ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Suit No.Nil/2005

Date	Order with signature of Judge

Date of hearing : 27.02.2008

Mst. Mehmooda Begum & others
Plaintiff : through Mr.Kunwar Mukhtair Ahmed Advocate.

Pakistan Defence Officers Housing Authority & another
Defendants : Mr.Khalid Javed Advocate.

ORDER

KHALID ALI Z. QAZI.J.- This is a suit for declaration, possession and permanent injunctions filed by the Plaintiff seeking the judgement and decree from this Court as under:-

> A) Grant declaration that the order bearing No. DHA/SSI/WL-4559 dated 21-09-99 upholding the earlier order No. DHA/SSI/WL-4559/P & D dated 01-07-96 passed by the defendant No. 1 cancelling the allotment of commercial plot No. 24-C, sunset Boulevard, Phase-II measuring 200 square yards in the Pakistan defence officers, Housing Authority, Karachi, is illegal, arbitrary, contrary to law, without jurisdiction, against the principles of natural justice, without lawful authority and the same as such is void and consequently of no legal effect and that late Mr. Bashir Ahmed, predecessor-in-interest of the plaintiffs continued to be the lawful allotted of the said plot vide allotment order No. DS/SSI/WL-4559 dated 01-12-1975 and the plaintiffs being the heirs and legal representatives of said late Bashir Ahmed succeeded and/or inherited all rights and interest in the aforesaid plot of land alongwith defendant No. 2 being the widow of late Shakeel Ahmed and one of the heirs and legal representatives of late Bashir Ahmed.

B) Grant mandatory injunction directing the defendant No. 1 to hand over to the plaintiffs/defendant No. 2 jointly the physical possession of the aforesaid plot (as described in clause (A) above) being the successors in interest of late Bashir Ahmed.

C) Grant permanent injunction restraining the defendant No. 1 from allotting, transferring, alienating, selling, leasing out or disposing of the said plot in any manner to any other person of persons

D) Grant such other relief or reliefs as may be deemed fit in the circumstances of the case.

E) Award costs of the suit.

Office has raised the following objections.

i) It appears that the suit is barred under the doctrine of Res-Judicata as provided under Section 11 CPC as the plaintiffs earlier had filed Constitution Petition being C.P. No. D-1873/1999, which was dismissed by the Hon'ble Division Bench on 06.10.2005 at Annexure "Q" pages 143 to 153 and thereafter plaintiffs went in Civil Petition for leave to appeal being C.P. No. 737-K of 2005 before the Hon'ble Supreme Court of Pakistan which was also dismissed by the Hon'ble Supreme Court of Pakistan on 11.11.2005 at Annexure "S" pages 187 to 190, on same cause of action in respect of the same subject matter (PLD 1966 Karachi 31 (DB) and PLD 1962 Karachi (DB).

ii) It appears that the suit is barred under Articles 14 & 91 of the Limitation Act as admittedly the notice for cancellation of suit plot was served on 21.9.1999 and the instant suit has been filed after the lapse of six(6) years.

2. The Additional Registrar (O.S) in his objection has specifically mentioned that the suit is barred under the doctrine of Res-Judicata as provided under Section 11 CPC as the Plaintiff's earlier had filed Constitution Petition being C.P. No. D-1873/1999, which was dismissed by the Division Bench of this Court on 06.10.2005 and thereafter plaintiffs went in Civil Petition for leave to appeal before the Hon'ble Supreme Court of Pakistan which was also dismissed by the Hon'ble Supreme Court of Pakistan on 11.11.2005 on same cause of action in respect of the same subject matter.

He also raised the objection as the suit is barred under Articles 14 & 91 of the Limitation Act 1908 as admittedly the notice for cancellation of suit plot was served on 21.9.1999 and the instant suit has been filed after the lapse of six(6) years.

3. In reply to the objection Mr. Kunwar Mukhtair Ahmed learned counsel for the plaintiff submits that office objections are not valid and are not sustainable in law as much as that neither the provisions of section 11 CPC nor the Article 14 & 91 of the limitation are applicable to the facts and circumstances of the plaintiff's case.

