation seeking the following reliefs:-

- A) declaration that the Plaintiff is the owner and / or leasehold rights holder of the Suit property and is entitled to enjoy the same under Article 23 and 24 of the Constitution;
- B) A declaration that the impugned notices allegedly dated 2.4.2014 (ANNEX P-29 to 23 above) are arbitrary, malafide, illegal and without legal effect and set aside the same as well as set aside / undo all consequential orders / actions issued or taken subsequent / pursuant to the impugned notices;
- C) A permanent injunction restraining the Defendant from allotting the Suit property to any other person and / or creating third party interest or alienating the interest of the Plaintiff or taking any action prejudicial to the interest of the Plaintiff in any manner whatsoever and / or cancel allotment orders, if any, issued by the Defendant in favour of any person / party other than the Plaintiff;

- D) A Permanent injunction restraining the Defendant and / or anyone claiming through or under it or on its behalf from raising any construction whatsoever on the Suit property and / or from removing any construction of the Plaintiff on the Suit property;
- E) A mandatory injunction directing the Defendant to restore possession of the Plaintiff over the Suit property;
- F) Any other and better relief(s) deemed just and proper in the facts and circumstances of the case;
- G) Costs."

2. Briefly, the Plaintiff claims to be owner of four Industrial Plots bearing No.F-169/B, F-169/C, F-169/D and F-169/E situated in SITE, Karachi measuring 0.5 Acre each and collectively measuring 2 Acres ("Plots"). The said Plots were acquired by the Predecessor in interest of the Plaintiff in an auction from the Official Assignee of this Court and four separate identical Registered Deeds of Assignment dated 18.09.2004 were executed to that effect. The predecessor in interest with the permission of the Defendant sold/assigned the Suit Properties through four separate identical Registered Deeds of Assignment all dated 27.12.2005 to the Plaintiff. It is the case of the Plaintiffs that with ulterior motives, the Defendants have now raised a demand of non-utilization fund and have also threatened through impugned Notice dated 02.04.2014, the cancellation of the plots, whereas, thereafter on 24.04.2014, the Suit plots have been cancelled, which has come on record through counter affidavit of the Defendants as till filing of his Suit they had no intimation to that effect. Replies were filed by the Defendants and since only a legal controversy was involved, on 23.01.2017 the following issues were settled and matter was put to final arguments without adducing any evidence:-

- (i) Whether the Defendant has cancelled the Plaintiff's plots and allotted them to new allottees?
- (ii) Whether the Plaintiff is liable to pay non-utilization fees to the Defendant in respect of his plots?
- (iii) Whether the impugned notices dated 2.4.2014 (issued in relation to the Plaintiff's four plots) were illegal, unlawful, void, ab-initio, without any legal effect and hence are liable

to be struck down and set aside along with any order or action issued or taken consequent thereto?

(iv) What should the decree be?"

3. Learned Counsel for the Plaintiff in response to Issue No.1 has contended that very recently (i.e. after filing of Suit) the Defendants have accepted payments in respect of the Plots, which prima-facie reflects that the plots have not been cancelled as yet, nor allotted to anyone else, and therefore, this Issue be decided in favour of the Plaintiff. Insofar as Issues No.2 & 3 are concerned, learned Counsel has read out the impugned Notice dated 02.04.2014 and has contended that neither in the Assignment Deed executed by the Official Assignee, nor thereafter, when the Plaintiff purchased the Plots from the predecessor-in-interest, any clause was available regarding levy of non-utilization fee. Per learned Counsel insofar as the other charges are concerned, the same have already been paid and there are no dues against the Plaintiff, and therefore the impugned notice and the Order passed thereafter, without confronting the Plaintiff are illegal and void ab-initio. Learned Counsel has further contended that in fact the Suit plots were already constructed when they were auctioned, and thereafter purchased by the Plaintiff, and therefore, even otherwise no question of payment of any non-utilization fee arises. Learned Counsel has relied upon an unreported Judgment Dated 03.05.2002 passed in the case of M/s. Indus Battery Industries v. SITE in C.P No.D-333/2002, in identical circumstances, whereby, the levy of non-utilization fee has been struck down.

