

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.1018 of 2007

[Pakistan Developers Pvt. Ltd.v.....Karachi Development Authority
& another]

Date of Hearing : 24.12.2021

Plaintiff : Mr. Muhammad Aqil, Advocate.
Mr. Amir Khosa, Advocate.

Defendants : Ms. Afsheen Aman, Advocate for KDA
assisted by Mr. Abid Hussain Zaidi,
Additional Director Land, KDA and Mr.
Imran Shah, Assistant Director Land,
KDA. & Ms. Falak Naz Fatima,
Advocate.

JUDGMENT

Zulfiqar Ahmad Khan, J:-*Lis* at hand arises from an alleged apathy of the defendants by not handing over possession of Flat Site No. FL No.8, Sector 2-C, measuring 5500 square yards, Corridor Development Project Scheme-33, Karachi (the “said plot”) to the plaintiffs despite having received the entire consideration and occupancy value in respect of the said plot. Plaintiff while narrating the facts states that the Governing Body of the defendant No.1/KDA approved the request of the plaintiff in respect of the said plot vide Resolution No.179 dated 04.06.1986, thereafter, the said plot was allotted to them by the defendant No.1 vide letter dated 10.08.1986. It is stated in the plaint that the plaintiff was also directed to make payment of the occupancy value in respect of the said plot, which directions of KDA were complied with by the plaintiff and that the plaintiff paid occupancy value of the said plot through pay orders, details of which are mentioned in paragraph-4 of the plaint. It is further alleged by the plaintiff that having received the occupancy value of the said

plot in full, KDA issued Possession Order in respect of the said plot in favour of the plaintiff on 28.09.1988. Plaintiff further alleged that having paid the entire consideration in respect of the said plot, they visited the office of the defendant No.1 for possession of the said plot, such requests were ignored by the defendant No.1 and the plaintiff was kept on hollow hopes. Having aggrieved by the actions of the defendant No.1, the plaintiff addressed a communication to the defendant No.1 drawing their attention towards the fact that the said plot was under encroachment and prayed in the said letter that the plaintiff be handed over physical and vacant possession of the said plot but no indulgence was shown by KDA, nor KDA removed the encroachments from the said plot, nonetheless, the plaintiff registered a complaint with the Ombudsman. It is further alleged by the plaintiff that learned Ombudsman having provided ample opportunity of hearing to the plaintiff and KDA passed an order dated 22.03.2002 directing the KDA to either provide an alternate plot or refund the amount paid by the plaintiff with markup on the said amount. Seemingly KDA being aggrieved with the said decision of the learned Ombudsman, preferred an appeal before the defendant No.2 who vide decision set aside the decision of the learned Ombudsman, therefore, the plaintiff has filed the present action with the following prayers:-

“i). Declare that judgment/order of defendant No.2 conveyed to plaintiff through letter dated 17.07.2004 is illegal, ultra vires without jurisdiction and has no legal force.

ii). Direct the defendant No.1 to hand over vacant and peaceful possession of Flat Site being Plot No. FL-8, Sector 2-C, Scheme-33, Corridor

Development Project measuring 5500 square yards to the plaintiff.

Alternatively allot another plot of same size and same value in some another developed scheme of defendant in favour of the plaintiff and to hand over physical possession thereof.

iii). Direct the defendant to make payment of Rs.62,105,042 to the plaintiff towards damages sustained by the plaintiff on account of the failure of defendant No.1 to handover possession of the suit plot.

iv). Cost of the suit may also be granted.

v). Any other better and further remedy in the light of circumstances of the case may also be granted.”

2. Having admitted the lis at hand, notices were issued to the defendants and in response to the Court's notice, the defendant No.1 filed its written statement, where, in the introduction part the said defendant raised objection as to the maintainability of the action at law at hand stating that the suit is barred by limitation as well as having no cause of action, but in later part of the written statement admitted the claim of the plaintiff to the extent that the plaintiff allotment order and possession order were issued in respect of the said plot, however, took the plea that there is a ban in allotting an alternate plot thus alternate plot could not be provided.

