JUDGMENT SHEET

IN THE LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

W.P. No. 15807/2016

Ghulam Muhammad Vs. Secretary Housing, etc.

JUDGMENT

Date of hearing: - 13.09.2017

Petitioner by: - Mr. Muhammad Javed Umar, Advocate.

Respondents Raja Muhammad Arif, Addl. A.G.

SHAHID WAHEED, J:- The subject matter of challenge in this constitutional petition is the order dated 20.04.2016 passed by respondent No.1 on the second appeal of respondent No.3 whereby the order dated 11.03.2008 of respondent No.2 was set aside and consequently the allotment of plot in favour of the present petitioner was cancelled.

2. Dispute in this case relates to plot No.58/3-Z measuring 7-Marlas situated at Area Development Scheme (ADS), Chiniot. On 13.02.1976, the plot was allotted to the present petitioner under Low Income Housing Scheme. The petitioner after making payment of first installment amounting to Rs.893/- executed sale agreement in respect of plot on 25.08.1976. Physical possession of the plot was delivered to the petitioner vide possession slip dated 24.05.1977. According to clause (vii) of the Schedule provided in the allotment order dated 13.02.1976, the petitioner was required to pay the balance price of the plot with the prescribed interest in five equal half yearly installments from the date of delivery of possession. The petitioner was also bound to construct the building within four years from the date of possession. These conditions were not fulfilled by the petitioner. This breach of terms and conditions of allotment led the respondent No.4 to issue a show-cause notice bearing No.1248 dated.9.9.1981 to the petitioner. This notice was received back un-delivered. The Head Clerk of the

office of respondent No.4 prepared a note disclosing the afore-stated facts and sought order for cancellation of allotment. On this report, the respondent No.4 recorded his note dated 08.12.1981 for the issuance of cancellation order. Pursuant to said note, memorandum No.98 dated 03.02.1982 was issued to the petitioner informing him that his allotment had been cancelled; and, that if he wanted to prefer an appeal he might do so within a period of three months before the Deputy Commissioner, Jhang. Though memorandum was sent to the petitioner under registered cover but the same was also received back in the office of respondent No.4 undelivered. The petitioner was, therefore, ignorant about the cancellation of allotment of plot. He, however, being in possession of the plot raised construction thereon. It is an admitted fact that on 26.7.1999 the petitioner executed a document through which he agreed that he would have no objection if the plot, on payment of outstanding dues, is transferred in the name of one Abdul Waheed. Pursuant to said document, Abdul Waheed got possession of the plot and raised further construction. Subsequently, one Ghulam Rasool Kokab, to whom the plot was allotted on 6.7.1993, tried to dispossess Abdul Waheed from the plot. In order to protect his possession, Abdul Waheed instituted a suit before Civil Court, Chiniot and obtained injunctive order dated 3.9.1999. This suit was dismissed for non-prosecution, perhaps for the reason that allotment in respect of Ghulam Rasool Kokab was cancelled.

3. It is a matter of record that Abdul Waheed moved this Court through constitutional petition i.e. W.P.No.21668/1999 with the contention that he had filed an application before the Deputy Director, Housing and Physical Planning Department for transfer of plot but the same was not decided. Since Abdul Waheed had not attached copy of the said application alongwith the petition, the same was found pre-mature. However, the constitutional petition was disposed of vide order dated 17.11.1999 with the observation that Abdul Waheed would be

well within his right to approach the respondents for redressal of his grievance and the respondents would be duty bound to redress his grievance strictly in accordance with law. Pursuant to the said order the petitioner on 05.01.2000 moved an application before the District Collector, Jhang for restoration of his allotment. It was maintained in the application that the plot had been sold to Abdul Waheed vide agreement dated 26.07.1999; that Abdul Waheed had constructed a house on the plot; and, that the cancellation of allotment was made without any notice, and thus, the same was void. On the other hand, Abdul Waheed also filed an application before the District Collector for issuance of allotment order in respect of the plot in his favour. Both the applications were declined by respondent No.4 vide memorandum No.17 dated 11.01.2000.

4. The petitioner felt aggrieved by memorandum No.17 dated 11.01.2000. He, therefore, preferred an appeal before the Commissioner (respondent No.2)/appellate authority. This first appeal was contested by respondent No.4. On consideration of the matter, respondent No.2 accepted the appeal vide order dated 11.03.2008. Through the said order allotment of the plot was restored subject to the condition that the petitioner would pay/deposit 10% restoration fee and other dues to the department within a period of two months. It is an admitted fact that restoration fee and other dues were paid by the petitioner within the stipulated period of time.

