ORDER SHEET

IN THE HIGH COURT OF SINDH,

CIRCUIT COURT, HYDERABAD.

R.A. No.26 of 2004.

DATE	ORDER WITH SIGNATURE OF JUDGE
	For hearing of main case.

10-02-2020

Mr. Arbab Ali Hakro, advocate for the applicant.

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This revision application involves conflicting findings of two Courts below. A suit for specific performance was filed by Poonio against the legal heirs of Veeru in respect of an agreement of sale. The subject matter of the suit was a land which was allegedly allotted by Barrage Department for a period of 22 years on annual rent bearing Block No.315 w.e.f. 1986/1987. Though by afflux of time the period has already lapsed but a litigation commenced on the basis of the aforesaid suit for specific performance and possession collusively retained without annual rent. The litigating parties were claiming possession on count of the alleged allotment order. The trial Court dismissed the suit of the specific performance on the ground that the land was not available for transfer in view of an embargo under section 19 of the Colonization Act, 1912. Whereas, the findings and conclusion were reversed by the appellate Court on the count that it was the corpus of the land which was disposed of by allottee and not the tenancy rights.

I have heard this matter on the last date of hearing and it was adjourned on account of the fact that the respondents counsel had not marked his appearance. The matter was adjourned for 20.01.2020 and no one was in attendance on behalf of the respondents even on that date. Today yet again the respondents and their counsel have failed to appear.

I have heard the learned counsel for applicant and perused the material available on record. The only question that requires consideration is whether

such tenancy rights in respect of the land in question bearing Block No.315 as described in the allotment order could be transferred in presence of section 19 of the Colonization Act, 1912.

All litigants are related as descendants of Veeru, the allotte. There is no dispute to this proposition that respondents' predecessor Veeru entered into an agreement to sale however, what was admitted by the alleged buyer was that Veeru was only a tenant in respect of the land in question and has not paid installments in respect of the land in question. It was thus a running grant and was not fully paid up at the time of agreement. In terms of section 19 of the Colonization Act, 1912 there was no transfer order issued in favor of the alleged buyer before entering into an agreement of sell. These grants under the ibid Act are meant for a limited period and in this case it is for 22 years. In consideration of the "entitlement" of the allottee further transfer or alienation of the subject land by allottee is to be strictly regulated on the basis of terms and conditions of allotment and the law referred above.

The right to acquire property is a grant by the Provincial Government. The Provincial Government has the right to allot or refuse allotment of a property to a person having "entitlement" under the law. Thus the discretion being regulated under the law, always vests with the Provincial Government and this discretion, subject to law cannot be taken over by a subsequent alleged transfer of land by an individual who was selected on the basis of his entitlements, for such grant earlier as it would violate the discretionary rights of the Provincial Government. This discretion of the Provincial Government to select person having specifications under the law as transferee of the colony land is crucial in the sense that even original allottee cannot transfer or sell the land in his occupation to a third person unless the recourse as required under section 19 of the Colonization Act, 1912 is exhausted and taken into consideration. As long as the grant is temporary and the installments are yet

to be paid, the ownership vests with the government and there cannot be a transfer or alienation unless permitted by the provincial Government.

In the present case as admitted in paragraph No.6 of the plaint it was only a running grant and the remaining installments were yet to be paid when the agreement was entered into. The agreement disclosed that rest of the installments were required to be paid by the transferee. Thus when the further installments were agreed to be paid by the transferee it is not the corpus of the land but the tenancy itself was agreed to be transferred between the two private parties and hence, the case of *Sher Muhammad Khan versus Alam Din reported in 1994 SCMR 470* is not applicable and is distinguishable. The case of *Muhammad Aslam versus Shabbir Ahmed* reported in *PLD 2003 SC 588* is relevant for the consideration of the present case where the tenancy and not the corpus of land was agreed to be transferred. In terms of section 10 (4) of the Colonization of Government land Act no person can be treated as a tenant unless he has taken over possession of the land with permission of the Collector. Thus the vendor at the relevant time was neither competent nor any permission existed for the transfer of such tenancy rights in respect of the land in question. The agreement as such is not enforceable under the law. The agreement/ contract is void as the object (transfer of running grant tenancy) is unlawful in terms of section 24 of the Contract Act.

Insofar as the observation of the appellate Court regarding findings of the trial Court which leads to conclusion that the agreement was entered into between Veeru and respondent No.1 is concerned, in terms of Order 41 Rule 22 all questions were open for consideration before the appellate Court, hence, it is immaterial that the issues which went in favor of the respondent such as execution of agreement, were not challenged by way of cross appeal or otherwise. What is important for the consideration of the appellate Court was to see whether such performance is permissible under the law. There are certain agreements which no doubt may have been executed between the

parties but it is the nature of the agreement itself which may conclude as to whether a performance is permissible under the law. In view of the above irrespective of the fact whether alleged agreement was executed or not such agreement itself is not permissible under the law to be given effect and hence, judgment of the appellate Court is set-aside and that of the trial Court is maintained. The revision application is accordingly allowed in the above terms.

JUDGE

Irfan Ali