3. Record shows that on 04.05.2010, issues filed by the plaintiff were adopted by the Court and on the same day matter was referred to the learned Commissioner for recording of evidence. The issues settled by this court are as under:-

- “1. Whether the suit is maintainable under law?
2. Whether defendant No.1 allocated/allotted flat site plot bearing No. FL-8, Sector 2-C, Scheme 33,

Corridor Development Project measuring 5500 square yards to plaintiff who paid entire occupancy value amounting to Rs.1,105,042/-?

3. Whether the defendants are liable to handover and plaintiff is entitled for recovery of peaceful and vacant possession of suit plot or alternatively, plaintiff is entitled for allotment and possession of any other plot of same size and same value in some other developed scheme?
4. Whether the plaintiff is entitled for recovery of amount of Rs.62,105,042/- along with mark-up towards damages and compensation from defendants?
5. What should the decree be?"

4. Counsel introducing the plaintiff contended that the buyer is deprived of valuable property rights despite paying entire consideration which right is constitutionally protected vide Article 24 of the Constitution, 1973. Having reiterated the contents of the pleadings, the learned counsel contended that the defendant/KDA has admitted the claim of the plaintiff in their written statement but the plaintiff is being dragged since 1986 and even till date it is empty-handed despite paying entire amount claimed by the defendant/KDA. While concluding his submissions, he vociferously argued that the present action at law ought to have been decreed upon admission of the defendants as early as 2007 as mandated under Order XII Rule 6 CPC.

5. Incidentally, representative of the defendant/KDA did not deny the claim of the plaintiff to the extent of allotment of said plot; payment of entire occupancy value by the plaintiff of the said plot to the KDA and possession order issued by the defendant. Learned counsel next contended that the defendant No.2 set aside the

decision passed by the learned Ombudsman and in the said decision of the defendant No.2, KDA was also restrained from allotting an alternate plot as there was a ban imposed by the competent authority to allot an alternate plot to any allottee. To a query raised by this Court as to whether KDA admits the claim of the plaintiff to the extent of allotment of said plot in its favour? She could not controvert and admitted that said plot was allotted to the plaintiff upon paying of the entire occupancy value by the plaintiff.

6. Heard the arguments and examined the evidence. **Issue No.1** germane to the maintainability of the suit. The pleadings of the plaintiff suggest that soon after allotment of the said plot, the plaintiff paid the entire occupancy value of the said plot through Pay Orders and upon receiving the occupancy value of the said amount, KDA issued Possession Order in favour of the plaintiff. It is considered pertinent to record here that the plaintiff in order to have vacant possession of the said plot, filed a complaint with the learned Ombudsman as the said plot was under encroachment, thereafter, the learned Ombudsman vide its Decision dated 22.03.2002 directed KDA to allot an alternate plot to the plaintiff, however, KDA being aggrieved with the said decision of the learned Ombudsman, preferred an appeal before defendant No.2 who vide its order dated 24.09.2003 set aside the decision of the learned Ombudsman and the said order of the defendant No.2 was communicated to the plaintiff on 17.07.2004 by the office of the learned Ombudsman. A glance over the substratum of the pleadings of the plaintiff, it manifests that present action at law was preferred before this Court by the plaintiff on 01.11.2006 and the time prescribed by the statute to prefer a

declaratory suit is six (06) years, therefore, cause of action of the plaintiff is within time. It is an established position that accrual of “cause of action” and that a “suit is barred by law” are two distinct attributes and characteristics. It is not necessarily meant that nonexistence of cause of action concomitantly means that the suit is also barred by law. The expression “cause of action” means a bundle of facts which if traversed, a suitor claiming relief was required to prove for obtaining judgment. Nevertheless, it does not mean that even if on such fact, a constituent of cause of action was in existence, the claim to be succeeded. It is a well understood position of law that not only a party seeking relief is to have a cause of action with regards the transaction or the alleged act having been done, but also at the time of the institution of the claim. A suitor is required to show that not only a right had been infringed in a manner to entitle him to a relief, but also that when he approached the court the right to seek relief was also in existence. Under section 42 of the Specific Relief Act, any person entitled to any legal character or to any right as to any property may institute a suit against any person denying or interested to deny his title to such character or right. A person can seek the aid of the court to dispel the cloud in case one is casted upon his title or legal character. From a plain reading of section 42, it does not appear to be any justification for assuming that a suit for declaration as to status claimed by the plaintiff could be not-maintained. A man's legal character is generally taken as the same thing as a man's status. The words "right to as to any property" are to be understood in a wider sense than "right to property" and the words "interested to deny" denote that the defendant is interested in