5. The order dated 11.03.2008 of respondent No.2 was challenged by respondent No.3 through second appeal before respondent No.1, Secretary to Government of Punjab, Housing, Urban Development and Public Health Engineering Department, Lahore. The petitioner also filed an application before respondent No.1 for the implementation of order dated 11.03.2008 passed by respondent No.2. After hearing, respondent No.1 came to the conclusion that first appeal of the petitioner before respondent No.2 was barred by time and thus

the order dated 11.03.2008 was not valid. On the basis of said conclusion the second appeal of respondent No.3 was allowed and consequently the cancellation order issued by respondent No.4 was restored. The order of respondent No.1 was assailed before this Court through a constitutional petition i.e. W.P. No.4493 of 2009, wherein it was observed that respondent No.1 while accepting the second appeal of respondent No.3 had not adverted to the reasons recorded by respondent No.2 in his order dated 11.03.2008; and, that it was the duty of respondent No.1 to advert to the reason given by respondent No.2 and then give his own reasons while differing with the order of respondent No.2 but he had failed to do so. On the basis of above stated findings W.P. No.4493 of 2009 was accepted vide order dated 14.07.2015 and the matter was remanded to respondent No.1 with a direction to decide the same afresh in the light of above findings/observations.

6. On remand, respondent No.1 again accepted the second appeal vide order dated 20.04.2016 and set aside the order dated 11.03.2008 of respondent No.2. The petitioner is not satisfied with this order and, therefore, he has filed the instant petition with a prayer that by accepting this petition the order dated 11.03.2008 of respondent No.2 be restored.

7. It is contended on behalf of the petitioner that orders of respondent No.1 and respondent No.2 are at variance; that order dated 20.04.2016 of respondent No.1 being not in conformity with the observations recorded by this Court in order dated 14.07.2015 passed in W.P. No.4493/2009 is not valid; that the action of the respondents is discriminatory (in this regard reference is made to the case of Muhammad Latif, Fazal Din, Manzoor Ahmad and Muhammad Aslam); and, that the impugned order was passed by ignoring the different instructions/orders issued by the Government of Punjab from time to time particularly order dated 08.08.2003 and memorandum

dated 15.11.1966. On the other hand, learned Addl. Advocate General, Punjab submits that since the petitioner had breached the terms and conditions of the allotment order dated 13.02.1976, he could not make a grouse that cancellation order was not valid; that the appeal of petitioner before respondent No.2 was patently barred by time which fact was not considered by respondent No.2 while accepting the appeal of the petitioner and, therefore, respondent No.1 rightly reversed the order of respondent No.2.

8. This is a case where order dated 20.4.2016 of the respondent No.1 (Secretary, Housing, Urban Development & Public Health Engineering Department, Government of the Punjab) and order dated 11.3.2008 of the respondent No.2 (District Co-ordination Officer, Jhang) qua the cancellation of allotment of plot are at variance. The legal position is that if the finding of fact reached by the second appellate authority is at variance with that of the first appellate authority, the former will ordinarily prevail. The finding of the second appellate authority will be immune from interference in constitutional petition under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 if it is found to be substantiated by evidence on the record and is supported by logical reasoning, duly taking note of the reasons recorded by the first appellate authority. However, if the finding of the second appellate authority cannot be supported on the evidence on record or if it has failed to take into account a material piece of evidence on record or if it does not record a logical basis for differing from the finding of the first appellate authority or is otherwise found to be arbitrary, it will have to be set aside in constitutional petition. In the present case, the respondent No.2, on perusal of record, found that the said cancellation order was made without issuing show-cause notice to the petitioner and by ignoring order dated 08.08.2003 whereby concession was allowed to the allottees in the Housing Scheme under the control of Director General to deposit outstanding

dues in respect of allotted residential plots/quarters upto 31.12.2005. On the basis of these findings, respondent No.2 accepted the first appeal of the petitioner and set aside the cancellation order. The findings recorded by respondent No.2 in his order dated 11.03.2008 came up for consideration before respondent No.1 through second appeal which was preferred by respondent No.3. It was the duty and obligation of respondent No.1 to address himself to all the issues of law and facts and decide the matter by giving not only discreet reasoning but also by meeting with the reasoning recorded by respondent No.2 in his order dated 11.03.2008. Exactly on the same lines a direction was issued, in the earlier round of litigation, to respondent No.1 by this Court vide order dated 14.07.2015 while disposing of W.P. No.4493/2009. This direction by virtue of Article 201 of the Constitution of the Islamic Republic of Pakistan, 1973 was binding on respondent No.1. On the contrary the respondent No. 1 not only disregarded the direction of the Court but also passed the impugned order without appraising the record/evidence. It is, therefore, a case where respondent No. 1 has passed the order in excess of his jurisdiction.

