JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P.No.772 of 2019
Umer Perwaiz and others
Versus
Capital Development Authority and another

Dates of Hearing:	19.12.2022 and 10.11.2023.
Petitioners by:	M/s Sher Afzal Khan and Ch. Usama Tariq, Advocates.
Respondents by:	M/s Amir Latif Gill and Rizwan Ahmed, Advocates for C.D.A.

MIANGUL HASSAN AURANGZEB, J:- Through the instant writ petition the petitioners, who are the legal heirs of Muhammad Parwez (**"Parwez"**), seek a declaration to the effect that they are the owners of Plot No.22, Grain Market, Sector I-11/3, Islamabad (**"Plot No.22"**) as well as Plot No.26, Cloth Market, Sector I-11/3, Islamabad (**"Plot No.26"**). They also seek a direction to the Capital Development Authority (**"C.D.A."**) to issue allotment letters for the said plots in their favour.

2. The facts essential for the disposal of the instant petition are that on 25.05.2010, Parwez participated in an auction conducted by C.D.A. and emerged as the highest bidder for Plots No.22 and 26. Parwez's bid of Rs.27,346,620/- for Plot No.22 was accepted vide C.D.A.'s letter dated 18.06.2011 and his bid of Rs.22,399,650/- for Plot No.26 was accepted vide C.D.A.'s letter dated 28.06.2010. The auction was conducted in accordance with the Terms and Conditions for the Auction of Commercial Plots (**"Brochure"**) issued by the Estate Management Directorate of C.D.A.

3. C.D.A.'s letter dated 28.06.2010 to Parwez shows that for Plot No.26 he had paid 40% of the bid amount, i.e.,

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Rs.8,960,000/- and the remaining 60%, i.e., Rs.13,439,650/- had to be paid in two equal quarterly installments. In paragraph 3 of the said letter, it was mentioned that if the purchaser pays the remaining 60% amount in lump sum, he would be *"awarded 5% rebate on remaining 60% of the premium."* Admittedly, Parwez paid the remaining amount in lump sum and was given the benefit of the 5% rebate. In this way, the total amount paid by Parwez for Plot No.26 was stated to be Rs.21,728,000/-.

4. As regards Plot No.22, C.D.A.'s letter dated 18.06.2011 to Parwez shows that he had paid 40% of the bid amount, i.e., Rs.10,939,000/- and the remaining 60%, i.e., Rs.16,407,620/- had to be paid in two equal quarterly installments of Rs.8,203,810/- each on 27.09.2011 and 27.12.2011. Parwez did not pay the remaining 60% of the amount within the said deadlines.

5. Vide letter dated 29.07.2011, Parwez surrendered Plot No.26 and requested C.D.A. to refund the amount he had paid after deduction of 10% of the total amount as per C.D.A.'s terms and conditions. When asked by C.D.A. vide letter dated 13.12.2011 to pay the remaining amount Parwez, in his letter dated 01.01.2012, took the position that since he was in a state of financial crisis he wanted C.D.A. to refund the amount that he had paid for Plot No.26. He had reiterated the said request for refund through several letters addressed to C.D.A. He also asserted that he wanted to make timely payment of the installments for Plot No.22 but due to financial crisis he could not do so.

6. Having not received a plausible response from C.D.A., Parwez on 03.07.2012, filed a complaint before the *Wafaqi Mohtasib* ("Ombudsman") seeking a direction to C.D.A. to refund him Rs.19,488,035/- for surrendering Plot No.26.

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Parwez had also claimed 15% per annum on the said amount as compensation due to devaluation of Pakistan Rupee.

7. During the pendency of the proceedings before the Ombudsman, C.D.A., vide letter dated 23.09.2013, informed Parwez that a cheque for an amount of Rs.3,080,415/- (after adjustment of the amount payable by Parwez for Plot No.22) was ready to be given to him. Parwez wanted the entire amount paid by him for Plot No.26 to be refunded to him. Hence, he refused to accept Rs.3,080,415/- as refund for Plot No.26. This is apparent from Parwez's letter dated 08.10.2013 to C.D.A.

