Stereo. HCJDA 38

Judgment Sheet

IN THE LAHORE HIGH COURT, LAHORE.

JUDICIAL DEPARTMENT

ICA No.475 of 2016.

Binyameen Khalil. VS. FOP etc.

JUDGMENT

Date of Hearing:	30.05.2017.
Appellant by:	Ch. Muhammad Ali Binyameen, Advocate.
Respondent by:	Syed Fazal ur Rehman, Advocate.

CH. MUHAMMAD IQBAL, J:- Through this Intra Court Appeal, the appellant challenged the judgment dated 14.01.2016 passed by the learned Single Judge in Chambers through which the writ petition filed by the appellant challenging anticipated average appreciation in the value of the house charged by respondent No.2 was dismissed.

2. Brief facts of the case are that the appellant obtained loan of Rs.2 million from the respondent House Building Finance Corporation and in this respect an agreement dated 30.07.2004 was executed between the parties. The appellant asserts that he has paid Rs.2.8 Million as principal amount alongwith rent and requested the respondent to release the ownership documents of property along with clearance certificate, but the respondents claimed an amount of Rs.31,10,871/-under the head of "anticipated average appreciation in the value of the house, which is over and above the original amount of loan. The appellant challenged the aforementioned charges through filing W.P.No.32077 of 2014. Respondents filed reply to the writ petition raising preliminary objection of

maintainability of the petition, non-availing of the alternate remedy provided under the statute and also contested the petition on factual controversy as well. The learned Single Judge in Chambers after hearing both the parties dismissed the petition vide judgment dated 14.01.2016, hence the present ICA.

3. The learned counsel for the appellant submits that the demand of anticipated appreciation in the value of the house as mentioned in clause 16 and 18 and 37 of the contract/agreement is illegal and not in consonance with the House Building Finance Corporation Act, 1952 (hereinafter referred to as "HBFC Act, 1952") as well as House Building Finance Corporation Investment Regulations, 1979. He further submits that any agreement/contract against the statute is not permissible under the law, which aspect of the matter has escaped from the consideration/appreciation of the learned Single Judge in Chambers who has illegally and unlawfully dismissed the writ petition of the petitioner, which (order) is not sustainable in the eye of law.

4. The learned counsel for the respondent submits that the appellant willfully executed the contract and is bound by the contractual obligations settled in the said contract/agreement, as such no illegality has been committed by the learned Single Judge in Chambers. That an amount of Rs.31,10,871 uptil 10.06.2015 in respect of appreciation in the value of the house is due against the appellant and he has committed a willful default in

payment of the same. He further submits that the appellant has not come to this Court with clean hands, therefore, he is not entitled to any discretionary relief and the Intra Court Appeal may kindly be dismissed.

5. Heard. Record perused.

6. The House Building Finance Corporation was established in 1952 for providing financial facilities for construction/re-construction/repair and purchase of house on the basis of interest. However, in 1978 the Council of Islamic Ideology recommended to abolish the term interest from some financial institutions including the Corporations. The Council suggested that instead of advance loans on the basis of interest, the Corporation should enter into investment of a joint ownership on the partnership basis with their clients and the client shall pay rent to the Corporation for utilization of share of the corporation. At the same time the partner will keep on purchasing different units/ share of the Corporation through purchase/installments and thus the principal amount invested by the Corporation will be gradually restored back to the Corporation in the form of purchase price installment against the unit of investment made in the purchase of the house until the Corporation's share is fully purchased by the partner and the above proposed procedure / mechanism in the Islamic banking terminology is named as "diminishing partnership". Under the guidelines/ instructions of the Ideology Council HBFC Ordinance, 1979

was promulgated and the Corporation started financing under the provisions of the said Ordinance.