9. On being confronted with the above stated situation, learned Additional Advocate General by relying on the principles laid down in the cases of ***Balakotiah vs: Union of India and others*** (AIR 1958 SC 232), ***The Chairman East Pakistan Railway Board, Chittagong & another vs: Abdul Majid Sardar, Ticket Collector, Pakistan Eastern Railway, Laksam*** (PLD 1966 SC 725) and ***Muhammad Siddique vs: Divisional Forest Officer, Okara*** (2014 PLC (CS) 253 suggested that by setting aside the impugned order the matter be remitted to respondent No. 1 for fresh decision in accordance with law. I am not inclined to accede to this suggestion. There is a perversion of procedure apparent on the face of the record, and it is in my view idle to suggest that against such a denial of rights the proper course is to remand the

matter to respondent No. 1 for fresh decision. The petitioner cannot be refused relief by throwing him again on the mercy of respondent No. 1 who is responsible for such excess. My view finds corroboration from the principle settled by the Hon'ble Supreme Court of Pakistan in the case of ***Syed Ali Abbas and others v Vishan Singh and others*** (PLD 1967 SC 294) and ***Wattan Party through President vs: Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others*** (PLD 2006 SC 697).

10. In the present case the plot was allotted to the petitioner under Low Income Housing Scheme vide Allotment Order dated 13.2.1976. The petitioner after making payment of first installment took possession of the plot. He was required to pay the balance price of the plot with the prescribed interest in five equal half yearly installments from the date of delivery of possession; and, also to construct the building within four years from the date of possession. Allegation is that these conditions were not complied with by the petitioner and this could be a valid basis for cancellation of allotment. However, before doing this the respondent No. 4 was required to issue notice calling upon the petitioner to show cause as to why his allotment should not be cancelled. This was the fundamental requirement of procedural fairness and for this reason the Director General, West Pakistan Housing and Settlement Agency vide Memorandum No. 3384-AURD-66/10637 dated 15.11.1966 had made it mandatory that before cancelling the allotment on account of a default of an allottee, proper show-cause notice should be issued to the allottee in future. The directions contained in said memorandum are relevant and, therefore, the same are reproduced hereunder:-

> *"It has been noticed that allotments/sales were cancelled in some cases by the Secretaries, District Allotment Committees on account of various defaults without given proper Show Cause Notices to the defaulting individual allottees/auction purchasers. In some other cases it has been noticed that a general notice was issued in the local*

> *press to a number of the defaulting allottees. In the general notice they were required to file objections against the cancellation of their allotments/sales. The cancellation of an allotment/sale without a proper notice or on the basis of a general notice is bad in law. A general notice does not fulfill the legal requirements because it is necessary that service of a notice, before a contemplated action is taken, is assured. The notice, through press is issued to an individual only when all means of service of notice are applied and failed to deliver the notice to the individual concerned or the allottees/auction purchasers refuse to accept the notice. It is, therefore, requested that before cancelling the allotment/sale on account of a default of an allottee or an auction purchaser, proper show cause notice should be issued invariably to the allottee/auction purchaser individually in future and further action as required under rules be taken against him after its service is assured."*

The respondents in their report and para-wise comments have stated that complying with the above requirement of law, the respondent No. 4 on 9.9.1981 vide Memo No. 1248/STJ directed the petitioner to show-cause within a fortnight as to why his allotment of plot should not be cancelled. This Memo is enclosed as Annexure-I with the report and para-wise comments of respondent No.1. This was all fictional for two reasons: Firstly, a notice to be valid must satisfy at least four requirements, that is, *(i)* it must state the act complained of attracting adverse action; *(ii)* it must state the action proposed to be taken; *(iii)* it must state the source of power under which the action is proposed to be taken; and, *(iv)* it must prescribe the date, time and place of hearing and the period within which the reply may be filed [see **Ambika Devi v State of Bihar and Ors** AIR 1988 Pat 258]. Perusal of Memo No. 1248/STJ dated 9.9.1981 (i.e. show cause notice) unfolds that it does not contain the date, time and place of hearing. Thus, it was an inadequate notice. Secondly, the service of notice was feigned. According to Allotment Order dated 13.2.1976 the address of the petitioner was "Ghulam Muhammad Janjua son of Taj Din, Street Rajoa, Adda Chowk, Mohallah Thathi Sharqi, Chiniot, District Jhang".

