JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

I.C.A.No.55 of 2016
Akhtar Hussain and others
Versus
Federation of Pakistan through Secretary Ministry of Housing and Works and others

Date of Hearing: 03.05.2017
Appellants by: Raja Muhammad Khan, Hafiz Farmanullah, Hafiz Munawar Iqbal, Raja Muhammad Farooq, Muhammad Akhtar Awan, Imran Shaukat Rao, Javed Afzal Khan, Advocates,
Respondents by: Mr. Salman Saeed, Advocate.

MIANGUL HASSAN AURANGZEB, J:- Through this common judgment, we propose to decide Intra Court Appeal No.55/2016, and all other connected appeals (i.e. Intra Court Appeals No.48/2016, 51/2016, 56/2016, 57/2016, 58/2016, 62/2016, 63/2016, 64/2016, 65/2016, 72/2016, 79/2016, 93/2016, 115/2016, 124/2016, 125/2016, 249/2016, and 308/2016), since they involve common questions of law and fact. In all these appeals except I.C.A.No.308/2016, the appellants have impugned order dated 03.02.2016, passed by the learned Single Judge-in-Chambers, whereby the appellants' writ petitions were dismissed. In I.C.A. No.308/2016, the appellant has impugned order dated 06.05.2016, passed by the learned Single Judge-in-Chambers, whereby the appellant's W.P.No.1829/2015, was dismissed, on the basis of reasons already rendered by the learned Single Judge in order dated 03.02.2016 (which has been challenged in the above referred appeals).

2. The appellants' case is that they applied to Pakistan Housing Authority (respondent No.2) for the allotment of apartments (D-type) in Sectors G-10/2 and G-11/3, Islamabad, in the scheme launched by respondent No.2. As per respondent No.2's representations contained in the brochure issued by respondent No.2. The housing schemes in the said Sectors were to be completed on 'no profit and no loss basis', and were to be completed by 2010, and in some cases by 2011. After going to the

balloting process, the appellants were offered/allotted D-type apartments in the said Sectors. The appellants made payments in accordance with the schedule fixed by respondent No.2. Even though the appellants had made the entire payment for the said apartments, the construction of the apartments was unduly delayed. The appellants were expecting the completed apartments to be handed over to them in 2010 and 2011, but respondent No.2 vide letter dated 03.06.2014, raised a demand of Rs.8,84,000/- as an additional cost for each apartment. The appellants contend that the said demand was unlawful and in breach of the terms and conditions contained in the brochure issued by respondent No.2.

3. The said demand was impugned by the appellants in writ petitions before this Court. In their writ petitions, the appellants had prayed for the said letter dated 03.06.2014, to be set aside. Furthermore, the appellants sought a direction to the respondents to complete the appellants' apartments in all respects within a period of six months, and also prayed for the payment of rental at the rate of Rs.25,000/- per month from 2011 until the handing over of the possession of the said apartments.

4. Vide impugned judgment dated 03.02.2016, the learned Single Judge dismissed the appellants' writ petitions. It was held that the issue raised by the appellants in their writ petitions pertained to the enforcement of contractual obligations, which could not be done by invoking the jurisdiction of this Court under Article 199 of the Constitution. Furthermore, it was held that the controversy raised by the appellants could not be resolved without the recording of evidence, which was also not permissible in the constitutional jurisdiction of this Court. The said judgment dated 03.02.2016, has been impugned by the appellants in the instant intra Court appeal and other connected appeals.

5. Learned counsel for the appellants submitted that the appellants were government employees in BPS-1 to BPS-16 and were eligible for allotment of apartments in the housing schemes launched by respondent No.2; that the appellants were allotted apartments after they were selected through a transparent

balloting process; that in the brochure issued by respondent No.2 a representation was made that the apartments in Sectors G-10/2 and G-10/3 would be completed by July, 2010; that the appellants made payments in accordance with the schedule fixed in the said brochure; that no payment was outstanding against the appellants; that the appellants had the legitimate expectancy to be handed over the apartments completed in all respects within the period set out in the brochure; that respondent No.2 remained silent for four long years, and thereafter, vide letter dated 03.02.2014, raised an unlawful demand of Rs.8,84,000/- as additional costs for the D-type apartments; that the appellants cannot not afford to pay this additional cost; that even otherwise, such an unreasonable demand is not contemplated by the terms and conditions of the brochure for the said housing scheme.

6. Furthermore, it was submitted that the learned Single Judge, erred by not appreciating that respondent No.2 had deprived the appellants from their hard earned money by not completing the construction of the apartments within the time frame fixed in the brochure, and handing them over to their lawful allottees; that there were no disputed questions of fact involved in the petitions filed by the appellants; that the mere fact that the relationship between the appellants and respondent No.2 was contractual in nature, this by itself did not prevent the High Court from issuing a writ of mandamus against respondent No.2. The learned counsel for the appellants prayed for the impugned judgment dated 03.02.2016, to be set aside. Furthermore, it was prayed that the impugned letter dated 03.06.2014, issued by respondent No.2, be declared without lawful authority and of no legal effect.