4. Mr.Kunwar Mukhtair Ahmed learned counsel further contended that Additional Registrar has not given any reason as to how Section 11 CPC would be applicable, nor has given any reason as to on what basis Article 14 and 91 of the Limitation Act would be applicable and as such merely citing decisions of the superior Court or mentioning the Articles of Limitation Act without dealing with the factual and legal aspect of the case, could not be of any avail and suit could not be construed to be barred by law without examining the facts and circumstances of the case in support thereof he further contended that decision relied upon by the learned Additional Registrar expressly lays down that if the issues in the previous suit or proceedings were finally adjudicated and decided on merits, the subsequent suit on the same cause of action and in respect of the same issue would be barred by Res-Judicata. According to Mr.Kunwar Mukhtair Ahmed learned counsel the aforesaid decisions are not applicable to the present suit of the plaintiff's as in none of the former proceedings the Courts have decided the issues involved on merits. Learned counsel contended that in C.P No.1873/99 the Division Bench of the High Court vide its order dated 8.8.2003 had recorded the following points of dispute:

> "*The only question involved in the petition is whether the allotment in favour of Bashir Ahmed predecessor in interest of the Petitioner was approved by the Managing Committee in its meeting dated 22.11.75 such plea has been taken by the respondent. They are directed to produce the minutes of the meeting allegedly held on the aforesaid date".*
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> *In response to the aforesaid order the respondent Authority filed statement with copy of Minutes No. 17/75 dated 26.11.75 of the Managing Committee of the Respondent Authority (Please see Page No. 115 of the suit). The Authority however did not file annexure-1 to items 5 of the Minutes, which contained the details of persons who were allotted plots at the aforesaid meeting of the Managing Committee. The plaintiff consequently submitted rejoinder and sought direction of the Hon'ble Court that Annexure-I to item No. 5 be ordered to be produced. The Hon'ble High Court on 29.04.2004 in the said petition accordingly ordered as under.*
>
> *29.04.04*
> Mr. Kunwer Mukhtar Ahmed, Advocate.
>
> Mr. Ch. Muhammad Jameel, Advocate.

Annexure I, item No. 5 has not been placed on record. Mr. Kunwer contends that original of minutes of meeting No. 13 of 1975 dated 26.11.1975 may also be placed on record. Ordered accordingly".

The respondents Authority under took to comply with the above order on 18.5.2005, but failed to comply with the same and the Hon'ble High Court passed order dated 13.09.2005, with reads as under:-

13.09.2005

Mr. Kunwer Mukhtar Ahmed, Advocate
for the petitioners.

Mr. Ch. Muhammad Jameel, Advocate
for respondent NO. 2:-

"From perusal of the order dated 29.04.2004, it appears that direction given to the respondent to place on record Annexure I, Item No. 5 and the original of minutes of meeting No. 13 of 1975 dated 26.10.1975. Today Mr. Ch. Muhammad Jamil, learned counsel, after almost one and one half years has produced the minutes of the meeting dated 13.05.1996 which is not even called for. Secretary DHA is directed to be personally present in Court on 6.10.2005 alongwith the original records".

5. It has been contended by Mr.Kunwar Mukhtar that eventually the matter came up for hearing before the Hon'ble High Court on 6.10.2005 when the Hon'ble Court passed order dismissing the petition inlimine. The operative part of the order reads as under:-

"Admittedly, the Petitioners predecessors jointed the defunct society in 1968. On the dated of alleged allotment i.e. 16.11.75 he had served only for 7 years and not 10 years as required under bylaw 7(iv) above. Secondly, Minutes of meeting dated 16.11.75 has been produced in original, copy is also available on record. Item No. 5 reflects that "the committee scrutinized the applicants for membership and decided that those listed at Annx. I to these minutes, exception of civilian officers be accepted as member of society". Though Annexure I was not produced. Major Moin, who appeared along with record of the Authority, under direction of Court. It was stated that during shifting some documents were destroyed and are not traceable. We should have drawn adverse inference and were inclined to draw adverse presumption as suggested by Mr. Kanwer Mukhtar, that none production of Annexure I, shows that name of Petitioners predecessors was on the list. However, in view of the fact that he had not completed minimum of 10 years of service with society at the time of such meeting dated 16.11.75, such presumption was not drawn as on the dated of said meeting predecessors of the Petitioner was not eligible for allotment being short of three years of total length of required 10 years service.

