IN THE HIGH COURT OF SINDH KARACHI

Present:
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Adnan Iqbal Chaudhry.

High Court Appeal No. 104 of 2018
[Port Qasim Authority v. Industrial Management & Investment Co. Ltd & others]

Appellant	:	Port Qasim Authority through Mr. Ali T. Ebrahim, Advocate.
Respondents	:	Industrial Management & Investment Company Ltd. and others through Mr. Mansoor-ul-Arfin, Advocate.
Date of hearing	:	13-09-2018
Date of decision	:	24-12-2018

JUDGMENT

Adnan Iqbal Chaudhry J. – By this appeal the Port Qasim Authority (PQA) has assailed the common order dated 14-03-2018 passed by a learned Single Judge of this Court on Execution Application No.s 02/2017, 03/2017 and 04/2017 whereby the said Execution Applications filed by the Respondents 1, 2 and 3 respectively to execute similar compromise decrees against the PQA, were allowed.

By consent of learned counsel we heard this appeal for disposal at the *katcha peshi* stage.

2. The background to the aforesaid compromise decrees is that the PQA had agreed to allot land to the Respondents in its Eastern Industrial Zone. However the quantum of Peripheral Development Charges (PDC) claimed by the PQA in making the allotments became an issue between the parties when the PQA demanded PDC @ Rs.4 million per acre. Suits for specific performance of the contracts of allotment were brought by each of the Respondents

contending that they were only required to pay PDC @ Rs.2 million per acre. During the Suits, the parties compromised when the Respondents agreed to pay and the PQA agreed to accept PDC @ Rs. 2.5 million per acre, the balance of the outstanding amount being payable in 3 installments. Consequently, compromise applications were filed in the Suits and a compromise decree was passed in each of the three Suits on 14-05-2013.

3. In Suit No.757/2009 by Industrial Management & Investment Company Ltd. (Respondent No.1), the relevant clauses of the compromise decree read as follows:

> *"4. That the parties M/s Industrial Management & Investment Company Ltd. and Port Qasim Authority have agreed that the allotment of 200 Acres of land shall be at the rate of Rs. 2.5 Million per as Occupancy Value i.e. half of the prevailing Peripheral Development Charges (PDC), the Defendant has already received Rs.59,240,532/- as mentioned above, leaving a balance amount of Rs.440,759,468/-, which is agreed to be paid in three installments as under:-*
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> *(i) First installment of 25% within 18 months from the date of signing of the Agreement;*
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> *(ii) Second installment of 25% within next six months from the first installment date;*
>
> *(iii) Third installment of 50% within next 12 months from the 2nd installment date.*
>
> *5. The Defendant will give possession/lease of land on payment of 100% Occupancy Value (OV) on same lines/procedure adopted in the case of M/s Aromatic Foods Limited.*
>
> *6. In case of delay in payment as per above schedule and charges whether demanded legally or not the Plaintiff shall have to pay the penalty as per prescribed rate (3.5% per annum) above Treasury bill rate or as may be fixed by the Authority. Other terms and conditions of the allotment letter will remain the same.*
>
> *7. That the Plaintiff shall be liable to pay annual land rent and maintenance charges applicable from the date of signing of this Agreement."*

In Suit No.758/2009 by Aromatic Foods (Pvt.) Ltd. (Respondent No.2) the relevant clauses of the compromise decree read as follows:

"4. That the parties M/s Aromatic Foods Ltd., and Port Qasim Authority have agreed that the allotment of 240 (200+20+20) Acres of land shall be at the rate of Rs. 2.5 Million per as Occupancy Value i.e. half of the prevailing Peripheral Development Charges (PDC), the Defendant has already received Rs.200,00,000/- as mentioned above, leaving a balance amount of Rs.400,000,000/-, covering 160 acre, which is agreed to be paid in three installments as under:-

(i) First installment of 25% within 18 months from the date of signing of the Agreement;

(ii) Second installment of 25% within next six months from the first installment date;

(iii) Third installment of 50% within next 12 months from the 2nd installment date.

5. The Defendant will give possession/lease of land on payment of 100% Occupancy Value (OV) on same lines/procedure adopted earlier in 50 acre for project development.

6. In case of delay in payment as per above schedule and charges whether demanded legally or not the Plaintiff shall have to pay the penalty as per prescribed rate (3.5% per annum) above Treasury bill rate or as may be fixed by the Authority. Other terms and conditions of the allotment letter will remain the same.

7. That the Plaintiff shall be liable to pay annual land rent and maintenance charges applicable from the date of signing of this Agreement, except 50 acres already in possession."

