

IN THE HIGH COURT OF SINDH AT KARACHI

C.P. No. D-4404 OF 2014

PRESENT: ***MR. JUSTICE SYED HASAN AZHAR RIZVI***
 MR. JUSTICE MUHAMMAD FAISAL KAMAL ALAM

J U D G M E N T

Date of hearing : _____ 06.11.2015 _____

Petitioner Mr. Basil Nabi Malik, Advocate .

Respondent No.1 Mr. Ainuddin Khan DAG.

Respondent No.2 Mr. Sohail H. K. Rana Advocate.

Respondent No.3 Mr. Shanawaz Advocate .

Muhammad Faisal Kamal Alam, J: The Petitioner above-named has filed the present Constitutional Petition to agitate his grievance primarily against the Respondent No.3, Pakistan Defence Officers Housing Authority (D.H.A), as the latter (Respondent No.3 DHA), as averred in the Memo of Petition, is refusing to process the Application for approval of the Completion Plan and issuance of Completion Certificate of the property-Plot No.S-95, Khayaban-e-Muhammad Hussain Shaheed, Phase-VII, Ext. DHA, Karachi, admeasuring 150 square yards, together with the construction thereupon, which for the reference's sake be referred to as the "subject property", belonging to Petitioner. The instant Constitutional Petition contains the following prayer clauses: -

"1. *That the Hon'ble Court may be pleased to declare that the actions of the Respondents in placing a caution on the*

subject property of the petitioner, thereby restricting enjoyment thereof by the petitioner, is wholly illegal and unlawful;

2. *That the Hon'ble High Court may be pleased to direct the Respondents to remove the caution from the subject property of the Petitioner, thereby allowing the Petitioner to fully enjoy and handle his property without any hindrance or restrictions;*
3. *That the Hon'ble High Court may be pleased to direct the Respondents to accept the requisite fee for and consider its application for approval of the completion plan, and upon approval of the completion plan, thereof, forward the same to the Respondent No.2 for issuance of the Completion Certificate;*
4. *That the Hon'ble High Court may be pleased to restrain the Respondents from refusing to consider the Petitioner's application for approval of completion plan on the ground of pendency of Suit No.390 of 2013 and / or Suit No.1211 of 2014;*
5. *That the Hon'ble High Court may be pleased to award the costs of the petition to the Petitioner;*
6. *That the Hon'ble High Court may be pleased to award any and all other relief as it may deem appropriate in the facts and circumstances of the instant case."*

2. Prior to the instant Constitutional Petition, a Suit No.390 of 2013 is also pending, which was filed by one Shaban Abdul Manan against Muhammad Qadir Khan and present Respondent No.3 (DHA), wherein the said plaintiff Shaban Abdul Manan claiming to have purchased the subject property, and also succeeded in obtaining the restraining orders initially. Although the present petitioner was not impleaded as a party in the aforesaid suit but the respondent No.3 (DHA) has specifically pleaded in paragraph-3 of its written statement (available at page 41) filed in the said suit No.390 of 2013 that the owner of the subject property is present petitioner, namely, Syed Dost Ali. The perusal of said written statement of the respondent No.3 (DHA) shows that the subject property has changed hand four times, but the above named Shaban Abdul Manan was never a transferee at any given time. It is also a matter of record that the present petitioner in order to get NOC for electricity connection had filed an intervenor application in the above suit and the learned Single Judge of this Court was pleased to direct

the respondent No.3 (DHA) to issue N.O.C for new electricity connection to the present petitioner. Subsequently, on 23.12.2013, the interim order earlier granted in the above suit was vacated and the application under Order XXXIX Rules 1 and 2 CPC was dismissed for non-prosecution, with the observation that after obtaining the interim injunction, the counsel of the plaintiff did not appear. Relevant record of the above suit is available at pages 133 to 139.

3. In the intervening period, the present petitioner also filed a Suit No.1211 of 2014 in this Court and obtained restraining order in his favour to the effect that lawful possession of the present petitioner (plaintiff in Suit No.1211 of 2014) in respect of the subject property should not be interfered with. The said interim injunction order in favour of the present petitioner passed in the above suit No.1211 of 2014 is still holding the field. In the said suit, the present respondent No.3 (DHA) was impleaded as Defendant No.2, but no relief was claimed against it, as the proceedings were primarily directed against the private party, that is, the above named Shaban Abdul Manan. In the aforesaid suit, the petitioner has specifically pleaded and placed on record a public notice issued by Defence and Clifton Association of Real Estate Agent (Registered) that the afore-named Shaban Abdul Manan is involved in fraudulent activities of filing frivolous litigation. This public notice is available at page 209 of the file.