7. Admittedly, the appellant obtained loan of Rs.2.0 million from the House Building Finance Corporation and executed an agreement dated 30.07.2004 and made re-payment in shape of installment amounting to Rs.26,54,514/- upto 10.06.2015. In this case the pivotal issue before this Court is to consider whether the clauses 16, 18 and 37 regarding the charging of anticipated average appreciation in the value of the house mentioned in the agreement dated 30.07.2004 are in accordance with HBFC Act, 1952 or with House Building Finance Corporation Regulations, 1979 or otherwise. Clause 16, 18(i) to (iii) and 37 of the agreement are reproduced as under:-

> "16. The anticipated average appreciation in the value of the house/flat and the investment units thereof, shall be Rs.12.5 per year for each hundred rupee and shall be binding on the Corporation and the Partner.
>
> …….
>
> 18. (i) the share of Corporation in the rental income on monthly basis during the moratorium period. The amount of monthly share of the Corporation in the rental income for the initial period shall be Rs.8333/- (Rupees Eight Thousand Three Hundred Thirty Three).
> (ii). 23 UNITS OF Rs.86957/- (Rupees Eighty Six Thousands Nine Hundred Fifty Seven only) each with appreciation of Rs.12.5 for each hundred rupee per year or part unit in the value of unit on yearly basis after completion of moratorium period of 24 months. Monthly payment or part payment towards purchase of unit shall be treated on account till the total purchase price (including the agreed appreciation in the value of the house/flat) has been received.

(iii) monthly installment for the initial period of one years commencing from the expiry of agreed and moratorium period shall be as under:-

(a)	Rent:	Rs.8333
(b)	Purchase price of investment unit (on-account):"	Rs.9963
(c)	Monthly Group Life Insurance Premium:	Rs.1000
	Total	Rs.19296."

.....

37. The appreciation in the value of the house/investment units shall be finally assessed for adjustment of profit and loss at the time of full and final settlement of account of expiry of the period allowed for purchase of units or otherwise. However, the Corporation shall have the sole discretion to forego, at the time of final valuation, its share of profit in excess of agreed appreciation in the value of investment units."

8. The main controversy between the litigating parties in this case is with regard to unilateral imposition/charging of anticipated average appreciation in the value of the house. It is appropriate to apply microscopic scanning of the plain provisions of the enactment on the subject relating to the issue of investment made by the Corporation. Section 24 of the HBFC Act, 1952 provides the salient features of the investment and permit the corporation to invest its funds in such securities or in such other manner as may be prescribed and may sell or mortgage such securities.

Further Section 24(3) of the HBFC Act, 1952 imposed restrictions on transfer, sale or charging the property without the prior written consent of the Corporation or subject to payment of corporation investment and other dues including shares in the capital gains. Section 24(5),(6) envisage the precaution and restriction over the corporation unless the amount

invested is duly safeguarded or secured and no investment shall be made unless the partner agrees that the share of the Corporation in capital gains, in case the property is being sold or transferred during the currency of deed of assignment and partnership. For reference Section 24 of the HBFC Act, 1952 is reproduced below:-

> **24. Conditions for investments.**___ (1) No investment shall be made unless it is fully secured by assignment of the land and the house constructed or to be constructed thereon or by such guarantee as may be prescribed:
>
> Provided that where the land on which it is proposed to construct the house is held by the partner not as owner but as mortgages, lessee, sublicensee, or in any other capacity, then, notwithstanding anything contained in any other law for the time being in force, investment may be made against assignment of such land and the house to be constructed thereon.
>
> (2) No property shall be accepted for assignment under subsection (1) unless it is free from all encumbrances and charges :
>
> Provided that the Corporation may, subject to the maximum limit provided in section 25,___ (
>
> (a) make additional investment on the security of any property already assigned or mortgaged to the Corporation;
>
> (b) make investment on the security of any property already assigned or mortgaged to the Federal Government, a Provincial Government, or a bank, a banking company or any other financial institution established by or under any law and controlled, directly or indirectly, by the Federal Government or Provincial Government or by a Corporation set up a controlled by any of them.
>
> (3) No land or house in respect of which investment is made shall be transferred, sold or charged without the prior consent of the Corporation in writing and payment of the Corporation's dues, including share in the capital appreciation ; and any such transfer, sale or charge made without such consent shall be void, and in the case of a sale, the Corporation shall have the option to buy out the partner's share in the property at the price settled between the partner and the intending buyer.
>
> No investment shall be made unless the Corporation is satisfied that the partner has clear title to the property and is in possession of the land, the area in which the house is to be situated has been adequately planned, and the permission of the lessor, lessee, licensor, licensee or other competent authority for participation of the Corporation as partner in the construction or purchase of the house has been obtained.
>
> (5) No investment shall be made unless the partner agrees that ___
>
> (a) the assessment of cost of land and cost of construction thereon;
>
> (b) the assessment of gross and net rental income of the property;

(c) the share of the Corporation in the said income in consideration of its investment;

(d) the share of the Corporation in capital gains, if property is sold or transferred during the currency of the deed of assignment and partnership;

(e) demand charges in case of default in scheduled repayment; and

(f) date of completion of the house;

as fixed by the Corporation shall prevail and be binding upon him.