In Suit No.759/2009 by Project Development Corporation Ltd. (Respondent No.3), the relevant clauses of the compromise decree read as follows:

"4. That the parties M/s Project Development Corporation Ltd. and Port Qasim Authority have agreed that the allotment of 50 Acres of land shall be at the rate of Rs. 2.5 Million per as Occupancy Value i.e. half of the prevailing Peripheral Development Charges (PDC), the Defendant has already received Rs.3,900,000/- as mentioned above, leaving a balance amount of Rs.121,100,000/-, which is agreed to be paid in three installments as under:-

(i) First installment of 25% within 18 months from the date of signing of the Agreement.

(ii) Second installment of 25% within next six months from the first installment date.

(iii) Third installment of 50% within next 12 months from the 2nd installment date.

5. The Defendant will give possession/lease of land on payment of 100% Occupancy Value (OV) on same lines/procedure adopted in the case of M/s Aromatic Foods Limited.

6. In case of delay in payment as per above schedule and charges whether demanded legally or not the Plaintiff shall have to pay the penalty as per prescribed rate (3.5% per annum) above Treasury bill rate or as may be fixed by the Authority. Other terms and conditions of the allotment letter will remain the same.

7. That the Plaintiff shall be liable to pay annual land rent and maintenance charges applicable from the date of signing of this Agreement."

4. Before the subject Execution Applications, the Respondent No.1 had filed Execution Application No.07/2014 for a partial execution (rather part performance) of the consent decree passed in its Suit i.e. for a lease of a part of the land allotted to the Respondent No.1 on the ground that the agreed price/charges of such part stand paid. The PQA had opposed that previous Execution Application No.07/2014 on the ground that the consent decree did not envisage part performance, rather it stipulated that the lease would be executed on payment of 100% occupancy value. On the other hand it was being contended by the Respondent No.1 that the words *"……. on same lines/procedure adopted in the case of M/s Aromatic Foods (Pvt.) Ltd."* appearing in the consent decree referred to the fact that previously (a) the PQA had partly performed the allotment made to Aromatic Foods (Pvt.) Ltd. by executing a lease for a part of the allotted land; and (b) such lease was executed in favor of ASG Metals Ltd. as a nominee of Aromatic Foods (Pvt.) Ltd. In that view of the matter, the previous Execution Application No.07/2014 was allowed vide order dated 02-10-2014 by directing the PQA to execute a lease not only for a part of the allotted land, but also to execute the same *"…… in favor of the decree holder or its nominee ……"*, and on the failure of the PQA to do so, the Nazir of this Court was directed to do the same.

5. Eventually by letters dated 09-06-2016, the Respondents informed the PQA that they had made the complete payment agreed under the consent decrees and called upon the PQA to lease the remainder of the land allotted to them to their nominee namely ASG Metals Ltd. with whom the Respondents claimed to have a joint venture agreement. Vide letters dated 14-10-2016 the PQA required the Respondents to submit an application for transferring interest in the land to ASG Metals Ltd. along with a list of other documents to enable the PQA to scrutinize the request for leasing the land to ASG Metals Ltd. as per the PQA Land Allotment Policy. The Respondents were of the view that the demand of such documents by the PQA was an excuse to decline the transfer to the nominee, and hence a breach of the consent decrees, and therefore the Respondents filed the subject Execution Applications (Execution Application No.s 02/2017, 03/2017 and 04/2017) with the prayer that the consent decree be executed for the remaining land by appointing the Nazir of the Court "*to execute the indenture of lease in favor of the decree-holder or its nominee…*".

6. Before the learned Single Judge, it was not disputed by the PQA that the reference in the compromise decrees to "*same lines/procedure adopted in the case of M/s Aromatic Foods Ltd.*" was an agreement to transfer the allotment to the nominee of the decree holders. However, it was the case of the PQA that such transfer could not be done unless the decree holders paid the prescribed Transfer Surcharge, which charge had been imposed by the PQA in July 2015 on the transfer of all properties.

The learned Single Judge held that the Transfer Surcharge having been introduced by the PQA subsequent to the compromise decrees, it would not be applicable to the transfer agreed under the compromise decrees. The Learned Single Judge further held that since the Transfer Surcharge was not part of the compromise decrees, the executing court could not modify or deviate from the compromise decrees; that the previous Execution Application

No.07/2014 had also been allowed by directing the execution of a lease in favor of the nominee; and therefore, vide the impugned order, the learned Single Judge allowed the subject Execution Applications by directing the PQA to execute the lease *"…… in favor of the decree holder or its nominee….."*, and on their failure to do so, the Nazir of the Court was directed to do the same.