4. The petitioner in order to complete the requisite formalities in respect of the subject property has approached the respondent No.3 (DHA) with his application and ancillary documents so that the same may be processed and a Completion Certificate be issued to the petitioner, which is necessary for availing other basic amenities, such as water. The respondent No.3 (DHA) refused to even accept the application of the petitioner for issuance of Completion Certificate on the ground that they **have put a caution** in respect of the subject property on account of pending litigation.

5. The case record also shows that the construction on the subject property was carried out after approval of the building plan by the respondent (Clifton Cantonment Board) and duly forwarded by the respondent No.3 (DHA) and further endorsed by the Military Estate Office (M.E.O). These three official functionaries while according approval of the building plan have also confirmed the ownership of the present petitioner in respect of the subject property. Petitioner has specifically pleaded in the present Petition as well as in his afore mentioned suit No. 1211 of 2014 that the latter has purchased the open plot of the subject property from its previous owner after payment of full sale consideration of rupees sixty five lacs, which fact has not been denied. An undisputed transfer order dated 24.02.2012 issued by Respondent DHA for subject property in favour of petitioner as new owner is also available, besides other official documents to show that formalities were completed by respondent No.2 in purchasing the subject property. The present case record also contains various correspondence(s) starting from March, 2014 addressed by the petitioner to official respondents for removal of purported caution and processing the completion plan and issuance of Completion Certificate, though without any success, has not been disputed by the respondents in their replies / para-wise comments.

6. The counsel for the petitioner Mr. Basil Nabi Malik, argued at length that such an action rather an in-action on the part of the respondent No.3 (DHA) is violative of fundamental rights of the petitioner guaranteed in terms of Articles 9, 14, 23, and 24 of the Constitution of Islamic Republic of Pakistan, 1973. It was also argued on behalf of the petitioner that the impugned action of the respondent No.3 (DHA) is unjust and oppressive as it has put a clog on the ownership rights of the petitioner vis-à-vis the subject property, as the latter has been deprived of his right to use and enjoy the same. It was next argued by the petitioner's counsel that since the stay order in favour of the aforesaid Shaban Abdul Manan was vacated long time back and he has not even pursuing his aforesaid suit bearing No.390 of 2013, therefore, the respondent No.3 (DHA) is not at all justified to put

such a caution in respect of the subject property, which is causing serious prejudice to the present petitioner.

7. Learned counsel for the respondent No.3 (DHA) while opposing the present petition argued that the respondent No.3 (DHA) has put the impugned caution in the best interest of all the parties, as in the event the aforesaid Suit No.390 of 2013 is decreed then the same may be given effect to. Learned counsel for the respondent No.3 (DHA) further argued that the petitioner in his subsequent suit (Suit No.1211 of 2014) sub judice in this Court has himself sought a declaration of his ownership rights in one of the prayer clauses and unless the same is granted, the present *caution* in respect of the property should remain intact and his application for processing and issuance of Completion Plan and certificate should not be entertained. It was further argued that Respondent No.3 (DHA) takes such measures as a standard practice and in the best interest of the public at large. To further advance his contentions, the learned counsel has cited two judgments, one of our Hon'ble Supreme Court reported as 2002 SCMR page 238 (Haji Muhammad Ashraf Vs. The District Magistrate, Quetta and 3 others) and the other of Indian Supreme Court reported as 1994 SCMR Page 212 (Mohan Pandey and another Vs. Smt. Usha Rani Rajgaria and others).

8. Mr. Sohail H.K Rana, learned counsel representing the Clifton Cantonment Board has, inter alia, contended that instant petition is misdirected against his client, that is, respondent No.2 (Cantonment Board Clifton) as the latter has not issued the impugned caution and the learned counsel further pressed that the Petition be dismissed.

9. Learned Deputy Attorney General Mr. Ainuddin Khan has also opposed the present petition and contended that the reliefs sought in the present petition could have been sought in the pending suit No.1211 of 2014 of the present petitioner by resorting to amendment of pleadings' procedure as contained in Civil Procedure Code, instead of filing the present petition. Learned DAG