(6) No investment shall be made unless the Corporation is satisfied that___

(a) where the investment is for the construction of a house, the partner will be able to provide necessary funds which, added to the investment made by the Corporation, will cover the entire cost of construction of the house;

(b) the partner or his surety or both, as the case may be, and where the partner is more than one person, any one or more of such persons or their sureties will have sufficient means to repay the amount invested by the Corporation during the prescribed period in the prescribed manner; and

(c) the plan and the design of the house is approved by the competent authority and the specifications provide for a sound and durable construction.

(7) Before accepting any movable or immovable property as security, due allowance shall be made for depreciation and probable fall in value; and whenever such property is found to fall in value below the margin allowed, additional security shall be obtain.

(8) No investment shall be made with a partner for construction or purchase of more than one house on income sharing basis.

(9) The investment shall be adjusted through transfer of investment units in such manner and on such terms as provided in the deed of assignment and partnership.

(10) The total estimated cost of a house constructed or to be constructed and the investment to be made shall be determined by the Corporation.

(11) The net rental income shall be assessed by the Corporation for an initial period as provided in deed of assignment and partnership and thereafter shall be revised periodically notwithstanding anything to the contrary contained in any other law for the time being in force till the entire investment units of the Corporation are transferred to the partner.

(12) The share of the Corporation in the net rental income shall be fixed as the ratio between the investment of the Corporation and the total estimated cost of the house at the time of the execution of deed of assignment and partnership and shall be revised 1 [on each adjustment of the investment through transfer of investment units as provided in sub-section (9) and shall be payable on such periodical basis as provided in the deed of assignment and partnership.

(13) The share in the capital gains when the property is sold or transferred shall be determined in the prescribed manner.

(14) The income on the investment shall start accruing on completion of the agreed period.

(15) The Corporation shall share the losses which may be caused by natural calamities, war or civil commotion only.
(16) No investment shall be made for a period exceeding twentyfive years.
(17) Investment shall be made in suitable installments concomitant with the construction of the house.
(18) No information given by any person applying for financial assistance and communicated to any of the Directors or employees of the Corporation shall be disclosed or used by such Directors or employees except for lawful purposes of the Corporation without the written consent of such person.
(19) Investment may be made in collaboration with Cooperative Societies and such other authorities and housing corporations as may be prescribed.
(20) Loans made before the first day of July, 1979, shall become due and payable along with accruals as on the last day of June, 2000, and all borrowers shall within three months from the commencement of the House Building Finance Corporation (Amendment) Ordinance, 2001, pay their entire obligations and the investment made after the 30th of June, 1979, shall, unless the Federal Government otherwise directs, continue to be governed by the terms and conditions on which they were made:

Provided that
(a) the repayment of the principal amount shall be deemed to be the purchase of investment units as provided in subsection (9);
(b) the share of the Corporation in the net rental income shall be revised on payment of the full value of each investment unit as provided in the deed of assignment and partnership or, as the case may be, on each repayment of the principal;
(c) service charges based on the amount of investment made by the Corporation shall not accrue nor shall be charged after the 30th of June, 2000; and
(d) demand charges accrued and recovered by the Corporation from the first day of July, 2000, shall be credited to a separate account to be spent on meeting actual out of pocket expenses on recovery of overdue investments and the balance shall be used only for charitable purposes and shall not be credited to the income account of the Corporation.

(21) The Corporation may, in compliance with any instruction issued by the Federal Government in that behalf, relax or modify any of the conditions provided under this Act for any class of investment.

