

Stereo. H C J D A-38.

JUDGMENT SHEET
IN THE LAHORE HIGH COURT AT LAHORE
JUDICIAL DEPARTMENT

I.C.A. No.216 of 2007

Amer Bakht Azam etc. Vs. Co-operative Model Town Society etc.

J U D G M E N T

Date of hearing	<u>23.11.2011.</u>
Appellants by	<u>Mr. Bilal Hassan Minto,</u> <u>Advocate</u>
Respondents.	<u>Mian Iftikhar Ahmad, Advocate</u> <u>for respondent No.1 & 2.</u> <u>Mian Muzaffar Hussain,</u> <u>Advocate for respondent</u> <u>No.7/LDA.</u>

NASIR SAEED SHEIKH, J:- This ICA is directed against the judgment dated 13.8.2007 passed by a learned single Judge of this Court in Writ Petition No.5245 of 2007.

2. Brief facts of the case forming basis of the instant ICA are that the appellants claimed to be the residents of Model Town Lahore which is a residential colony run and managed by a Co-operative Model Town Society. It was claimed by the appellants in the writ petition that in a portion of the Model Town Co-operative Society on the link roadside a space was specified in the Master Plan of the Society for the purpose of a fruit garden. It was further alleged by the petitioners in the writ petition that with the passage of time some portions of this open space were encroached upon. Lastly the appellants got aggrieved of an advertisement in the daily News published by the respondent No.2 inviting Expression(s) of Interest (**EOI**) from “International cash and carry stores, International wholesale warehouse networks” to provide “an outlet on prime commercial land for marketing fresh farm produce and

ancillary non food items for the convenience of Model Town as well as the general public” through a project over 100000 sq.ft. intended to be constructed on an area approximately 70/80 kanals of this open space land. The appellants considered this advertisement for inviting Expression(s) of Interest (**EOI**) as an attempt to rob Model Town Society open space reserved for fruit garden by turning it into a commercial activity described by the appellants as commercial monster for irrational and meager consideration for a foreign company.

3. The petitioners first instituted a Writ Petition No.4006/2006 for assailing the advertisement dated 14.2.2006 which writ petition came up for hearing before a learned single Judge of this Court on 14.11.2006 and vide judgment announced on 01.12.2006 the said writ petition was disposed of as premature. It is worthwhile to point out that the judgment announced on 01.12.2006 was further assailed by the respondents of the said writ petition through ICA No.388/2006 which appeal was dismissed in limine vide order dated 27.12.2006 passed by a learned Division Bench of this Court. A second writ petition was later on instituted by the appellants on 24.5.2007 which came up for hearing before a learned single Judge of this Court and has been dismissed on merits by holding that the appellants/petitioners of the writ petition have alternative remedies before the appropriate forums constituted under the relevant rules as well as the laws for resolving controversy and that writ petition as instituted involves probing into disputed questions of facts which exercise cannot be undertaken by the High Court while taking cognizance of a matter under Article 199 of the Constitution of Islamic Republic of Pakistan. The dismissal of Writ Petition No.5247 of 2007 through the judgment announced

on 13.8.2007 by a learned single Judge of this Court has been assailed by the appellants who were the writ petitioners before the learned single Judge, through the instant Intra Court Appeal.

4. The respondents were called upon by a learned Division Bench of this Court vide order dated 03.9.2007 to arrange for their representation in the Intra Court Appeal.

5. At the commencement of the arguments the learned counsel for the respondents has raised a preliminary objection that the instant ICA is not maintainable in view of the provisions of 1st proviso of Section 3 sub section 2 of Law Reforms Ordinance 1972. The precise contention raised by the learned counsel for the respondents is that the appellants/petitioners have alternative remedies of appeal for the redress of their grievances as raised in the writ petition therefore the appellants cannot prefer an ICA against the judgment dated 13.8.2007 of dismissing the Writ Petition No.5245 of 2007 by a learned single Judge in chamber of this Court. The learned counsel for the respondents by raising objection to the maintainability of the instant ICA elaborated his contentions by referring to paragraph Nos.16 and 17 of the impugned judgment in which the following observation was made by the learned single Judge in chamber.

“ The petitioners have submitted to the jurisdiction of Authority, which I have already held appropriate forum to resolve the controversy. The impugned decision is assailable in appeal under rule 14 of Rules 2005 (ibid) before Secretary, Government of the Punjab, Local Government and Rural Development.