7. Mr. Ali Ebrahim, learned counsel for the PQA (Appellant) submitted that pursuant to its 164th Board Meeting dated 04-06-2015, the PQA had amended its Land Allotment Policy to impose a Transfer Surcharge as per a schedule on the transfer of interest in any allotted or leased land; that the request of the Respondents to issue a lease of the land allotted to them to their nominee was a transfer which attracted the Transfer Surcharge, and therefore the Respondents were liable to pay the same. He submitted that the learned Single Judge failed to appreciate that though the Transfer Surcharge was not in the field when the consent decrees were passed in 2013, but it was in the field in 2016 when the Respondents made the request to the PQA to execute leases in favor of their nominee.

8. On the other hand, Mansoor-ul-Arfin, learned counsel for the Respondents objected to the very maintainability of the appeal. His first objection was that since the impugned order has been passed on three separate Execution Applications, the Appellant cannot maintain a common appeal as held in the case of *Asif Anwar v. Nishibe Kaike Manufacturing Co. Ltd.* (PLD 1986 Kar 446). His second objection was that the Authority Letter filed with the appeal is not sufficient and it was mandatory for the PQA to have filed a Board Resolution to show that the appeal was being instituted competently in terms of the law laid down in the case of *Iftikhar Hussain Khan of Mamdot v. Ghulam Nabi Corporation Ltd.* (PLD 1971 SC 550).

On the merits of the appeal, Mr. Arfin supported the impugned order and submitted that the words *"same lines/procedure*

adopted earlier for Aromatic Foods (Pvt.) Ltd." appearing in the consent decrees was a reference to PQA's letter dated 08-12-2011 addressed to Aromatic Foods (Pvt.) Ltd. which shows that no such Transfer Surcharge was envisaged, and therefore the PQA was bound by the consent decrees to execute leases of the allotted land to the nominee of the Respondents without claiming the Transfer Surcharge.

9. In rebuttal, Mr. Ali Ebrahim, learned counsel for the PQA (Appellant) submitted that the Transfer Surcharge having been fixed by the Board of the PQA in accordance with law, the PQA has no authority to deviate from the same. As regards the maintainability of the appeal, he submitted that the Authority Letter on the record sufficed, and per the law laid down in the case of *Zahid Zaman Khan v. Khan Afsar* (PLD 2016 SC 409), the Appellant could bring this one appeal against the common order passed on the subject Execution Applications.

10. We advert first to Mr. Mansoor-ul-Arfin's objections to the maintainability of the appeal.

In the case of *Zahid Zaman Khan v. Khan Afsar* (PLD 2016 SC 409), the Honourable Supreme Court while holding that a separate decree for each suit is to be prepared pursuant a judgment given in a consolidated suit, also held that against such consolidated judgment a consolidated appeal is permissible. Though the case in hand is not an appeal from a decree, nevertheless it is an appeal from a common order passed for the same reasons on identical applications making identical prayers. In these circumstances we do not see why the same procedure of filing a common appeal cannot be followed here especially when it is not the case of the Respondents that a common appeal is to their prejudice. The case of *Asif Anwar* relied upon by Mr. Arfin is completely distinguishable, for in that case different applications under different provisions of law for different prayers pending in one suit were disposed off under one order for different reasons. It was in those circumstances that a learned Division Bench

required the appellant to file separate appeals. Therefore, we hold that this consolidated appeal from the common impugned order is maintainable. However, following the case of *Zahid Zaman Khan*, we direct the Appellant to affix the requisite court fee in the same manner as they would be required to affix if separate appeals had been filed.

11. Regards Mr. Arfin's other objection that the case of *Iftikhar Hussain Khan of Mamdot* (*supra*) makes mandatory the filing of a Board Resolution with the appeal to show that the appeal has been instituted competently, our reading of the case of *Iftikhar Hussain Khan of Mamdot* shows that no such principle of law has been laid down therein. In that case a suit had been brought by the respondent-company against its director, the appellant. One of the defenses of the appellant was that the person signing the plaint on behalf of the company had never been authorized by the company to institute the suit. An issue was framed in the suit to decide such controversy. During evidence a Board Resolution was produced for the first time by the company to prove that institution of the suit had been authorized. The appellant/defendant contended that as director of the company he was never served with the notice of the board meeting at which the alleged Board Resolution was passed. The trail court held that the Board Resolution had been made-up and back-dated after filing the suit. The appellate court recorded additional evidence on the issue and concluded otherwise. After perusing the evidence on the appellant's/defendant's appeal, the Supreme Court concluded that the evidence did not establish that notice of the Board meeting was sent to the appellant, and therefore the Board Resolution allegedly authorizing the institution of the suit was suspect, and in these circumstances it was held that the suit was not instituted competently. Therefore, the case of *Iftikhar Hussain Khan of Mamdot* does not advance the objection raised by Mr. Arfin. Nothing on the record has been highlighted to raise the doubt that the Authority Letter on the record may have been issued

incompetently. Having been satisfied that the appeal is not instituted incompetently, we do not embark on a discussion whether the requirement for "instituting" a suit is the same for an appeal.