requested that the instant petition should be dismissed being not maintainable in view of the pendency of above suits before the original Civil Jurisdiction of this Court. In rebuttal the petitioner's counsel argued that the scope of his aforementioned pending Suit No.1211 of 2014 is altogether different, besides refusal by the Respondent DHA to entertain and process the Completion Plan of the subject property is a subsequent event for which the present petition is filed. To further substantiate this factual aspect of the case, Mr. Basil Nabi Malik has drawn our attention to the date of filing of the above Suit No.1211 of 2014 and the interim injunction passed in his favour, which is 27th September, 2013, whereas the present grievance of the petitioner started in March, 2014, when he approached the Respondent DHA with his application and requisite documents for processing and issuance of Completion Plan/certificate, which was refused by the Respondent DHA. This very aspect has not been disputed by any of the Respondents. In this regard, the learned counsel for the petitioner has placed reliance on two judgments of Hon'ble Supreme Court, reported as PLD 2003 Supreme Court Page 818 relating to the principle of *lis pendens* and the other one is a well-known judgment of Frontier Sugar Mill and Distillery reported in PLD 1975 SC Page 244.

10. First adverting to the question of maintainability; the undisputed facts of the case show that the Petitioner as per the official record is the owner and in possession of the subject property, present grievance of the petitioner is a subsequent event, as discussed in the preceding paragraphs, for which his above pending suit No.1211 of 2014 is not an efficacious remedy, inter alia, as amending the plaint of above suit No. 1211 [of 2014] would be a laborious exercise and thus as decided by the learned Judges of Hon'ble Supreme Court in the above cited case of Frontier Sugar Mills (relevant pages 263 to 264) that where remedy including by way of a civil suit is neither adequate nor efficacious and does not give the requisite relief then in such peculiar circumstances invoking the writ jurisdiction even during pendency of suit is not prohibited.

In this regard, the case law cited by the learned counsel of Respondent DHA has been carefully examined; in the first case-2002 SCMR page 238, the issue before Hon'ble Supreme Court was that the petitioner (in the above reported case) was allotted a land adjacent to cattle market which the local administration subsequently wanted to shift and the allottee/ petitioner filed a suit to safeguard his interest and despite that the allottee was removed from his land and a Criminal case was also registered. Subsequently, the said allottee preferred a Constitutional Petition before the High Court, which too was dismissed as the officials in their counter affidavit disputed the very ownership and possession of the claimant and when he approached the Hon'ble Supreme Court, with the above set of facts, the Apex Court ruled that the appropriate remedy is a Civil Suit, particularly when during its pendency the person / allottee was dispossessed. Since facts of the above decision of Hon'ble Supreme Court is altogether different from the present dispute in hand, therefore, cited Judgment is clearly distinguishable and not applicable to the present case.

In the second case of Indian Supreme Court-1994 SCMR page 212, the dispute was with regard to letting out the premises between the respondent and appellant and further subletting of the property. In that case also a parallel Criminal Proceeding was instituted amongst the parties and considering all the facts, the Indian Supreme Court held that writ jurisdiction under Article 226 of the Indian Constitution cannot be invoked by the parties for deciding the factual controversies, particularly relating to proprietary rights, for which remedies under the general law, civil or criminal, are available. The above decision is also of no help to the learned counsel of the Respondent DHA, as the issue in hand is entirely different and relates to issuance of Completion Certificate to the petitioner whose ownership and possession are not disputed by the concerned official Respondents. Therefore, the instant Constitutional Petition in view of its peculiar facts and exceptional circumstances is maintainable.

11. That the petitioner's counsel today, that is, 09.11.2015 has filed written synopsis alongwith number of decisions in support of his arguments. The Judgment relating to the maintainability of the instant petition are as under: -

- i. PLD 1986 SC Page 36
- ii. PLD 1975 SC Page 244
- iii. PLD 1960 SC Page 639
- iv. 2011 SCMR Page 1813
- v. PLD 2013 Islamabad Page 49
- vi. PLD 2009 SC Page 45
- vii. 2010 CLC Page 54 (of Lahore High Court)
- viii. PLD 2006 Page 298.

The following category of case law is in respect of the proposition that the Respondent No.3 (DHA) is a public functionary and, therefore, should act fairly, justly and reasonably:

- ix. 2013 SCMR Page 1707
- x. PLD 2005 SC Page 792
- xi. 2012 CLC Page 168

The Judgments herein below are in support of contention of the Petitioner's counsel that even during pendency of litigation / *lis-pendens* a property can be transferable but subject to decision of the Court, which is seized of the matter-

- xii. 2003 CLC Page 250 [Karachi]
- xiii. 2003 MLD Page 1970 [Karachi].
- xiv. 1990 YLR Page 910 [Karachi].
- xv. PLD 2003 SC Page 818

The above cited case law has been examined and decisions handed down in Frontier Sugar Mill and Distillery (PLD 1975 Supreme Court Page 244) is applicable to the present case. Basically, the judicial precedents from serial number (i) to (viii) shed light on the issue that

despite availability of an alternate remedy, the beneficial jurisdiction in the shape of Article 199 conferred by the Constitution on the High Court in the larger public interest, can be invoked.