9. The main controversial issue in this case is regarding the unilateral assessment of anticipated appreciation in the value of the house as envisages in clause 16 of partnership agreement which is fixed at the rate of 12.5% per year on the assessed amount of the appreciation of value

whereas no such provision of fixing the ratio of increase in the value have been mentioned in the HBFC Act, 1952. Section 24 (13) provides that share in the capital gain shall be determined when the property is being sold or transferred according to the prescribed manner. From the plain reading of sub-section it clearly envisages that this provision is only applicable in the eventuality when the partner intends to sell or transfer the said property, whereas no such regulations or clear procedure meant for determining the capital gains are available. Further as the term anticipated appreciation in the value is alien to statute and no such provision in this regard is available in the regulations of corporation as such unilateral fixing of 12.5% as appreciated value does not have any support of law.

Moreover Section 24(13) of the Act which deals with capital gain is made applicable in the eventuality when the property is being sold or transferred then the share of the partners in the capital gain is be determined and proportionately charged whereas in the instant case no such situation has yet been arisen to make assessment of capital gains as the appellant is not interested or intending to alienate the property in any manner whatsoever, as such the demand raised by the respondent Corporation regarding the assessed outstanding amount of Rs.31,10,871/- against the appellant including the amount of anticipated appreciation of value assessed at the rate of 12.5% per year, is unilateral, exorbitant, arbitrary and having no backing of any law, rather it amounts to the financial exploitation which is not warranted by any law and is also against

the Article 3 of the Constitution of Islamic Republic of Pakistan which provides safeguard against exploitation of the citizens.

10. For the functioning of transparent and smooth business, HBFC Investment Regulations were framed, approved and promulgated in 1979. Regulation No.14 only deals with anticipated gross annual rental income of a house and with the anticipated average appreciation in the value of the house/flat which has no nexus with the capital gain. Regulation 14 of the HBFC Investment Regulations, 1979 is reproduced as under:-

> "14. (1) The anticipated gross annual rental income of a house in which investment is made shall be the average of the rental income of similar house in the locality obtained through a sample survey conducted during the three months preceding the financial year in which the proposal for availing the investment is made.
>
> Provided that the results of sample survey shall be reviewed by the Corporation before formal adoption in order to bring them in to conformity with other supporting indices or to remove discrepancies, if any
>
> (2) The anticipated gross annual rental income in localities where a sample survey has not been conducted shall be determined by the Corporation in such manner as it may deem proper.
>
> (3) The anticipated net annual rental income shall be determined after deduction of the following from the anticipated gross rent:-
>
> (i) maintenance allowance at $1/12^{th}$ of the gross rent; and
>
> (ii) property tax payable to the Provincial Government of a local authority, as determined by the Corporation.
>
> Provided that the net rental income of the house may be revised any time if so necessitated due to a revision in the property tax structure.
>
> (4) The annual rental income shall be reviewed after every three financial years commencing from the financial year in which the proposal has been accepted till the entire investment.
>
> (5) The anticipated net annual income calculated under this regulation shall be final and binding on the Corporation and the partner.

11. Further sections 24(3) & (5)(d) of the HBFC Act, 1952 creates an embargo upon the petitioner to further transfer, sale of the house/and also prohibits to create any kind of charge on the property till the final realization of dues of the Corporation and if during the currency of the deed of assignment and subsistence of relationship of partnership, a partner wants to transfer, sale or charge the property, he has to obtain written consent of the Corporation after making payment of the Corporation's dues including share in the capital gain. But in the aforesaid Act and Regulation, there is no such provision available regarding monthly or yearly assessment of anticipated appreciation in the value of the property and it has accumulative effect toward the increase in the capital investment so made by the Corporation. The respondent has imposed anticipated average appreciation in the value of the house/flat at Rs.12.5 for each hundred rupee per year, which has no support of very statute and the regulation made thereunder. The amount assessed and claimed under the anticipated appreciation in the value of the property is levied in addition to the amount being charged under the head of rental Value of the House, which is much harsh/exploiting than the imposition or charging of compound interest whereas in the case in hand the Corporation is receiving the rental income, installment toward the invested amount and also adding 12.5% in shape of anticipated appreciation in the value of the property against the amount of its investments. This question of claiming rent as well as anticipated appreciation in value of house came under consideration of the Federal

Shariat Court which has declared the unilateral assessment etc. against the injunctions of Islam in case reported as Muhammad Iqbal Chaudhary, Advocate High Court, Lahore and another Vs. Federation of Pakistan through Secretary M/O. Justice and Parliamentary Affairs, Government of Pakistan Islamabad and others **(PLD 1992 Federal Shariat Court 501)** wherein it is held as under:-