denying the right of the plaintiff or his legal character. It is now an established legal position that Section 42 provides that any person entitled to any legal character or to any right as to any property, can institute a suit against any person denying or interested to deny his title to such character or right. This section is held to apply when a person is entitled to any legal character or to any right as to any property. The phrase "legal character" is known to occur in two statutes viz., in section 42 of the Specific Relief Act and in section 41 of the Evidence Act (Article 55 of Qanun-e-Shahadat Order, 1984) but that phrase has not been defined in either of the said two laws. Section 42 provides for making a declaratory decree i.e., making a decree declaring a man's rights which would mean legal rights and it would therefore appear that both the said categories mentioned in section 42 are species of the same genus viz., "legal rights", "legal character". When the legislature used the phrase "legal character" in the said two sections, it is legitimate to assume that the legislature was using these in respect of some known legal concept and the context in section 42 of the Specific Relief Act indicates that what was intended to be meant by "legal character" was "legal status". It is sine qua non as to whether the plaintiff in facts and circumstances of the case should or should not be granted a declaration. Taking a pragmatic approach it has been held in many cases that courts should not stick to mere rigidities and complexities rather need to take generous comprehension to meet up all exigencies. Lord Cottonham, in Taylor v. Salmon long ago held that:-

“It is the duty of a court of equity to adapt its practice and course of proceedings, as far as possible, to the existing state of society and to apply its jurisdiction to all those new cases, which

from the progress daily made in the affairs of men, must continually arise and not from too strict an adherence to forms and rules established under very different circumstances, decline to administer justice and to enforce rights for which there is no other remedy". (1838) 4 Myln and Cr 134. (C M Row. Law of Injunctions, Eighth Edition.)

7. The dictum laid down in the case of Arif Majeed Malik and others v. Board of Governors, Karachi Grammar School (2004 CLC 1029) is of significance too as it holds that wherever there is a right there must be a remedy to enforce and persuades courts to not to be constrained with the technicalities of section 42 of Specific Relief Act. The reason for the divergence of judicial opinion is probably that when Specific Relief Act, 1877 was enacted concept of rights which could be enforced through courts was largely confined to status as understood in feudal social context or rights pertaining to property in laissez-faire economy. A close look to the substratum of the above deliberation, unequivocally demonstrates and confirms that the plaintiff can file a civil suit in the present form for alleviation of their grievances, therefore, the **Issue No.1 is answered in affirmative.**

8. **Issue No.2.** Onus to prove this issue is on the plaintiff. In order strengthen and validate their claim, plaintiff produced overwhelming documentary evidence during their examination-in-chief amongst which following are significant documents to reach at right and just conclusion of the issue under discussion:-

Allocation letter dated 10.08.1986 bearing reference No.KDA/L&E/Gul/CC/Allocation/86/137/635 as Exh. P/3.

Acknowledgement payment receipts as Exh. P-4 to P-9.

Pay Order dated 29.11.1986 amounting to Rs.228,280/- as Exh. P-10.

Pay Order dated 10.12.1987 amounting to Rs.489,042/- as Exh. P-11.

Paid challan dated 17.12.1997 amounting to Rs.489,042/- as Exh. P-11-A.

Paid challan dated 27.09.1998 amounting to Rs.132,000/- as Exh. P-12.

Details of payment made by the plaintiff to the defendant No.1 as Exh. P-13.

Possession Order of the said plot along with site plan as Exh. P-14 & P-15.