The respondent No. 4 was under obligation to send show cause notice at the said address. On the contrary the notice contained incomplete address, that is, "Ghulam Mohd. s/o Taj Din, Gali Raja M/ Thathi Sharqi, Chiniot". The notice, therefore, received back undelivered in the office of respondent No. 4 with a remark that no person with the name of Ghulam Muhammad reside at the given address. This fact stands established from the office-note (Annexure-C) appended with the report and para-wise comments of respondent Nos. 3 & 4. Notwithstanding the above omission, the respondent No. 4, under these circumstances, was required to effect service of notice through publication in the local press. This was also not done. Thus, the present case is not one of inadequacy of notice, but also a case where no notice at all was given to the noticee/ the petitioner. In the absence of proper notice, the cancellation order dated 8.12.1981 could not be held to be valid as being violative of natural justice.

10. The malfeasance and nonfeasance on the part of respondent No. 4 did not end here. It continued till end. Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 guarantees that for the determination of his civil rights a person shall be entitled to a fair trial and due process. It is for this reason culture of authority is now a vintage. The Administrative Law has progressed and promotes the culture of reasoning. The respondent No. 4 was, therefore, not only required to record reasons for the cancellation of allotment but also to supply a copy of his order to the petitioner. Again the provision of law and the fundamental right of the petitioner were violated by the respondent No.4. Annexure-'C' attached with the report and para-wise comments of respondent Nos. 3 & 4 transpires that on the office-note respondent No. 4 just recorded "Issue cancellation order". This was recorded on 8.12.1981. There was neither any reason nor application of mind. This was nothing but a clear case of dereliction of duty. Perversity is still going on. The order of respondent No. 4 was

purportedly conveyed to the petitioner vide Memo No. 98 dated 3.2.1982. This was sent under registered cover but the address mentioned therein was incomplete and, therefore, it was received back in the office of respondent No. 4 undelivered with the remarks that "no person with the name Ghulam Muhammad reside at the given address". All these facts suggest corruption and corrupt practices of respondent No. 4 and thus respondent No. 2 was right while setting aside the cancellation order. The respondent No. 1 was the final authority on the administrative side and thus was carrying a heavy responsibility. It was his duty to check malpractices and maladministration. The record of this case indicates that he failed to discharge his duty. He did not bother to appraise the record and meet with the findings recorded by respondent No. 2 in his order dated 11.3.2008. He did not care to follow the directions of this Court which were issued vide order dated 14.7.2015 passed in W. P. No. 4493 of 2009.He ignored all principles of law and passed the impugned order by misreading and non-reading of record and in a slip-shod manner. This is a grave misconduct. The order dated 20.4.2016 of respondent No. 1, therefore, cannot be approved.

11. Now, I advert to the causes for cancellation of allotment. Non-payment of dues as per schedule given in the allotment order dated 13.02.1976 and non-completion of building within the stipulated time were the causes for cancellation of allotment. There is no denial to the fact that the petitioner after making payment of first installment amounting to Rs.893/- took over physical possession of the plot and thereafter did not make any payment as per schedule provided in the allotment order dated 13.02.1976. A question arises as to whether this could be made basis of cancellation of allotment. Answer to this question is in the negative for the reason that different notifications/orders [which have been appended with this petition as Annexures-U to U/18, particularly order dated 08.08.2007 (Annexure-

U/17)] issued by the Government of Punjab suggest that the petitioner had the time to make payment of the outstanding dues upto 31.12.2005. Similarly non-completion of building within a period of four years from the date of possession could not be made basis for cancellation as the Government of Punjab vide letter No.SO(D-1)2-7/81 dated 25.08.1982 had granted general extension in the period of construction in the Area Development Scheme for low income housing upto 31.12.1982 without any surcharge/ penalty. Respondent No.2, therefore, rightly placed reliance upon the said notifications/orders and set aside the cancellation of the allotment. This aspect of the matter was also not appraised by respondent No.1 and thus it is a case of misreading and non-reading of evidence and also misapplication of the provisions of law.