> "As stated above the Corporation, after the enactment of House Building Finance Corporation (Amendment) Ordinance, 1979, functions on partnership basis. The system of loaning by the Corporation which was previously based on interest has now been substituted by a system of joint ownership (Musharaka) and consequently the rental income is duly shared by the investors i.e. owner borrower and Corporation. The system devised by the Corporation for the assessment of the share of the Corporation in the gross and net rental income of the property and its capital gains (if property is sold or transferred during the currency of the deed of assignments and partnership) as given in paras 14(1), (2) and 15(1) and (2) of House Building Finance Corporation Investment Regulations, 1979 reads as under:-....."

12. The Federal Shariat Court declared the said provisions of HBFC Act, 1952 are against the injunctions of Islam in respect of recovery of interest and directed the respondent to bring the same in conformity with injunctions of Islam, which decision has been endorsed by the Hon'ble Supreme Court as Shariat Appellate Bench in the case of House Building Finance Corporation through its Executive Director Vs. Rana Muhammad Sharif and 4 others **(PLD 2000 SC 760)** and has directed that necessary deletions and amendments be made in sections 4(2), 21(2) and 24(11), (12) and (20) by 30th June, 2000. Relevant para whereof is reproduced below:-

"The objection of the Federal Shariat Court is that the process laid down for assessment of the rental income and fixation of the share of Corporation therein is arbitrary, and against the spirit of partnership. The need of the partner is, thus, exploited, while he is equally entitled to have a say in this matter. A proviso is, therefore, held to be necessary to the effect that the partner will have a right to place the matter before a higher authority nominated by the Corporation, so that the issue may be resolved on an equitable basis.

The proposal of the Federal Shariat Court seems apparently justified. However, it may also be kept in mind that it should not open the door for frivolous disputes and prolonged proceedings. The process provided by the 'Investment Regulations, 1979' is reasonable process, and the partner should enter into the agreement with open eyes. If the Corporation, or any one of its officers, has violated the procedure laid down for the fixation of rent, normal legal remedies will remain available for anyone who can prove the violation. To establish a separate forum for such disputes may bring a flood of complaints and may in turn defeat the system together.

However, there are certain points that were not attended to by the learned Federal Shariat Court while examining section 24 and its subsidiary Regulations. These are summarized below:

> "(a) Subsections (6) (b), (9) and (12) of Section 24 as well as Regulations 15(2) frequently refer to the 'repayment of the investment by installments'. This terminology is not suitable for the concept of ' diminishing partnership' on which Ordinance 1979 was conceptually based. The original concept, as mentioned at the outset of this discussion; was that the partner will gradually keep on purchasing different units of the share of the Corporation. These installments are meant to purchase these units. For example, the share of the Corporation is 80% of the property. This share of 80% will be divided into 160 units as a simple example. The partner will purchase one unit out of these 80 on monthly basis. No doubt, the net result is that the Corporation will recover its principal through this process. But it should be remembered that this is not the 'repayment of a loan'. It is a purchase. It will be more appropriate, therefore, that the installments are named 'the purchase installments'.
>
> (b) Subsection (11) of section 24 provides that the net rental income shall be assessed by the Corporation for a period of three years. This period seems to be reasonable so far as the fixation of rent with regard to the locality is concerned. However, there is another aspect that has been overlooked in this respect. As mentioned above, the payment of installments by the partner is, in fact, purchase of a certain unit of the share of the Corporation. Therefore, as soon as the partner pays an installment, the share of the Corporation is reduced and share of the partner is increased to that extent. This aspect should be reflected in the rent payable by him. In other words, the rent payable by him should decrease to that extent. In the above example, if the share of the Corporation

> constituted 160 units and the partner has paid one installment, the share of the Corporation came down to 159 units. The rent payable by the partner, therefore, ought to be reduced by 1/160. This adjustment in the rent must take place after every installment. It does not require a new survey of the rental value as was feared by the representatives of H.B.F.C.; it is simply a matter of calculation which can easily be done. It is not only equitable and gives gradual relief to the partner, but it is a necessary requirement of the concept of 'diminishing partnership' according to Shariah and is being practiced by many Islamic financial institutions, even in Non-Muslim countries.
>
> Mr.Zahid Hussain, the Executive Director of the Corporation admitted that this type of adjustment in the rent is not difficult in any way. This necessary requirement, therefore, must be reflected in the law , and in so far as subsection (11) of section 24 does not take care of it, it is repugnant to the Injunctions of Islam."