In para 21 of judgment dated 14.11.2006 passed in W.P.No.4006/2006, it was observed that the objections of the petitioners can be

adjudicated upon in fora vested with the jurisdiction under law to decide such matter. The petitioners have not approached the forum of appeal, against the approval of conversion by authority (conveyed through letter dated 19.5.2007). No appeal to challenge approval of agenda item 5 of general meeting dated 17.1.2007 by the Registrar, has been filed. These actions have been held by this Court, in earlier petition, justiciable separately under Cooperative Societies Act 1925 and Punjab Local Government Ordinance 2001. These actions can be challenged before this Court in its extra ordinary constitutional jurisdiction, when remedy in the hierarchy of respective department is exhausted. This has not been done in the instant case. Extra ordinary constitutional jurisdiction cannot be stretched, on the ground that assailing the matters in different fora is inconvenient. Mere convenience is no ground to deprive a forum from its jurisdiction, which the relevant statute has provided. The remedy of constitutional petition is available, when the remedy in the hierarchy of the department, is exhausted.”

The learned counsel for the respondents relied upon the judgments reported as ***Mst. KARIM BIBI AND OTHERS VS. HUSSAIN BAKHSH AND ANOTHER (PLD 1984 SC 344), MUHAMMAD ABDULLAH VS. DEPUTY SETTLEMENT COMMISSIONER, CENTRE-I, LAHORE (PLD 1985 SC 107), MST NARGIS KHATOON VS. DIRECTOR GENERAL, PUNJAB BROADCASTING CORPORATION ETC. (NLR 1994 AC 77), VICE CHANCELLOR, UNIVERSITY OF HEALTH SCIENCES VS. BREEHA ZAINAB AND OTHERS (2011 MLD 1652) and MST. SABIRA SULTANA VS. ASIF FIRDOUS (2011 YLR 1543)*** in support of his contentions.

6. The learned counsel representing the appellants has seriously controverted the contentions raised by the

learned counsel for the respondents and has replied that the instant ICA is not hit by the principles laid down in Ist proviso of Section 3 sub section 2 of the Law Reforms Ordinance 1972. The learned counsel for the appellants took a step further by arguing that in fact the appellants are seeking the implementation of the judgment passed by this Court in the earlier round of litigation while disposing of the Writ Petition No.4006 of 2006 through the judgment announced on 01.12.2006.

7. Through the instant order passed by us the preliminary objection as raised by the learned counsel for the respondents about the maintainability of the instant ICA is intended to be disposed of.

8. The writ petition No.5245 of 2007, as stated earlier is the second writ petition in the series instituted by the petitioners, the first one Writ Petition No.4006 of 2006 was dismissed as being premature vide judgment dated 01.12.2006 against which judgment the respondents of the writ petition themselves preferred an ICA before a learned Division Bench of this Court which ICA was dismissed not on the point that the ICA is not competent but on the point that the appellants at that time did not appear to be aggrieved of the observations made by the learned single Judge of this Court while disposing of the writ petition No.4006 of 2006. It would be advantageous to reproduce the prayer clause of Writ Petition No.5245 of 2007 out of which the instant Intra Court Appeal has arisen:-

“Under the circumstances it is respectfully prayed that this honourable court be pleased to:-

- i. Declare that the signing of the agreement for lease between Respondent No.1 & 2 and all other acts leading up to the same including applications for permission from*

other respondents and grants of permissions if any are illegal and liable to be struck down and quashed.

- ii. Declare that permissions, if granted, by Respondents No.6 & 7 upon the illegal applications aforesaid, are illegal and liable to be quashed.*
- iii. Grant any other relief deemed fit under the circumstances.*

Ad interim relief during the pendency of this petition is also respectfully prayed for.”

In paragraph No.16 of the writ petition which precedes grounds on which the writ petition was instituted by the appellants highlights the acts of the respondents assailed in the writ petition and sought to be set aside and this paragraph No.16 is also reproduced as below:-

*“That besides constituting contempt of this honourable court, all acts done and steps taken towards the signing of a lease agreement between the Respondent No.1 & 2 and Respondent No.3 and the signing of the agreement itself (altogether, the **“Acts”**) are in violation of this honourable court’s Order dated 14.11.2006 and are liable to be declared as such, inter alia on the following grounds:-*

- a. That the Acts are against the law as laid down by this honourable court in its Order dated 14.11.2006.*
- b. That the Acts violate this honourable court’s order dated 14.11.2006.*
- c. That the Act violate the Petitioners’ statutory and Constitutional Rights.*
- d. That the Act are mala fides and collusive as between Respondents No.1 & 2 and Respondent No.3.*

- e. *That the Act and their intended ultimate goal violate the Petitioners' Fundamental Rights including that contained in Article 9 in that they will severely damage the Petitioners' environment and that this concern is not adequately addressed by the Environmental Protection Act 1997 which is therefore (and even otherwise) invalid as "law" in terms contemplated by Article 9, as also otherwise.*
- f. *That the grounds urged in W.P.No.4006/2006 and stated in para 6 hereof are also reiterated.*
- g. *That the Petitioners seek leave to urge further grounds at the time of hearing.*

9. In order to understand the acts assailed in the Writ Petition No.5245 of 2007 the paragraph Nos.10 to 15 are relevant. Regarding the precise objections raised by the learned counsel for the respondents two specific points are pointed that the appellants have a remedy of appeal under Rule 14 of the Punjab Private Site Development Schemes (Regulations) Rules 2005 against an approval granted on 19.5.2007 by the LDA and that the appellants have also a remedy u/s 54 of the Punjab Co-operative Societies Act 1925 before the Registrar, Co-operative Societies against the decision of the respondent No.1 to lease out the subject plot to the respondent No.3 as held in the **SGM** on 30.4.2006. The learned counsel for the respondents further attempted to get support to his above arguments from the observations made by the learned single Judge regarding the availability of those remedies to the writ petitioners in the impugned judgment dated 13.8.2007.