12. We advert now to the merits of the appeal. It is not disputed by the PQA (Appellant) that the words "*same lines/procedure adopted earlier for Aromatic Foods (Pvt.) Ltd.*" appearing in the consent decrees refer to the fact that the PQA had previously allowed the transfer of allotment to a nominee of Aromatic Foods (Pvt.) Ltd. Therefore, it is not the case of the PQA that the land allotted to the Respondents cannot be leased to the stated nominee. Rather the dispute is with regards to the charges for executing such lease in favour of the nominee. Per learned counsel for the PQA (Appellant), the charge for executing such lease would be the 'Transfer Surcharge' as per PQA's Land Allotment Policy as amended on 04-06-2015. Per learned counsel for the Respondents the Transfer Surcharge being made applicable to the Respondents as per the Land Allotment Policy is Rs. 1.5 Million per acre which is in breach of the "*same lines/procedure adopted earlier for Aromatic Foods (Pvt.) Ltd.*" and hence in breach of the consent decrees.

13. It is settled law that a decree passed pursuant to a compromise under Order XXIII Rule 3 CPC is essentially a contract between the parties which is superadded with the command of the Court, and therefore a compromise decree is subject to the incidents of a contract [see the case of *Nazir Ahmad v. Ghulama* (1987 SCMR 1704)]. The primary rules for interpreting a contract are also settled, viz., that the context of the contract and the intent of the parties at the time of entering into the contract have to be seen [see the cases of *House Building Finance Corp. v. Shahinshah Humayun Cooperative Housing Society* (1992 SCMR 19); and *Saudi-Pak Industrial & Agricultural Investment Co. v. Allied Bank of Pakistan* (2003 CLD 596)].

Applying the aforesaid rules of interpretation to the compromise between the parties, we have seen that though PQA's letter dated 08-12-2011 addressed to Aromatic Foods (Pvt.) Ltd. did

stipulate a fee @ Rs.360,000 per acre for transfer of rights in the allotted land to the nominee, firstly that was the transfer fee prevailing on that date, and secondly the matter of such fee was never an issue between the parties at the time of the compromise. Therefore, the reference in the consent decrees to the "*same lines/procedure adopted earlier*", is not a reference to the transfer fee/charge; rather the intent of the parties was that in the event the Respondents desired to transfer their rights in the allotments to a nominee, the PQA would not object to that as it had allowed such transfer earlier on the request of Aromatic Foods (Pvt.) Ltd. Indeed, when the compromise was arrived at, the Respondents had not applied to the PQA for leasing the land to their nominee. Therefore, it would be absurd to suggest that the parties had intended to freeze the rate of the transfer fee indefinitely at a time when the Respondents had not even called upon the PQA to make the transfer. It was on 04-06-2015 that while acting in the normal course of its business, the PQA increased its charges for all land transfers by amending its Land Allotment Policy and terming the increase a 'Transfer Surcharge'. It was only thereafter on 09-06-2016 that the Respondents called upon the PQA to transfer their rights in the land allotted to them to their nominee. Therefore we agree with learned counsel for the Appellant that in such circumstances, the Transfer Surcharge prevailing at the time when the Respondents applied for the transfer, would prevail. The reliance placed by the learned Single Judge on the order dated 02-10-2014 passed in the previous Execution Application No.07/2014 to hold for the Respondents is also misplaced inasmuch as, at that time the Transfer Surcharge had not even been imposed by the PQA, and the issue at that time was whether the contract underlying the consent decrees should be partly performed.

14. The upshot of the above discussion is that the issue between the parties as to the Transfer Surcharge being claimed by the PQA for leasing the allotted land to the Respondents' nominee, is a matter

not covered by the compromise and beyond the scope of the consent decrees. It is settled law that the executing Court cannot go beyond the decree. Consequently, the consent decrees cannot be executed to compel the PQA to lease the land to the nominee without receiving the Transfer Surcharge as per its Land Allotment Policy.

15. For the foregoing reasons the appeal is allowed, the impugned order dated 14-03-2018 passed in Execution Application No.s 02/2017, 03/2017 and 04/2017 is set aside, and the said Execution Applications are dismissed. The application pending in this appeal stands disposed off accordingly.

JUDGE

JUDGE

Karachi

Dated: 24-12-2018