In afore-quoted judgment the dispute was with regard to unilateral assessment and charging of the rent whereas in the instant case there is no dispute regarding the rental value of the property rather it is relating to unilateral assessment of the property and charging of 12.5% as anticipated appreciation in the value of the property. The appellant has never filed application for obtaining permission from the Corporation for sale, transfer or to encumber the property as such capital gain if any imposed by the respondent is totally against the law.

Section 24(13) deal with charging of capital gain and it also provide timing/occasion on which the same could be assessed. The applicability of the sub-section is subject to the circumstances when the partner intend to sell or transfer the house. It does not empower the respondent corporation to obtain any fixed amount under the garb of anticipated appreciation in value of the house exercising its powers under Regulation 14(5) as the term anticipated appreciation/increase in the value is explicitly alien to the basic

provision of the parent statute. As the regulation 14(5) have no backing of the Act as such Clause 16, 18 and 37 of the Contract Agreement also lacks any support of law.

It is well settled law that if a mandatory provision of statute is ignored, the same tantamount to transgress the express provision of law and is also against the spirit of legislation. Statute or a provision thereof is to be construed in the manner so as to make it workable and any construction which leads to defeat or creates any absurdity in the main scheme of law, is to be avoided. All rules, regulations, instructions so framed under the statute, if the same are not in consonance with the statute or contrary to law, the same would be treated as ultra vires to the statute. Similarly any agreement arrived at between the parties under such ultra vires rules and regulations that would also be considered as against the law. Therefore, no agreement/contract can be executed against the statute, even if such agreement is willingly entered into by the parties. Further under Section 23 of the Contract Act all the contracts which are in contravention of the statute are illegal and void and if permitted it would defeat the provisions of law. For reference aforesaid section is reproduced as under:-

> "23. What consideration and objects are lawful and what not.—The consideration or objection of an agreement is lawful, unless—It is forbidden by law; or.
>
> Is of such a nature that, if permitted, it would defeat the provisions of any law; or
>
> Is fraudulent; or
>
> Involves or imples injury to the person or property of another;

> Or the Court regards it as immoral or opposed to public policy.
>
> In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void."

Similarly in the instant matter clause 16, 18 and 37 of the agreement are in contravention of the statute, thus the same are void and un-enforceable. The Hon'ble Supreme Court of Pakistan in a case reported as Hameedullah and 9 others Vs. Headmistress, Government Girls School Chokara, District Karak and 5 others **(1997 SCMR 855)** held that:-

> "From the aforestated observations it is clear that the agreement between the Government and the appellant was in the nature of sale of a public office, consideration being the transfer of land. Sale of public office cannot be a legal transaction. It is completely illegal and against public policy. Therefore, such an agreement is hit by section 23 of the Contract Act, which makes it void."

The August Court in a case reported as Maulana Abdul Haque Baloch and others Vs. Government of Balochistan through Secretary Industries and Mineral Development and others **(PLD 2013 SC 641)** has held as under:-

> "The competent authority also failed to determine the terms and conditions to be fixed in granting the relaxations sought for. In this view of the matter, in absence of the requirements of rule 98 being fulfilled in the instant case, all relaxations were granted in excess of authority and were entirely beyond the scope of the provisions of law, and therefore, ultra vires the powers granted under rule 98 of BMCR 1970 read with section 5 of the Act of 1948, and thus void. Shorn of relaxations so grant, CHEJVA has no legal sanctity and consequently remains an agreement entered into against the provisions of law, hence not enforceable.
>
> All the key provisions of CHEJVA were made subject to a reliance on relaxations that were illegal and void ab initio, the illegality of the agreement seeps to its root. As such, no operative part of the agreement survives to be independently enforceable and the principle of severability cannot be applied to save any part thereof. The agreement is, therefore, void and unenforceable in its entirety under the law."