8. Vide letter dated 22.10.2013, Parwez informed C.D.A. that he wanted to surrender Plot No.22 as well and asked for a refund of the amount paid by him for the said plot. In the said letter, Parwez had asserted that Plot No.22 had been encroached upon and that without his consent C.D.A. could not have adjusted the amount paid by him for Plot No.26 against the amount payable by him for Plot No.22.

9. Parwez was suffering from cancer and that is why he was asking C.D.A. to refund him the amount paid by him for the two plots. Parwez died on 22.11.2013 but the proceedings pursuant to his complaint continued before the Ombudsman.

10. Vide letter dated 04.12.2013, the Deputy Director (Estate Management-II), C.D.A. informed the Ombudsman that the case for the refund of the amount paid by Parwez for Plot No.26 was under process with the Finance Wing of C.D.A. It was in these circumstances that Parwez's legal heirs vide letter dated 06.05.2014 to C.D.A., sought the withdrawal of Parwez's application for surrender of Plot No.26 and expressed their intention to retain the said plot. They also complained about the financial loss suffered by

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them due to the delay on C.D.A.'s part to refund the amount sought by their predecessor.

11. The Assistant Director (Estate Management-II), C.D.A., vide letter dated 31.12.2014, asked Parwez's legal heirs to withdraw the complaint pending before the Ombudsman, and that after such withdrawal they should submit an application for transfer of Plot No.26 which would be processed in accordance with the rules and regulations. Vide letter dated 11.02.2015, Parwez's legal heirs informed C.D.A. that they had filed an application for the withdrawal of the proceedings before the Ombudsman. Furthermore, C.D.A. was asked to transfer Plot No.26 in the name of Parwez's legal heirs. C.D.A., vide letter dated 15.05.2015, applied to the Ombudsman for closure of the proceedings on the ground that after Parwez's death, his legal heirs had withdrawn the application for surrender of Plot No.26.

12. Parwez's legal heirs, along with their application dated 31.03.2015, submitted pay orders for Rs.16,407,621/- to C.D.A. as balance sale consideration for Plot No.22. C.D.A., vide letter dated 17.06.2016, returned the said pay orders to Parwez's legal heirs and took the position that the amount payable for Plot No.22 had already been adjusted. C.D.A., vide its letter dated 21.05.2018, asked Parwez's legal heirs to pay government taxes in order to enable C.D.A. to transfer Plot No.22 in their favour. Vide letter dated 20.06.2018, Parwez's legal heirs submitted copies of the receipts for payment of 5% advance tax to C.D.A. with the request to transfer Plot No.22 in their favour.

13. C.D.A., on 22.10.2020, brought on record a number of documents which include an undated and unsigned letter from C.D.A. to Parwez's legal heirs wherein it is stated that it had been decided to refund the amount deposited by Parwez for Plots No.22 and 26 as he had surrendered the

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plots. There is, however, nothing on the record to show that a decision had been taken by the competent authority in C.D.A. to refund the amount that had been deposited by Parwez for the said plots.

14. Learned counsel for the petitioner, after narrating the facts leading to filing of the instant petition, submitted that Plots No.22 and 26 were purchased by Parwez in an open auction; that Parwez wanted to surrender Plot No.26 and therefore, on 29.07.2011, he asked C.D.A. to refund the amount paid by him for the said plot; that in terms of Clause VI of the Brochure, C.D.A. was bound to refund the amount paid by Parwez for Plot No.26 after deducting 10% of the bid amount; that even after a lapse of more than two years, C.D.A. did not refund any amount to Parwez; that after Parwez filed a complaint before the Ombudsman C.D.A., on 23.09.2013, issued a cheque for Rs.30,80,415/- in Parwez's favour; that said cheque was issued after C.D.A. unilaterally adjusted the balance amount payable by Parwez for Plot No.22; that in doing so C.D.A. did not obtain Parwez's consent; that after Parwez's death, his legal heirs requested C.D.A. to allow them to retain both the plots; that C.D.A. called upon Parwez's legal heirs to withdraw the complaint before the Ombudsman; that in reliance on C.D.A.'s assurance that both plots would be restored, Parwez's legal heirs submitted pay orders in C.D.A.'s favour in the amount equivalent to the balance amount that they considered was payable for Plot No.22; that C.D.A. issued demand notices and invoices to Parwez's legal heirs for the plots in question; that despite complying with all demands of C.D.A. the plots have still not been transferred to Parwez's legal heirs; that till date C.D.A. has not re-auctioned the plots in question; that since the allotment of Plot No.26 has not been withdrawn from Parwez's name, it implies that his request

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for refund was not entertained; that Parwez's legal heirs are ready to deposit Rs.16,407,621/- as the balance amount payable for Plot No.22; and that C.D.A. is bound to act fairly and in accordance with law. Learned counsel for the petitioners prayed for the petition to be allowed in terms of the relief sought therein.