9. The plaintiff was put to the test of lengthy cross-examination by the defendants' counsel but nothing came out favourable to the defendants. Apart from this, the defendant No.1 in its written statement admitted the claim of the plaintiff to the extent of allotment of said plot, payment of the said plot to the tune of Rs.1,105,042/- and issuance of possession order to the plaintiff. The defendant No.1 neither denied the claim of the plaintiff to the extent of allotment of said plot nor to deposit of occupancy value in respect of the said plot and that the defendant No.1 acknowledged to have received occupancy value of the said plot too. It is settled principle that right in immovable property itself is a right in rem and in this case clearly a right in rem in respect of the plot has passed to the allottee i.e. plaintiff¹. Furthermore, a right in rem corresponds to a duty imposed upon persons in general while a right in personam corresponds to a duty imposed upon determinate persons. Apart from above, Rights in *Rem* or *Jus in Rem* means every person entering into a contract has rights in rem. This is right available to him or her against the entire world. It protects a person's property from the

¹ Per. Muhammad Haleem & Z.A. Channa.JJ in the case of Haji Noor Muhammad & others v. KDA & others (PLD 1975 Karachi 373)

entire world, whereas, right in *Personam* or *Jus in Personam* is the opposite of right in *rem*. Right in *personam* gives the person rights against one person or party to the contract. Reverting to the merits of the issue under discussion, defendants produced Abdul Karim Palijo, (an official of defendant No.1) as its witness but no cogent and concrete documentary evidence was produced by the said witness in his defence. Since the defendant never negated the allotment of said plot to the plaintiff, plaintiff deposited entire occupancy value of the said plot thus the plaintiff is entitled for the possession of the said plot and issuance of allotment order by them in favour of the plaintiff. It is settled principle that admitted documents and admitted facts do not need to be proved. In the case of **Muhammad Bachal v. Muhammad Arif Memon (2019 YLR 1040 rel. at page 1643-1644)** (authored by me), I have held the similar principle. Furthermore, it is a golden principle of Qanun-e-Shahadat Order, 1984 as mandated vide Article 113 that facts admitted need not to be proved. For the ease of reference, Article 113 of the Qanun-e-Shahadat Order, 1984 is reproduced as under:-

“113. Facts admitted need not be proved. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule or pleading in force at the time they redeemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions.”

10. A glance over the provisions of Constitution in respect of holding of a property shows that Article 23 connotes that every citizen shall have the right to acquire, hold and dispose of property in any part of

Pakistan and such right is one of the Fundamental Rights enshrined and guaranteed by the Constitution. Article 24 of the Constitution also recognizes right of a person to hold the property and ordains that no person shall be compulsorily deprived of the property and it applies to every person, natural or artificial. Furthermore, Article 24 of the Constitution, 1973 is not confined in its application to citizens only, it also applies to corporation and it is the indefeasible right of every citizen to practice a profession provided he fulfills the requirement as to the standard prescribed by law and actions of the defendants of not handing over possession of the said plot is clearly against the said fundamental right. In view of these rationales and deliberations, the **Issue No.2 is answered in affirmative.**

11. **Issue No.3** germane to handing out of the possession of the said plot to the plaintiffs or an alternate plot in case the said plot is not ready for possession. Since it has been established in the preceding paragraphs that the defendant No.1 neither denied allotment of the said plot in the name of the plaintiff nor denied to have issued possession letter to the plaintiff, whereas, it manifests from the record that the defendant No.1 having issued possession order (Exh. P-14 available at page 23 of the evidence file) communicated to the plaintiff another letter dated 27.01.1990 (Exh. P-16 available at page 25 of the evidence file) craving attention of the plaintiff towards the fact that the said plot is under encroachment and occupied by Afghan Refugees and as soon as the encroachment is removed, possession would be handed out to the plaintiff. It is considered pertinent to reproduce the said letter (Exh. P-16 available at page 25 of the evidence file) hereunder:-