In another judgment reported as Tariq Ali Baqar Vs. New Goodwill Computers and others **(2011 SCMR 554)** the Hon'ble Apex Court held that:-

> "To determine the fair rent, on an application filed by the landlord or tenant, is the exclusive jurisdiction of the Rent Controller and any agreement between the parties not to seek determination of fair rent cannot bar the jurisdiction of the Rent Controller, if that has not been already done. The Court would not permit one of the contracting parties to take advantage of an unusual or onerously terms consideration, as it would deprive the other party from his legitimate rights. This Court in the case of Muhammad Yousuf V. Abdullah (PLD 19780 Supreme Court 298), while dealing with to some extent an identical clause not to seek fixation of fair rent held that said clause being illegal because it is contrary to the provisions of the Ordinance. In the case of Atta Muhammad V. Muhammad Abdullah (PLD 1971 Lahore 210) after relying upon the case of E.A. Evans Vs. Muhammad Ashraf (PLD 1964 Supreme Court 536) it was held that the Controller has power to determine fair rent under Section 4 of West Pakistan Rent Restrictions Ordinance, 1959 despite existence of agreement stipulating amount of rent payable."

This Court in a case reported as Abdul Rashid Vs. Water and Power Development Authority (WAPDA) Through Chairman, and 2 others **(2003 CLC 471)** held as under:-

> "There is still another aspect. There is nothing on the present record suggesting that at the time of purchase of the bonds, the petitioner ever learnt of or was made aware of the conditions of the transaction, particularly the so-called clause 8. It is not even clear whether this condition was given wide publicity in press or through electronic media or by conveniently making available the brochure and the booklet at all the sale points. This aspect is important as the Court will not permit one of the contracting party to take advantage of an unusual and onerous condition and thus deprive the other party from its legitimate right/property. Reference can be profitably made to the Pakistan General Insurance Company Ltd. V. Fazal Ahmad PLD 1960 (W.P) Lah. 135 and Hakim Ali V. Muhammad Salim and another 1992 SCMR 46."

In another judgment reported as Muhammad Arshad Khakwani Vs. I.U.B. and another **(2011 MLD 322)** this Court has held that:-

> "No doubt the Statutory bodies are governed under the Act, rules, regulations and statutes which are meant for the said purpose and no one is allowed to supersede the same. The University functionaries are presumed to act under the law and no one can exceed from its domain neither supersede nor deviate. If the provisions of the Act are not complied with then the Institutions cannot run smoothly as is required by the law and the guarantees provided by the Constitution of Islamic Republic of Pakistan, 1973."

13. Further when law prescribes anything to be done in a particular manner, it is to be done as mandated by law, any transgression amounts to stepping over the authority rendering the act, without lawful authority. In this regard, reliance may respectfully be placed on the case of "*Government of the Punjab, Food Department through Secretary Food & Another Vs. Messrs United Sugar Mills Limited & Another"* **(2008 SCMR 1148)**. Similar view has been taken by Sindh High Court in the case of "*Syed Muzahir Hussain Quadri Vs. Province of Sindh & Others"* **(PLD 2013 Sindh 285) (D.B)**. Sub Section 13 to Section 24 of the HBFC Act allows the charging of capital gain subject to existence of certain special circumstances of sale, alienation etc. of the property which are missing in this case whereas the corporation (HBFC) is continuously keep on charging 12.5% from the very inception of the agreement. It is settled law that when law does not permit to achieve a thing directly the same could not be allowed to be achieved indirectly. Reliance can be placed on Bank of Punjab and another Vs. Haris Steel Industries (Pvt.) Ltd. and others **(PLD 2010 SC 1109).** The Hon'ble Apex Court in the said judgment held as under:-

> "If the interpretation canvassed by Mr.Irfan Qadir, ASC was to be accepted then the same would not only defeat the clear object of the provision in question but would also lead to a blatant absurdity. It would be preposterous and irrational to declare that once an incumbent of the office of the Prosecutor General had completed his term of three years then no one had the competence to extend or enlarge the said term even by one day but the same competent authority could instead, grant him three years by appointing him afresh to the same office. In the recorded judicial history such a situation attracted judicial notice in the year 1889 in case of Madden V. Nelson (1889 AC 626) and it was Lord Helsbury who declared for the first time that what was not permitted by law to be achieved directly could not be allowed to be achieved indirectly. And the said principle has been repeatedly acknowledged and followed by the Courts ever since then and the Courts in Pakistan are no exception in the said connection. The cases of Mian Muhammad Nawaz Sharif and Haji Muhammad Boota (Supra) are evidence to the said effect."