15. On the other hand, learned counsel for the respondents / C.D.A. raised an objection to the maintainability of the petition on the ground that the case entailed disputed and controversial questions of fact which could not be resolved without the recording of evidence and that this Court, in exercise of jurisdiction under Article 199 of the Constitution, cannot undertake such exercise. Furthermore, it was submitted that vide letter dated 01.01.2012, Parwez had expressed his willingness to pay the balance amount for Plot No.22 from the amount to be refunded by C.D.A. for Plot No.26; that vide letter dated 22.10.2013, Parwez also surrendered Plot No.22; that since Parwez had surrendered Plots No.22 and 26 in his lifetime, the request made by his legal heirs to retain both the said plots was untenable and not worthy of consideration; that novation of a contract cannot be sought by legal heirs of a party to a contract; that in the bid acceptance letters, a timeframe was given for making payment of the premium and for Plot No.22 the last installment had to be paid by 27.12.2011; that the instant petition also suffers from *laches* as it was filed more than six years after surrender of the plots; that under the terms and conditions of the Brochure, C.D.A. was entitled to forfeit the paid premium as well the advance paid after Parwez failed to abide by the schedule of payment mentioned in the bid acceptance letter for Plot No.22; and that the process adopted by C.D.A. was in accordance with the law and does not suffer from any

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illegality. Learned counsel for C.D.A. prayed for the writ petition to be dismissed.

16. I have heard the contentions of the learned counsel for the contesting parties and have perused the record with their able assistance. The facts leading to the filing of the instant petition have been set out in sufficient detail in paragraphs 2 to 13 above and need not be recapitulated.

17. I propose in the first instance to deal with the objection taken on behalf of C.D.A. to the maintainability of the instant petition on the ground that the case entails disputed questions of fact that cannot be resolved without the recording of evidence, and that this exercise cannot be undertaken by this Court in exercise of its jurisdiction under Article 199 of the Constitution. It is well settled that the High Court, in exercise of its Constitutional jurisdiction, can go into questions of fact that are capable of being decided on the basis of documents on record and do not involve the recording of evidence.

18. When the petitioner raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to entertain the petition. Given the dispute, which is the subject matter of the instant petition, I am of the view that it involves a simple exercise of considering the admitted documents and obvious facts in arriving at an appropriate deduction which is well within the Constitutional jurisdiction of this Court. The questions raised in the instant petition are capable of being decided with reference to the documents on the record. Since I do not see the need for any fact to be proved or disproved through the recording of evidence to come to a just conclusion in this case, the objection raised

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on behalf of C.D.A. to the maintainability of the instant petition is turned down. In holding so, reliance is placed on the following case law:-

(i) In the case of Saad Muhammad Shaheen Al-Soofi Vs. Principle & Chairman, Academic Council, Sindh Medical College (1982 CLC 805), Saleem Akhtar J., speaking for the Hon'ble High Court of Sindh, held as follows:-

> ***"There is no cavil to the proposition that the disputed questions of fact cannot be gone into by the High Court in exercise of the Constitutional jurisdiction under Article 199 of the Constitution. However, each case has to be considered on its merits and before this principle is applied it has to be considered whether disputed questions of facts are involved in it. Merely because a certain assertion has been made and denied by the other party does not ipso facto make it a disputed fact. In order to establish that a fact is a disputed question of fact, the party making such allegation has to make out a prima facie case or place on record certain material from which it may be possible for the Court to determine that the dispute involves controversial question of facts or that the controversy will require evidence and investigation."***

(ii) In the case of Shamim Khan Vs. Pakistan Defence Officers Housing Authority (1999 YLR 410), Sabihuddin Ahmed J., speaking for the Hon'ble High Court of Sindh, held as follows:-