Another aspect of the matter that prevailed upon us is that Petitioner No. 3 received the refund as far back as on 12.8.1996 without any protest and approached this

Court belatedly, are circumstances that refrained us from exercising equitable writ jurisdiction.

In this view of the matter, the circumstances as stated above, the Petition is hereby dismissed and disposed of as such along with the miscellaneous pending Application".

6. It has been contended by Mr.Kunwar Mukhtar learned counsel that it would be seen from the aforesaid proceedings that the Hon'ble High Court framed the Issue/point of dispute as reproduced above and initially directing the respondent Authority to produce the relevant document namely annexure-I to item No. 5 of the aforesaid Minutes but at the time of hearing on 6.10.2005, taken on record the bare statement of the Authority representative (Major Moin) that some documents have been destroyed in shifting and are not traceable. As a result of this statement the aforesaid material document namely Annexure-I which contained the details of the persons allotted the plot by the Managing Committee as its aforesaid meeting dated 26.11.75, with the reason as to why those persons were allotted plots did not come on record and therefore no finding by the Court was arrived at as to who were the persons allotted the plots and on what basis. It is an admitted position vide allotment order dated 1st December 1975 of the Managing Committee of the Authority. The Authority this deliberately suppressed and withheld the production of the relevant evidence i.e. Annexure-I In consequence of the said deliberate suppression of evidence it became impossible for the High Court to exercise its jurisdiction and determine finally the point in dispute/issue, as recorded by the Hon'ble Court in his order dated 8.8.03. It would be seen that inter alia mainly for the above reason, the Hon'ble Court refrained from exercising equitable jurisdiction. The Hon'ble Court disposed of the petition as such. The order dated 6.10.2005 by itself states that the Court for the reason set out in the order did not exercise its jurisdiction. The order thus makes it quite evident that it has not recorded decision on the merits of the case. The plaintiffs filed petition for special leave to appeal against the aforesaid order of the High Court before the Hon'ble Supreme Court. The Hon'ble Supreme Court has in it operative part only recorded with approval the operative portion of the order of the High Court verbatim and neither the order of the Hon'ble Court nor that of the Hon'ble Supreme Court gave any findings on the Issues involved. The Hon'ble Supreme Court only endorsed the view of the Hon'ble Court. Thus there is not finding on the Issues involved by either of the superior Courts.

7. Mr. Kanwar Mukhtar further contended that the writ petition and the petition for leave to appeal both dismissed in limine by the Hon'ble High Court of Sindh and the Hon'ble Supreme Court, respectively could not be considered to have decided the Issues finally on merits. The learned Additional Registrar has not asserted or highlighted any portion of the aforesaid respective orders to demonstrate that both the aforesaid previous proceedings have decided the Issues finally on merits.

8. Learned counsel for the plaintiff further contended that the question arises as to whether the above issue was finally decided on merits. This involves determination of legal and factual findings on merits from the proceedings involved, which may attract the principle of Res-Judicata. The study of the orders of both the Hon'ble Supreme Court as well as High Court would reveal that there is no such

determination of Issue on merits. Therefore, the question of applying Section 11 CPC in respect of the present suit of the plaintiff does not arise as there is no decision on merits by either of the Court.