Reliance can also be placed on Haji Muhammad Boota and others Vs. Member (Revenue) Board of Revenue Punjab and others **(PLD 2003 SC 979)** and a judgment of this Court reported as Muhammad Sajjad Husain Vs. Government of Punjab through Secretary Establishment, Lahore and 19 others **(2013 PLC (C.S) 1).** Further in messrs Campaigner Associates (Pvt.) Ltd. Vs. Government of Balochistan and others **(2001 YLR 1839)**, controversy has been resolved in the following manner:-

> "It may not be out of place to mention here that "Article 199 casts an obligation on the High Court to act in aid of law, protect the rights of the citizens within the framework of the Constitution by the executive authorities, strike a rational compromise and a fair balance between the rights of the citizens and the actions of the state functionaries, claimed to be in the large interest of society. This power is conferred on the High Court under the Constitution and is to be exercised subject to Constitutional limitations. (PLD 1988 Lah. 49 = KLR 1988 Cr.C 128 (FB), in the matter of entertainment of petitions and grant of relief in equitable and discretionary jurisdiction, it is necessary not to be guided wholly by the technicalities of the law but also by the substance of the controversy when the proceedings did not suffer from mala fides of fact. (1991 SCMR 654). Technicalities cannot prevent High Court from exercising its Constitutional jurisdiction and affording relief which otherwise petitioner is found entitled to receive. PLD 1990 Lah. 121. The petition in hand has been examined in the light of criterion as laid down and discussed hereinabove. In our considered view it is a fit case where Constitutional jurisdiction could be exercised."

It is held by the Hon'ble Supreme Court of Pakistan in the judgment reported as Muhammad Afsar Vs. Malik Muhammad Farooq **(2012 S C M R 274)** that the courts are duty bound to uphold the constitutional mandate and to keep up the salutary principles of rule of law.

14. In view of the above, we are of the view that the learned Single Judge while passing the impugned judgment has not considered the vires of Regulation 14(5) and clauses 16,18 and 37 of the agreement which are against the Section 24(13) of the HBFC Act, 1952 as such the judgment of the learned Single Judge in Chamber is not sustainable as neither any provision in the HBFC Act, 1952 nor any direct regulations are available in respect of anticipated average appreciation in the value of the house and nor the statute has prescribed any authority to the corporation to recover such dues from the appellant in its own whims and caprice, thus the impugned unilaterally assessed recoverable amount from the appellant in respect of anticipated appreciation in value is against the law. Moreover, anticipated appreciation in the value and its assessment is illusory and based on unfounded imagination of an investor and willful addition of a fix percentage in the capital investment is not mandated by the law. The capital gains are to be assessed or determined at the time of conclusive sale or transfer of the property under the principal of diminishing partnership and there is considerable margin/difference between anticipated appreciation of the value and the capital gain as such continuous charging

of 12.5% as appreciated average appreciation in value of property are also ultra vires.

15. For the reasons recorded above, this ICA is **allowed** and the judgment dated 14.01.2016 passed by the learned Single Judge in Chambers is set aside. Resultantly the regulation 14(5) as well as clauses 16 and 18 and 37 of the agreement to the extent of charging of anticipated appreciation of value being against the statute are declared as ultra vires. Respondents No.2 and 3 are directed to calculate the amount paid through the purchase installment under the principle of diminishing partnership excluding the amount assessed and added under anticipated appreciation of value of the house within a period of 2 months, thereafter a demand notice containing the elaborate detail of calculated amount payable(if any) be issued to the appellant who shall liquidate the entire assessed liability within a period of 3 months whereof the respondent shall release the relevant documents to the appellant.

(MUHAMMAD AMEER BHATTI)
JUDGE

(CH. MUHAMMAD IQBAL)
JUDGE

Announce in Open Court on 29.06.2017.

JUDGE **JUDGE**

Approved for reporting.

A.Rehman.