10. The contention raised by the learned counsel for the respondents that the appellants could have preferred an appeal under Rule 14 of Punjab Private Site Development

Schemes (Regulations) Rules 2005 needs to be thoroughly examined which reads as follows:-

*“**Appeal:-** Any person aggrieved by an order of Development Authority or Tehsil Municipal Administration, as the case may be, may prefer an appeal before the Secretary, Government of the Punjab, Local Government and Rural Development.”*

The term “Development Authority” whose passing of an order can be assailed through an appeal is defined in Section 1 clause (d) in the following words:-

“ “Development Authority” means and includes the Lahore Development Authority constituted under the Lahore Development Authority Act, 1975 or any other Authority established under the Punjab Development of Cities Act 1976.”

By perusal of the contents of the writ petition particularly its prayer clause read with its paragraph No.16 reproduced above in the light of the contentions raised in the previous paragraphs Nos.10 to 15, we do not find that the appellants specifically assailed any order passed by the Development Authority as defined in Section 1 (d) of the Punjab Private Site Development Schemes (Regulation) Rules 2005. The contention raised by the learned counsel for the respondents that the instant ICA is not entertainable on the above grounds thus has no legal grounds to sustain and is accordingly repelled. The second objection raised by the learned counsel for the respondents that as the matter agitated by the petitioners/appellants in Writ Petition No.4006 of 2006 and Writ Petition No.5245 of 2007 fell within the four corners of Section 54 of the Punjab Co-operative Societies Act 1925 which provided a remedy of arbitration upon any dispute touching the business of a

Society cannot be considered as a remedy falling within the definition of an appeal, revision or a review as provided in Ist proviso of Section 3 sub section 2 of Law Reforms Ordinance 1972. Therefore the objection of the learned counsel for the respondents of applicability of section 54 of the Punjab Co-operative Societies Act 1925 to the instant case is also unsustainable regarding the non-maintainability of the instant ICA.

11. Adverting to the point that the learned counsel for the respondents has relied upon the observations made by the learned single Judge in the impugned judgment dated 13.8.2007 that the writ petitioners have alternative remedies as provided under the Punjab Private Site Development Schemes (Regulations) Rules 2005 as well as under the Punjab Co-operative Societies Act 1925 therefore the writ petition is not maintainable, we are of the view that the very findings and observation of the learned single Judge have been assailed through the instant Intra Court Appeal, therefore this contention of the learned counsel for the respondents cannot be allowed to prevail upon this Court at this stage on this point; firstly on the ground that the statutory provisions as discussed above are not strictly applicable to the facts and circumstances of the instant case and secondly we cannot uphold a portion of the impugned judgment for deciding the fate of the maintainability of the ICA because the entire judgment announced by the learned single Judge of this Court is under challenge through the instant ICA and we will have to examine the correctness of the observations made by the learned single Judge in the impugned judgment at the time of final disposal of the instant ICA. It is also to be noted in this context that during the previous hearing of the matter through Writ Petition No.4006 of 2006, the respondents themselves preferred an

ICA against the judgment passed by a learned single Judge of this Court and at that time they never thought it to be hit by the provisions of section 3 sub section 2 of Law Reforms Ordinance 1972 which ICA was dismissed in limine not on the point that it was not maintainable keeping in view the provisions of Law Reforms Ordinance 1972 but was dismissed on the ground that the appellants of the said ICA No.388 of 2006 at that time who are the respondents of the present ICA were not found to be aggrieved of the judgment passed in Writ Petition No.4006 of 2006.

12. The case law relied upon by the learned counsel for the respondents in view of the above mentioned observations need not to be discussed by us in the instant order as it has no relevance and application to the facts and circumstances of the case in hand.

13 The objection raised by the learned counsel for the respondents about the non maintainability of the ICA on the ground that it is hit by the 1st proviso of section 3 sub section 2 of the Law Reforms Ordinance 1972 is rejected. The ICA is directed to be listed for hearing on merits during the 3rd week of January 2012.

**(Nasir Saeed Sheikh)
JUDGE.**

**(Rauf Ahmad Shaikh)
JUDGE.**

Announced in open Court on 08.12.2011

JUDGE.

JUDGE.

Amjad

Approved For Reporting