> ***".....[I]n our humble opinion, the mere existence of a factual inquiry will not bar the maintainability of this petition. However, if it can be shown that there is a substantial and not merely illusory factual dispute, the relief claimed can only be granted upon resolution of such dispute and such dispute cannot be effected on the basis of affidavits and material on record, but requires an elaborate inquiry into facts, the Court would be persuaded to take the view that the alternative remedy by way of a civil suit is adequate and more efficacious, and therefore a writ petition will not lie."***

19. I shall now proceed to decide the petition on merits. The admitted facts are that Parwez's highest bid of

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Rs.22,399,650/- for Plot No.26 was accepted by C.D.A. vide letter dated 28.06.2010. After having been given the benefit of 5% rebate in the 60% of the bid amount, the total amount paid by Parwez for Plot No.26 was Rs.21,728,000/-. On the payment of this amount, Parwez was invested with ownership rights over the said plot. After this, Parwez wanted the entire payment made by him for Plot No.26 to be refunded. Clause VI.4 of the Brochure provides *inter alia* that *"in the event of cancellation or surrender of plot for whatever reason, the deposited amount of premium shall be refunded after forfeiture of 10% of the total auction price of the plot."*

20. As mentioned above, for Plot No.22, Parwez's highest bid of Rs.27,346,620/- had been accepted by C.D.A. vide letter dated 18.06.2011. This letter shows that 40% of the bid amount i.e., Rs.10,939,000/- had already been paid and the remaining 60% i.e., Rs.16,407,620/- had to be paid in two equal quarterly installments of Rs.8,203,810/- each on 27.09.2011 and 27.12.2011. Parwez's default in paying the remaining 60% of the bid amount by the said deadlines entitled C.D.A. to cancel Parwez's bid for Plot No.22. C.D.A. did not do so. Instead, almost two years after the expiry of the deadline for the first installment, C.D.A. dealt with Parwez's request for the refund of the entire amount paid by him for Plot No.26 by preparing a cheque for just Rs.3,080,415/- out of Rs.21,728,000/- paid by him for Plot No.26. C.D.A. justifies this short payment by asserting that since Parwez was liable to pay the remaining 60% of the premium amounting to Rs.16,407,620/- for Plot No.22 for which his highest bid of Rs.27,346,620/- had been accepted, Rs. 16,407,620/- (from the amount that Parwez had paid for Plot No.26) was used to adjust his liability to C.D.A. for Plot No.22. After this adjustment, a pay order for Rs.3,080,415/-

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had been prepared in Parwez's favour. This arrangement is set out in C.D.A.'s letter dated 23.09.2013 to Parwez, a copy whereof was also marked to the Ombudsman. The operative part of the said letter is reproduced herein below:-

> *"It is informed that your refund cheque No.4616607 amounting to Rs.3080415/- drawn on MCB CDA Secretariat Islamabad dated 27/8/2013 is ready after meeting necessary adjustment against the final price of the plot, Plot No. 22, Grain Market, Sector I-11/3, Islamabad. You are hereby advised to sign pre dated receipt and affix thumb impression and return the same to this office within 15 days."*

21. This adjustment would imply that Parwez was not liable to pay any further amount for Plot No.22. But this mechanism was not acceptable to Parwez, who wanted to surrender both plots and for the entire amount paid by him for the plots to be refunded to him. Parwez may well have wanted to surrender both the pots, but his request for the surrender of Plot No.22 was not acceded to at any stage by C.D.A. There is no document on the record to suggest otherwise.

22. After Parwez's demise, his legal heirs wanted both plots to be allotted to them, and for this purpose they expressed their willingness to pay the outstanding amount. C.D.A.'s position is that since Parwez had surrendered both the plots, the question of allotting them to his legal heirs does not arise. As regards the amount that had been paid by Parwez, C.D.A. asserts that Parwez's legal heirs are at liberty to receive the principal amount paid by Parwez. C.D.A.'s stance would have had force only if soon after Parwez's request for the refund of the amount paid by him for the surrendered plots, C.D.A. had acceded to his request and the amount was refunded after deducting 10% of the premium in accordance with clause VI.4 of the Brochure. Before Parwez's demand for the surrender of Plot No.22 and

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refund of the amount paid by him for the said plot could be acceded to by C.D.A., his legal heirs withdrew the said demand. Therefore, the mere fact that at some point in time in the past he had applied for the surrender of the said plot, would not inflict any disability on him or his legal heirs in seeking the allotment of Plot No.22 since the entire payment for the same had been made / adjusted on 27.08.2013.