KARACHI DEVELOPMENT AUTHORITY CONSTRUCTION WING	
No.:CE(C)/11-6(132)/90/21	Dated: 27.01.1990
To,	
M/s. Pakistan Developers Ltd., J-3/3, Jacob Line Complex, Jacob Line, KARACHI	
Subject: <u>PHYSICAL POSSESSION OF PLOT NO.FL-8, SECTOR2-C, SCH-33, KARACHI</u>	
Dear Sir,	
<p>With reference to your letter dated: 12.11.89, on the above subject, I am directed to inform you, that sector 2-C of corridor is entirely unauthorisedly occupied by Afghan Refugees. Every efforts for removal of encroachments have been made, but of no result, As soon as the encroachers are removal from Sector 2-C, possession will be handed over to the allottees.</p>	
<p>Your's Faithfully, Sd/- (S.M. AFZALULLAH) STAFF ENGINEER (CONT) K.D.A</p>	

12. It is gleaned from appraisal of the foregoing that the defendant No.1 despite being aware of the fact that the said plot was under encroachment never offered an alternate plot soon after allotment of the said plot to the plaintiffs. It is considered illustrative to highlight here that the plaintiffs having aggrieved with the conduct of the defendant No. 1 of not handing over the said plot despite receiving occupancy value of the said plot, filed a complaint before the learned Ombudsman which was registered as POS/3685/97/A (the said complaint was exhibited as Exh.P/20 available at page 31 of the evidence file) and the learned Ombudsman having heard the contesting parties disposed of the said complaint of the plaintiff vide decision dated 22.03.2002 (Exh. P/21 available at page 33 of evidence file). In order to reach to a just conclusion of the issue

under discussion, it would be useful to reproduce the relevant excerpt of the said decision as under:-

“4. From the foregoing, mal-administration of the Agency is established since it failed to hand over possession of this plot at the time the possession order was issued, and subsequently failed to prevent the Afghan refugees from occupying its land. The complainant has paid a huge amount of Rs.11,05,049/- as full O.V. of the plot long time back in 1986 which was being used by the agency all along. I therefore, direct the Agency to either provide an alternate flat site to the complainant, of the same size and value, in any of its developed scheme or refund the amount paid by the complainant with mark up at the prevalent bank rate as compensation. A compliance report to be submitted to me within 90 days thereof”

13. It is crystal clear from the above reproduction that the learned Ombudsman having heard the contesting parties, went on to hold that it is an apathy of the defendant No.1 in not handing over the possession of the said plot to the plaintiff, therefore, having observed the circumstances, the learned Ombudsman directed the defendant No.1 to allot an alternate plot (for the flat site) in favour of the plaintiff of the same size and value in any of its developed schemes. Apart from above, the witness of the defendant No.1 amid his cross-examination went on to admit that learned Ombudsman directed the defendant No.1 to award an alternate plot but the defendant No.1 had not complied with the decision of the learned Ombudsman. It would be conducive to reproduce the relevant excerpt of the cross-examination of defendant No.1's witness hereunder:-

“It is in my knowledge that Provincial Ombudsman passed order dated 22.03.2002 (Exh. P/22).”

“It is correct to suggest that as per Order dated 22.03.2002 (Exh. P/22) the Provincial Ombudsman passed order for giving alternate plot to the plaintiff.”

“It is correct to suggest that the defendant No.1 not complied the orders of Ombudsman due to heavy encroachment”

“The defendant No.1 has no objection if the subject plot is vacated from Afghan Refugees.”

14. The Hon’ble Supreme Court in the case of **Dr. Faisal Masud v. Umer Rasool, Director General, Lahore Development Authority (2017 SCMR 287)** has been pleased to hold that in case of unavailability of allotted plot an alternate plot may be granted, therefore, keeping in view the said dictum of the Hon’ble Supreme Court, the defendant No.1 is directed to allot an alternate plot to the plaintiff to be equal in size and equal in location in lieu of said plot and this allotment would satisfy the rule of fundamental right to property as enshrined by Article 23 of the Constitution of the Islamic Republic of Pakistan, 1973. In view of the above deliberation, the **issue No.3 is answered in affirmation.**