4. On the other hand, learned Counsel for the Defendant submits that insofar as Issue No.1 is concerned, the Defendant has taken the payments, whereas, the plots have not been allotted to anyone else as of today. He has further contended that action impugned was initiated by the Defendant on the basis of Order dated 29.09.2011 passed in the case of Anwar & Co. v. SITE, Karachi in C.P No.D-109 of 2005 by a Division Bench at Sukkur, whereby, certain directions were given to the Defendant to take necessary steps against the allottees, who have failed to set up their industrial units. Learned Counsel has further contended that

in view of the dicta laid down in the case reported as **PLD 1975 Karachi 128** (*Sindh Industrial Trading Estate Ltd., Karachi v. Central Board of Revenue and 3 others*) and up held in **PLD 1985 SC 97** (*Central Board of Revenue and another v. S.I.T.E*), the defendant is a Provincial Government Department, and therefore, any land, which is not utilized, can be cancelled under the Colonization of Government Lands Amendment Act, 2009 through which Section 10 of Colonization of Government Lands (Sindh) Act, 1912 has been amended. Learned Counsel has referred to the Lease/Assignment Deed executed in favour of the Plaintiff and the undertaking annexed thereto, whereby, the Plaintiff was required to carry out construction within a period of 6 months, which the Plaintiff has failed to honour and therefore, per learned Counsel the impugned order for cancellation has been passed.

5. I have heard both the learned Counsel and perused the record. My findings on the Issues are as under:-

ISSUE NO. (i)

6. Insofar as this issue is concerned, admittedly after passing of impugned orders and during pendency of this Suit on 08.06.2017, the Defendant has accepted payments against the Suit Plots in respect of conservancy, rent charges, development charges and penalty and while confronted the learned Counsel for the Defendant has conceded that such payments have been received. However, according to the learned Counsel there were arrears against the Plaintiff, and therefore these payments have been received. But, on perusal of the Receipt(s), it appears that even charges for conservancy have been received, which apparently reflects that the Defendant assumed that the plot is in possession and is being used by the Plaintiff, therefore, admittedly the plots have not been cancelled and or allotted to any third party, to that extent the Issue is answered accordingly.

ISSUES NO.(ii) & (iii)

7. Both these Issues are interlinked and therefore are being dealt with accordingly. The plots in question were admittedly purchased through auction conducted by the Official Assignee pursuant to his appointment as Official Liquidator vide order dated 4.12.1989 in J. Misc. No. 01 and 74 of 1989, and the Assignment Deeds dated 18.9.2004 executed by the Official Assignee do not incorporate any clause, whereby, any non-utilization fee could be imposed and it is only the rent charges, which were required to be paid by the Predecessor-in-Interest of the Plaintiff. It is noteworthy that these Assignment Deeds were executed with the consent of the Defendants and in fact they are also a party to such Assignment Deeds. Subsequently, the Plaintiff has purchased these plots and even in the subsequent Lease Deeds, there is no such condition for payment of non-utilization fee. Though learned Counsel for the Defendant has contended that an undertaking was given for raising construction within six months, however, even this does not provide that if the construction is not raised, the Plaintiff would be required to pay the non-utilization fee. The levy of Non-Utilization Fee and its demand has already been dilated upon in the Judgment of the Learned Division Bench of this Court in the case of *Indus Battery (supra)* and the learned Division Bench has come to a definite conclusion that such a levy can only be demanded, if the agreement or the contract between the parties permits to do so. The relevant finding of the learned Division Bench is as under:-

“4. We regret we are unable to agree notwithstanding the nature of the public duties required to be performed by the respondent. It is evident that such fee cannot be characterized as a tax which can only be imposed under the authority of a law. At best the respondent might be entitled to charge the same if their contract with the Petitioner permitting them to do so. Strongly enough that this resolution was passed in 1969, the respondent did not choose to incorporate its terms on the agreement made with the Petitioner 10 years thereafter, as such the Petitioner could not be held to be bound by the same. In any event even if such a provision was to be treated as part of the contract as compensation for breach, it had to conform to the requirements of section 74 of the Contract Act. The contract neither mentions the amount payable in the event of breach on the part of the petitioner nor can fee at the rate of 100% per year be treated as reasonable. Accordingly, we are constrained to hold that such demand is without lawful authority and of no legal effect. The notices dated 28.4.2001 and 29.12.2001 are liable to be set aside.

5. With respect to the final notice dated 14.2.2002, we may observe that allotment cannot be cancelled on the ground of nonpayment of fee.

At the same time, however, Mr. S. A. Samad Khan appears to be right in contending that the lease or right in immovable property had been created and the respondent was entitled to cancel the allotment in the vent of breach of any obligation on the part of the petitioner. Therefore, by our short order announced in Court on 3.5.2002 we allowed the petition to the extent of declaring the demand of non-utilization fee to be illegal, but leaving the respondent to take such appropriate action as it considered proper under the agreement."

Therefore, under these circumstances, when there is no agreement to that effect between the plaintiff and defendant, no such demand in respect of levy of Non-Utilization Fee can be sustained.