9. In support of his arguments Mr.Kunwar Mukhtair Ahmed learned counsel for the Plaintiff has relied on the following case law.

i. 2005 SCMR 511
ii. 2003 SCMR 1284 (b)
iii. 1999 SCMR 2289 (c)
iv. 1999 SCMR 705 (b)
v. 1997 SCMR R 281 (b)
vi. 1985 SCMR 464
vii. PLD 1969 Dacca 9230
viii. AIR 1961 1457
ix. AIR 1978 SC O 1283
x. AIR 1989 SC 1764
xi. AIR 1923 Madras 514

10. Mr. Kunwar Mukhtar Ahmed learned counsel for the Plaintiff also submits that the Plaintiff is entitled for the benefit of Section 14 of the Limitation Act and the period during the pendency of the Constitutional Petition and the petition for leave to appeal Hon'ble Supreme Court be excluded for the purpose of limitation.

11. On the other hand Mr.Khalid Javed learned counsel for the defendant controvered the arguments of Mr.Kunwar Mukhtar on the simple reason that this section 14 of Limitation Act is not applicable in the present case as it provide a remedy for litigation which remain pending before the wrong forum but in the present case the Hon'ble Supreme Court and High Court were competent and the Plaintiff himself filed the constitutional petition in High Court and petition for leave to appeal in Supreme Court of Pakistan. Mr.Khalid Javed learned counsel further submits that even otherwise the Plaintiff has not filed any application under Section 124 of the Limitation Act for excluding the period from the counting of the limitation.

12. Mr. Khalid Javed learned counsel for the defendant vehemently supports the objection raised by the Additional Registrar (O.S) and relied upon PLD 1983 SC 46 ASIF JAH SIDDIQI ..VS.. GOVERNMENT OF SINDH and others wherein it was held that suit would be barred by section 9 CPC both expressly and impliedly. It is expressly barred because the Supreme Court has declared it as a law and impliedly because even if it had not come strictly within the four corners of the facts of the case of Abdul Majid, the ratio of the said case and the principle discussed therein, would impliedly bar the suit.

13. Mr.Khalid Javed learned counsel for the defendant submits that Hon'ble High Court and Hon'ble Supreme Court have decided the case on merits and all the questions of issues raised by the petitioner have been duly adjudicated and even the question of maintainability raised by the official respondents had been controverted by Mr.Kunwar Mukhtar Ahmed. In the Constitutional Petitioner Mr.Kunwar Mukhtar had taken the specific instance that the matter could be decided in writ jurisdiction. Mr.Khalid Javed also relied upon PLD 2005 Karachi 188 in the case of MUSTAFA LAKHANI ..VS.. PAKISTAN DEFENCE OFFICERS HOUSING AUTHORITY, KARACHI wherein the Division Bench of this Court had held in the similar cases while dismissing the petition of Mustafa Lakhani that that the allotment order was not a legal, valid and bona fide order as the very basis thereof i.e. meeting of the Managing Committee of the Society wherein the decision was purportedly taken to allot the said plot in favour of the petitioner had never taken place and therefore there was no basis for issuing the said allotment order on the basis of such illegal and bogus and mala fide allotment order even if same decisive steps has been taken in the nature of payment made by the petitioner and execution of 'A' lease in his favour, the order of allotment would not become irrevocable and a past and closed transaction. The Hon'ble Division Bench has followed the judgment of YOUSUF ALI (PLD 1958 SC 104; HOME SECRETARY TO THE GOVERNMENT OF WEST PAKISTAN ..VS.. JAN MUHAMMAD AND ANOTHER (PLD 1969 SC 333) AND MANSAB ALI ..VS.. AMIR AND 3 OTHERS (PLD 1971 SC 124) and held that as the order of allotment was illegal, bogus, mala fide and of no effect, therefore, the subsequent payments made by the petitioner by way of price and other charges in respect of the said plot as well as of execution of 'A' lease in his favour was also illegal and of no effect and would not create any right or privileges in favour of the petitioner in respect of the said plot. Mr.Khalid Javed further relied on para 2 & 3 of the memo of plaint wherein