12. In view of the above discussion, if the stance of Respondent DHA is accepted, it would lead to a very complex situation. Any *bona fide* purchaser and owner of a property could be easily deprived of his rights and interest as owner on account of some pending litigation(s) may be (sometimes) a frivolous one. As a general rule measures taken by the Respondent DHA are correct that it diligently protects and safeguards the interest of bona fide purchasers and transferees of plots in respondent DHA, specially where regarding a property/land some restraining order from a competent Court of law is operating, but in the present set of facts, the respondent DHA has over stretched its authority to the extent of unreasonableness.

13. Secondly, the Respondent No.3, while maintaining a caution note in its record and computer system for the protection of future transferees and purchasers of the subject property, can still address the present grievance of the Petitioner by entertaining his application for processing the completion plan and issuance of Completion Certificate in accordance with relevant rules and byelaws. Present action of Respondent-DHA in refusing to do so is tantamount to putting a clog on the ownership rights of the Petitioner in respect of the subject property, which is not only an unreasonable act but an excessive use of authority vested in Respondent-DHA. On the basis of assumptions, the present Petitioner cannot be deprived of his entitlement to the use and enjoyment of his subject property, which otherwise would be violative of Articles 23 and 24 of the Constitution of Islamic Republic of Pakistan, 1973, relating to proprietary rights of a citizen. It is relevant here to quote few lines from a celebrated judgment of the Hon'ble Supreme Court reported as 1993 SCMR page 1533 about the discretionary powers vested in a public functionary and how it should be used;

“6. *There is much weight in the contentions of Mr. Khalid Ishaque. The principle is well settled that when express statutory power is conferred on a public functionary, it should not be pushed too far, for, such conferment implies a restraint in operating that power, so as to exercise it justly and reasonably. In the words of Scarman L.J. “ excessive use of lawful power is itself unlawful”.* **(emphasis added)**.

14. Thirdly, a genuine claimant can invoke Section 52 of the Transfer of Property Act, 1882, by notifying the concerned Registrar / Sub-Registrar responsible for registration of sale / conveyance-deed (under the Registration Act, 1908), about the pendency of litigation in a competent Court of Law, *inter alia*, to protect one’s interest in a property under litigation. In this regard the aforementioned decision-PLD 2003 Supreme Court page 818 [relevant paragraph 19] satisfactorily answers the apprehension raised by official respondents and for further guidance relevant portion of the said paragraph-19 is reproduced herein under: -

“19. *A close perusal of the section would clearly indicate that a lis pendens transaction is not void on this score alone that it was done during the pendency of some lis but the fate thereof would remain suspended till final verdict of the Court which is seized of the matter. Similar situation had come before this Court in Muhammad Zafar uz Zaman v. Faqir Muhammad (PLD 2001 SC 449), where this Court had held that vesting of title through a lis pendens transaction is not prevented by section 52 of the T.P. Act but the only impediment laid down by the section is that the validity of such transaction, keeping in view the rights of third parties, shall always be subject to the final decision by the Court. A lis pendens transaction is subject to the final decision by the Court. A lis pendens transaction is perfectly valid so far as the parties to such transaction are concerned but the effect thereof on a third party is kept pending till the decision of the suit or proceedings. In this view of the matter, the Courts should not discard a transaction merely because it had taken place during the pendency of a lis but its fate should be deferred to the final verdict. It merely operates as a status quo. Such transaction is not bad even if it takes place during the existence of a status quo order by the Court. In such case it can, of course, entail any punitive action contemplated by Order XXXIX of the CPC but would not nullify transaction between the parties on account of being lis pendens; the validity or otherwise whereof shall remain subject to final verdict by the Court. The Courts below and the learned High Court have therefore, wrongly determined that the transaction in hand was hit by section 52 of the Transfer of Property Act because this could always have been determined by the Court which was seized of the matter and which had*

failed to give any such verdict due to collusive and fraudulent disposal of appeal.”

15. The upshot of the above is that the present petition is accepted and respondent DHA is directed to process the application for approval of Completion Plan and issue the Completion Certificate in accordance with law, relevant rules and bye-laws.

16. It is further clarified that the above decision will not in any way prejudice the proceedings of aforementioned two suits No.390 of 2013 and 1211 of 2014.

17. There will be no order as to costs.

JUDGE

Karachi
Dated 13.11.2015

JUDGE

M.Javid.PA