15. **Issue No. 4.** Plaintiff introduced on record his grievances that having allotted the said plot in its favour by the defendant No.1, they beseeched the defendant No.1 for possession of the said plot but they were kept on hollow hopes. According to them, soon after allotment order issued in their favour, they addressed a communication to the defendant No.1 for possession of the said plot but neither the said letter was replied by the defendants nor possession of the said plot was handed out to the plaintiff, however, with the passage of time, the defendant No.1 informed the plaintiffs through letter dated 27.01.1990 (Exh. P-16 available at page 25 of the evidence file) that the said plot is under encroachment. Plaintiffs asserted they paid a

sum of Rs.1,105,042/- to the defendant No.1 as occupancy value of the said plot and incurred expenses in completion of the documentation but the said amount remained stuck with the defendant No.1 for the last three decades and if the said sum would have been invested elsewhere, it would have provided huge returns but owing to the carelessness and apathy of the defendant No.1, plaintiff has suffered and serious breach of trust has been occasioned. Having gone through such agony at the hands of defendant No.1, the plaintiffs pray for the award of compensation. It is not disputed that the defendant No.1 received substantial sums towards the said plot but, nonetheless, the plaintiff was kept away from his fundamental right to acquire property and that this right is constitutionally protected too vide Articles 23 & 24 of the Constitution, therefore, in my view, the plaintiff is entitled for the damages/compensation. During course of arguments, learned counsel for the plaintiff vociferously contended that owing to the acts of the defendants of not handing over physical possession of the said plot despite receiving entire occupancy value of the said plot, the plaintiffs suffered financial losses, mental torture and agony.

16. This Court has held in many cases that the damages can be classified into two kinds/types/sorts such as general damages and special damages. At the cost of repetitions, the difference between general damages and special damages is that the former is initially quantified by the person making the claim, while the latter is assessed by the court. Specific Relief Act 1950 provides that specific relief be given by taking possession of subject property and delivering it to a claimant or by ordering a party to do the very act which he

was under an obligation to do or by preventing a party from doing what he was under an obligation not to do, and finally by determining and declaring the rights of parties otherwise than by an award of compensation and it matters little to the aggrieved person as to whether it is general or special damages. The plaintiff has claimed a fixed amount of damages in lieu of their sufferings which they suffered owing to the tortious acts of the defendant No.1 and left themselves at the mercy of this Court so that the Court having seen the agony of trial faced by the plaintiff and acts of the defendants (in not handing over the physical possession of the said plot), award appropriate damages or compensation. It is a settled exposition of law that, the onus of proof for damages lies on the shoulder of claimant/plaintiff and without discharging such onus, damages cannot be granted straightaway more particularly even a fixed amount of damages cannot be granted, until and unless, the quantum of loss[es] or damages, actually suffered is proved through sufficient evidence. It is also an established position that damages no doubt are firstly to be pleaded and thereafter to be proved by leading reliable, trustworthy and cogent evidence as well as damages cannot be awarded on such expectation or on hearsay evidence. The Hon'ble Supreme Court in the case of Sufi Muhammad Ishaque v. The Metropolitan Corporation Lahore (PLD 1996 S.C 737) held that "*...the damages for mental torture, nervous shock etc, fall in the category of general damages for which no standard or method of proof can be laid down with precision. The claim of such nature is difficult to estimate. The Courts, therefore, in assessing such damages employ a guess work which can only meet the test of a reasonable assessment*

by a man of ordinary prudence....”. When I consider the submissions of learned counsel for the plaintiff that in an epoch when the buyer is deprived from his valuable property rights at the fault of the defendants, I find it just to hold that the plaintiff is entitled to general damages as claimed. **Issue No.4 is answered in in affirmation.**

17. So far as **issue No.5** is concerned, sanguine to the set of circumstances and ramification as well as connotation of statues, the plaintiff is entitled to the decree in terms of prayer (i), (ii) and (iii). Office is directed to prepare the decree, whilst parties are left to bear their own costs.

Karachi
Dated:27.09.2022

JUDGE