the plaintiffs have stated that Plaintiff's late husband / father Bashir Ahmed after having retired as Civilian Officer, Ministry of Defence, Government of Pakistan joined the service of then Pakistan Defence Officers' Co-operative Housing Society Limited, Karachi w.e.f 01.01.1968 initially as Superintendent and later on was promoted as Section Officer by the said Society and it was further stated that the above named late Bashir Ahmed was allotted a commercial plot of land bearing No.24-C Sunset Boulevard Phase-II, measuring 200 sq.yds on 1.12.1975 and had paid Rs.100/- to the said Society on account of share money and Rs.3000/- as advance development charges for commercial plot total amount Rs.3100/- for which the society issued a receipt No.539 dated 4.10.1975, and Society issued a statement of account on 28.3.1976 in respect of payments made by late Bashir Ahmed but admittedly late Bashir Ahmed was not eligible for allotment of the plot under By-laws No.7(iv) of the society as admittedly he served the society from 1968 to 1983. In terms of Clause (iv) to Byelaws No.7 to earn eligibility for plot, employee of society (now authority) was required to show that he drew minimum slalry of Rs.750/- per month and secondly had worked for a minimum period of 10 years. The allotment in all categories excepting thouse placed at the disposal of commanders-in-chiefs of three serves, were to be made through open ballot and on first come first serve basis. Admittedly on the date of alleged allotment dated 16.11.1975 he had served only for 07 years and 10 years as required under byelaw 7(iv) of the society bye-laws and not 10 years secondly minutes of meeting dated 16.11.1975 has been produced in original, copy of which is also available on record. Item N.5 reflects that "the committee scrutinized the application for membership and directed that those listed at annexure I to these minutes, exception of civilian officers be accepted as member of society". Mr.Khalid Javed learned counsel for the defendant further contended that the judgement passed by Hon'ble High Court on 6.10.2005 and order passed by Hon'ble Supreme Court of Pakistan on 11.11.2005 are very elaborate and cover the factual and legal controversy raised by the respective parties and now at this stage filing of suit after final adjudication upto the leval of Supreme Court is not maintainable and the suit is liable to be dismissed in limine on the basis of principle of res-judicata. Mr.Khalid Javed in support of his contention relied upon the following case law.

i. PLD 2005 Karachi 188
ii. 1971 SCMR 447
iii. 1974 SCMR 230
iv. PLD 1982 SC 146

v. PLD 1983 SC 46

14. I have heard the arguments and perused the record and I have gone through the relevant law and the case law cited at bar. I have carefully examined the entire record of the case and in my considered opinion the objection raised by the office are justified and merits consideration. The law cited by Mr.Kunwar Mukhtair Ahmed learned counsel for the Plaintiff are distinguishable and had given no support to his case. In my considered opinion the leave refusing order passed by Hon'ble Supreme Court of Pakistan have covered the entire case and all the issues involved therein. The paras 4, 5 & 6 of the order dated 11.11.2005 of Hon'ble Supreme Court of Pakistan are reproduced as under:-

> 4. It transpired that earlier the order of cancellation was impugned in CP No. D-682 of 1997 which by consent of the parties was allowed and the respondents were directed to decide the case of the petitioners after affording them opportunity of being heard and passing a speaking order. In pursuance thereof the petitioners were heard and the order of cancellation of the plot was upheld which was conveyed to them vide letter dated 21.9.1999.
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> 5. Kanwar Mukhtar Ahmed has vehemently attacked the order of cancellation and contended that the competent authority was authorised to condone or waive shortfall in the service of any member of the staff for allotment of the plot and the fact of issuance of an order of allotment in favour of the petitioners would lead to conclusive presumption that the competent authority had condoned or waived the shortfall. His further submission was that even if it is admitted that on the date of allotment order of the plot deceased Bashir Ahmed had not completed ten years of service the fact is that he put in another eight years of service after issuance of letter of allotment, thereby rendering a total of fifteen years of service in the defunct Society. It was argued that the shortfall of three years in service would be deemed to have been fulfilled or complied with on account of late Bashir Ahmed's rendering eight years of service after the order of allotment.
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> 6. The arguments advanced by Mr. Kanwar Mukhtar Ahmed are devoid of substance. He has not been able to refer us to any provision of law whereby the period of service requisite for entitlement of a member of staff for allotment of the plot in the defunct Society could be curtailed or the shortfall could be condoned. Regarding his contention that late Mr. Bashir Ahmed had put in eight years could be deemed to have been