12. There is another aspect of the matter which is worth consideration. The petitioner in ground-(k) of the memorandum of instant petition has pleaded that in identical matter restoration was granted to one Fazal Din and Muhammad Latif. In this regard, the petitioner has placed on record order dated 04.03.1990 whereby restoration was granted to the said persons. During the course of arguments the petitioner's counsel also referred the orders of respondent No. 1 through which cancellation orders in the case of Muhammad Aslam and Manzoor Ahmad were set aside. I have examined the said orders and found that the case of the petitioner is at par with the referred cases. There is also no specific denial to this effect by the respondents in their parawise comments. Thus, it is a case of discrimination which is not permissible under Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973. Needless to mention here that discrimination is a blemish which not only eclipses the integrity of the public authority but also vitiates its action. Thus, the order passed by respondent No.1 being violative of the fundamental right guaranteed under Article 25 of the Constitution of the Islamic

Republic of Pakistan, 1973 is not valid. Even otherwise valuable right has accrued in favour of the petitioner as he has not only paid the entire outstanding dues alongwith penalty which have been received by the respondents without any protest but has also raised construction on the plot. This valuable right cannot be allowed to be trampled on mere technicalities of law.

13. In view of above, it is clear to me that this is a case where respondent No.1, has reversed the findings of respondent No.2 regarding the cancellation of allotment without paying any heed to the reasoning given by respondent No.2. Respondent No.1 has also wrongly discounted a very fundamental piece of evidence in the case namely non adherence to the procedure prescribed in memorandum dated 15.11.1966 qua the service of show-cause notice for cancellation of allotment and the notifications/orders issued by the Government of the Punjab from time to time, particularly the order dated 08.08.2003. Thus, this is a case wherein the findings of the first appellate authority i.e. respondent No.2 would prevail over the findings of respondent No.1.

14. This petition discloses a sordid and disturbing state of affairs. The facts and circumstances of the case take me to the question as to how grave injustice which has been perpetrated upon the petitioner can be rectified; and, administrative sclerosis leading to infringements of fundamental rights can be prevented. This Court being the protector of the fundamental rights of the citizen, has not only the power and jurisdiction but also an obligation to grant relief in exercise of its jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 to the victims whose fundamental rights under Articles 9, 10-A, 23 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973 are established to have been flagrantly infringed by calling upon the State to repair the damage done by its officers. The instant case is illustrative of such cases. Time has come to

evolve new tools to give relief in public law by moulding it according to the situation with a view to preserve and protect the Rule of Law. While concluding his first Hamlyn Lecture in 1949 under the title "Freedom under the Law" Lord Denning said:

> *"No one can suppose that the executive will never be guilty of the sins that are common to all of us. You may be sure that they will sometimes do things which they ought not to do; and will not do things that they ought to do. But if and when wrongs are thereby suffered by any of us what is the remedy? Our procedure for securing our personal freedom is efficient, our procedure for preventing the abuse of power is not. Just as the pick and shovel is no longer suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new and up to date machinery, by declarations, injunctions and actions for negligence…. This is not the task for Parliament ….. the courts must do this. Of all the great tasks that lie ahead this is the greatest. Properly exercised the new powers of the executive lead to the welfare State; but abused they lead to a totalitarian State. None such must ever be allowed in this country*."

One of the telling ways in which the violation of fundamental rights can reasonably be prevented, is to punish its violator in the payment of monetary compensation. The right to compensation is some palliative for unlawful acts of instrumentalities which act in the name of public interest and which present for their protection the powers of the State as a shield. In my view it would be a sound policy to mould the relief by granting compensation to the victims; and, to issue direction to the Competent Authority for initiation of disciplinary proceedings against delinquent officers in exercise of jurisdiction under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973.

15. In the facts of the present case the mode of redress which commends appropriate is to restore order dated 11.03.2008 of respondent No.2 by setting aside order dated 20.04.2016 of respondent No. 1 and by ordering payment of compensation of Rs.10,000/- as costs/exemplary damages and issuing direction to the Competent Authority for initiation of disciplinary proceedings against all the delinquent officers. This petition is accordingly allowed in above terms.

16. Office is directed to send a copy of this judgment to the Chief Secretary, Government of the Punjab for compliance and placing it on the dossier/personal file of the delinquent officers and for its circulation amongst the heads of all the Administrative Departments and Autonomous Bodies of the Government of Punjab for information.

(SHAHID WAHEED)
JUDGE

Approved for reporting.

Judge

Noor Muhammad