8. Insofar as the issuance of impugned Notice dated 02.04.2014 as well as cancellation of provisional allotment order dated 24.04.2014 passed by the Secretary of the Defendant is concerned, it appears that in the notice, the Defendant has referred to Order dated 17.10.2011, passed by a Division Bench at Sukkur in C.P No.D-109/2005. The operative part of the said order, passed by the learned Division Bench reads as under:-

"While parting with his arguments, learned counsel submitted that there are many other allottees, who have been allotted plots for a number of years and who have similarly not taken any step to set up any industrial units and no action whatsoever has been taken against them. If it is so, respondent No.1 is directed to take steps to ensure that within a reasonable periods preferably within three months, all the allottees take concrete steps and initiate process for establishment of the industrial units for which the plot was allotted to them and any allottee, who is in violation of the terms of the deed, is dealt with in accordance with law."

9. Perusal of the aforesaid observations reflects that the same in fact pertains to the allottees of Defendant as in that case it was brought to the knowledge of the Court that various allottees, have been allotted plots for a number of years; but they have not taken any steps to set-up their industrial units. In that context the learned Division Bench observed that, if it is so, respondent No.1 is directed to take steps to ensure that within a reasonable period preferably within three months, all the allottees take concrete steps and initiate process for establishment of the industrial units for which the plot was allotted to them and any allottee, who is in violation of the terms of the deed, is to be dealt with in accordance with law. In my view, the reliance placed on the judgment of the

learned Division Bench, as above in the impugned notice is misconceived on two accounts. Firstly, the Plaintiff before the Court is not an allottee of the Defendant, therefore, the aforesaid directions, if any, could not be applied on the case of the Plaintiff, who is a purchaser of the plot assigned to his predecessor in interest through auction conducted by the Official Assignee of this Court. Secondly, and with utmost respect, no adverse order could have been passed against all the allottees nor it appears that the same was so intended by the learned Division bench, and it is only asking the Defendant to act in accordance with law, which even otherwise they are required to do so as a public functionary. Therefore, the impugned notice issued under the purported garb of the aforesaid order is on the face of it misconceived and based on misconception.

10. Insofar as the subsequent order dated 24.04.2014 for the purported cancellation of provisional allotment is concerned, it appears that the Secretary of the Defendant has purportedly exercised powers under the Colonization of Government Lands (Sindh) Act, 1912 read with the Government Lands (Amendment) Act, 2009 and while confronted learned Counsel for the Defendant has contended that the Defendant Organization is for all legal and practical purposes is a government functionary and in that context he has relied upon the cases of **Sind Industrial Trading Estate Ltd Karachi** (supra) and **Central Board of Revenue** (supra). However, I may observe that the aforesaid Judgment of the Division bench of this Court and upheld by the Honourable Supreme Court, is altogether in a different context. There, the question was regarding levy of income tax on the Defendant as according to CBR (now FBR), the Defendant had engaged in trade and business, and therefore, they were liable to pay income tax. In that context, the Hon'ble Supreme Court came to the conclusion that in view of the various provisions under the Constitution the Defendant falls within the exemption granted to the Provincial Government. However, such interpretation does not authorizes the Defendant to assume powers under the Colonization Act ibid and seek protection in cancellation of the plots allotted to various allottees under the garb of this Act and the amendment carried out

by the Government of Sindh. This on the face of it appears to be contrary to the terms and conditions of the Assignment Deed as well as the subsequent Lease granted in favour of the Plaintiff and his predecessor-in-interest, whereas, even in the impugned notice, there is no such disclosure as to taking action under the Colonization of Government Lands (Sindh) Act, 1912. Therefore, on this account also the impugned notice as well as the purported cancellation of the provisional allotment cannot be sustained. For the sake of repetition, it may be observed that this is not a case of any allotment simplicitor under the Colonization Act, and therefore, even if it is assumed for the sake of argument that defendant is part of Provincial Government, since there is no allotment per se, question of its cancellation does not arise.

11. It is needless to observe that even otherwise the Plaintiff in this case is in possession of the land, which is not in dispute and such possession as well as ownership is based on registered instruments i.e. the Assignment Deed and Lease Deed. It is trite law that cancellation of a registered document can only take place through a declaration of the Court and not by means of executive orders, as has been done in this case. Moreover, as observed earlier, this is not a case of allotment of which the cancellation could be made in the manner the Defendant has attempted to.

Accordingly, issue No.(ii) is answered in negative, whereas, Issue No.(iii) is answered in the affirmative.

ISSUE NO.(iv)

12. In view of hereinabove facts and circumstances of this case and the discussion thereof, the Plaintiff's Suit is decreed as prayed.

Dated: 06.02.2018

J U D G E

Ayaz