condoned it is to be observed that on t he date when the allotment was made in his favour he had not completed ten years of service in the defunct Society which was a condition precedent for his entitlement for allotment of a plot. Thus the order of allotment at the time of its making was contrary to the provisions of bye-laws No. 7 (iv) of the defunct Society's bye-laws as late Bashir Ahmed was not legally entitled to seek allotment of the plot in his favour. No doubt after putting in another three years and completing ten years service he would have become entitled for allotment but an allotment order passed before completion of the requisite period of service would not attain legality on completion of the requisite period subsequent to the order of allotment. It will also be appropriate to reproduce the relevant portions dealing with all the above issues from the impugned judgement of the High Court as under:-

> "On examination of Bye-laws No. 7(iv) it appears that the case of Late Bashir Ahmed prima facie is covered under sub-clause (iv) of the Bye-laws as reproduced above, as admittedly he served the society from 1968 to 1983. In terms of Clause (iv) to Bye-laws No. 7 as reproduced above, to earn eligibility for plot, an employee of society (now authority) was required to show that he drew minimum salary of Rs. 750/- p.m. and secondly had worked for a minimum period for 10 years. The allotment in all categories excepting those placed at the disposal of Commander-in-Chiefs of three serves, were to be made through open ballot and on first come first serve basis. Examining the case of Petitioners predecessors, it is claimed that allotment was made in a meeting dated 16.11.1975 as also mentioned in purported allotment letter dated 1.12.75. Admittedly, the Petitioners predecessors joined the defunct society in 1968. On the date of alleged allotment i.e. 16.11.1975 he had served only for 7 years and not 10 years as required under Bye-laws 7(iv) above. Secondly, Minutes of meeting dated 16.11.75 has been produced in original, copy is also available on record. Item No. 5 reflects that "the committee scrutinised the applications for membership and decided that those listed at Annx 1 to these minutes, exception of civilian officers be accepted as member of society". Though Annexure "I" was not produced. Major Moin, who appeared along with record of the Authority, under direction of Court. It was stated that during shifting some documents were destroyed and are not traceable. We would have drawn adverse inference and were inclined to draw adverse presumption as suggested by Mr. Kanwar Mukhtar, that non production of Annexure "I", shows that name of Petitioners predecessors was on the list. However, in view of the fact that he had not completed minimum of 10 years of service with society at the time of such meeting dated 16.11.1975, such presumption was not drawn as on the date of said meeting predecessor of the Petitioners was not eligible for allotment being short of three years of total length of required 10 years of service.

Another aspect of the matter that prevailed upon us is that Petitioner No. 3 received the refund, as far back as on 12.8.96 without any protest and approached this court belatedly, are circumstances that refrained us from exercising equitable writ jurisdiction.

For the facts, discussion and reasons as discussed hereinabove the objection raised by the office is upheld and the suit is dismissed.

Karachi
Dated:_____ JUDGE

IN THE HIGH COURT OF SINDH AT KARACHI.

C.P. No.D-327/2008

Agha Arslan Khan _____ PETITIONER

Versus

D.R.O Shaikarpur_____ _____ RESPONDENT

DOCUMENTS PRODUCED

I do hereby produce the following documents on behalf of the petitioner for kind perusal.

i. Newspaper cutting of Daily Koshish dated 20.2.2008.
ii. Result sheet of P.S 56 Qadir Bux Pohohore.
iii. Transfer / change of presiding officers on day before the election.

Karachi
Dated:28.2.2008 ADVOCATE FOR THE PETITIONER.