23. The manner in which C.D.A. refunded Rs.3,080,415/- out of the total amount that Parwez had paid for Plot No.26 showed that Parwez had no further financial liability to clear as regards Plot No.22. Even though this adjustment was not acceptable to Parwez and / or his legal heirs, C.D.A., at no material stage refunded the amount that had been utilized to clear Parwez's financial liability for Plot No.22. There is nothing on the record to show that C.D.A. had prepared a cheque in favour of Parwez and / or his legal heirs to refund the amount paid / adjusted for Plot No.22. Hence, there is no legal basis for C.D.A. to deny the rights that were created in favour of Parwez on account of the payment / adjustment of the entire financial liability towards Plot No.22.

24. As regards Plot No.26, it is true that Parwez's request for the refund of the entire amount paid by him for the said plot (less than 10% of the bid price which was to be forfeited) had not been acceded to by C.D.A., which had refunded just Rs.3,080,415/- while utilizing the remaining amount of Rs.16,407,620/- to clear Parwez's financial liability towards Plot No.22. For Parwez's legal heirs to take a volte-face from the position taken by their predecessor and lay claim to Plot No.26 as well is most unreasonable, and therefore C.D.A. was well within its rights to reject such a demand. Indeed, Parwez's legal heirs had, through letter dated 06.05.2014, requested C.D.A. for the allotment of both the plots and expressed their willingness to pay the

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remaining amount, but they took more than six years to file the instant petition.

25. All this controversy would not have been created had Parwez not asked for a refund. Since he was suffering from cancer, he cannot be faulted for making such a request. On the surrender of plots with respect to which the letters of acceptance had been issued, the terms and conditions of the Brochure entitled C.D.A. to forfeit 10% of the total auction price and return the remaining amount paid by the bidder at the time of auction. C.D.A., instead of doing so, carried out the process of adjustment which resulted in clearing Parwez's liability towards Plot No.22 but left Plot No.26 unpaid for. In these circumstances, C.D.A. cannot deny ownership rights to Parwez's legal heirs with respect to Plot No.22.

26. Clause V.3 of the Brochure provided that *"on receipt of full amount of premium and taxes, etc., if any are applicable, within the specified time, the allotment letter will be issued as shortly as may be...."* Vide letter No.CDA/DEM-42(1012)/IM/2011/1385 dated 21.05.2018, C.D.A. required Parwez's legal heirs to provide the receipt for the government taxes paid with respect to Plot No.22 as required in paragraph 4 of the Brochure. At pages 55 to 60 of the instant petition are copies of the tax challans showing a cumulative amount of Rs.1,367,335/- paid by Muhammad Parwez's legal heirs as taxes.

27. Parwez's legal heirs should thank their lucky stars that C.D.A., instead of acceding to Parwez's request to refund the entire amount deposited for Plot No.26, adjusted the balance amount payable by him for Plot No.22 from the amount that he had deposited for Plot No.26. Had C.D.A. also acceded to Parwez's request to refund the amount deposited by him for Plot No.22, his legal heirs would have

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had no legal foundation to seek the allotment of either of the plots.

28. In view of the above, the instant petition is partly allowed and it is declared that Parwez had acquired ownership rights with respect to Plot No.22 on account of the adjustment of Parwez's liability for the remaining 60% amount for the said plot from the payment that had already been made by Parwez for Plot No.26. C.D.A. shall issue an allotment letter for Plot No.22 to Parwez's legal heirs after the payment of all outstanding fees and taxes. As regards Plot No.26, C.D.A. is at liberty to subject the same to an auction. Parwez's legal heirs are at liberty to collect Rs.3,080,415/- from C.D.A. for which a pay order had been prepared on 27.08.2013. There shall be no order as to costs.

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN OPEN COURT ON 15/11/2023

(JUDGE)

APPROVED FOR REPORTING

Qamar Khan

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