7. On the other hand, learned counsel for respondent No.2 submitted that the learned Single Bench had correctly dismissed the appellants' writ petitions; that the appellants, through their writ petitions, were seeking the enforcement of their contractual rights, which could not be done through a petition under Article 199 of the constitution; that respondent No.2 is a self financed organization, and does not receive any funding from the Federal

Government; that respondent No.2 spends the funds collected from the allottees on the construction of the housing projects; that the construction work regarding the project in which the appellants were allotted apartments, started in November, 2008, but due to a stay order issued by the Court, the project could not be completed within time; that 80% of the project works were complete when the stay order was issued; that the cases in which stay was granted, was instituted by a petty contractor; that after the Islamabad High Court was abolished in the year 2009, the said petition was transmitted to the Court of competent jurisdiction, where it remained pending for a long time; that it was not until 26.08.2013, that the stay order was vacated by the learned Court; that against the said order dated 26.08.2013, civil revision petition 382/2013, was filed before this Court, which granted a *status-quo* order; that on 25.02.2014, the said status *quo-order* was vacated; that the delay in the construction of the apartments was beyond the control of respondent No.2; that as a result of the said delay there was an enhancement in the cost of the construction; and that accordingly, letters dated 03.06.2014, were issued to the appellants demanding an additional cost for the construction.

8. Furthermore, it was submitted that the terms and conditions set out in the brochure to made it clear that the cost of the apartments were tentative in nature, and subject to variations on account of escalation in prices due to unforeseen circumstances. Learned counsel for respondent No.2 prayed for the appeals to be dismissed.

9. We have heard the contentious 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 Intra court appeals have set out in sufficient detail in paragraphs 2 to 4 above, and need not be recapitulated.

10. It is not disputed that the appellants were selected through a transparent balloting process held on 29.10.2008 for the allotment of "D" Type Apartments at G-10/2, Islamabad. The list of the successful applicants was published by respondent No.2 on 30.10.2008. The allotment letters issued to the appellants made

express reference to the terms and conditions set out in the brochure issued by respondent No.2. As per the payment schedule fixed by respondent No.2, the appellants were required to make the entire payment in installments up-to the dates ranging from 2010 to 2011 for various apartments.

11. The learned counsel for the appellants did not dispute that the appellants had gone through and understood the terms and conditions set out in the brochure issued by respondent No.2. The said brochure was annexed to most of the writ petitions. In the said brochure, it was represented that the construction of the apartments will commence in July 2008 tentatively on approval of the plans by the competent authority. It was also represented that the project was expected to be completed within a period of 24 months. Clause 10 of the brochure provides that the cost of the apartments is tentative and is subject to variations on account of escalation in prices and unforeseen circumstances. Furthermore, it is provided that if the cost of the apartment increases due to factors beyond the control of respondent No.2, the increase in such cost shall be finally determined and charged from the allottees on the basis of actual expenditures incurred on completion of the apartments, which was to be communicated to the allottees in due course.

12. Now, the conditions set out in the said brochure show that the cost of the apartments was tentative in nature. The word "tentative" is derived from the Latin word *tentare*, which means "to attempt". The original meaning of "tentative" was "attempted", "provisional" or "experimental". Since the cost of the apartment, as per the brochure was said to be tentative, it was by no means final. Therefore, we are of the *prima-facie* view that the appellants could not insist upon the construction and the handing over the completed apartments upon the payment of the tentative cost of the apartment determined in the year 2008. This, however, is not an open license to respondent No.2 to demand an additional amount, which is not commensurate with the inflation or escalation in the price of construction during the period when the project was delayed. The position taken by respondent No.2 is

that the delay was occasioned on account of a stay order obtained by a contractor. True an act of Court shall not prejudice any party, but If respondent No.2 emerged triumphant in the litigation with the contractor, respondent No.2 would owe a fiduciary duty to the appellants to institute proceedings against the litigious contractor or any other person for the recovery of the amount equivalent to the increase in the cost of the apartments caused due to inflation or escalation in the cost of construction during the period when the stay/status quo order remained operative. The amount so recovered by respondent No.2 from the contractor would have to be paid to the appellants. Respondent No.2 cannot just sit back and say that the delay was due to the stay order issued by a Court on the application of a contractor, and that the appellant should suffer for this. Respondent No.2 is under an obligation to institute proceedings for recovery against all those who were responsible for the delay in the execution of the project by four years. Once respondent No.2 is able to recover the amount from such a person, it will have to compensate the appellants. Since respondent No.2 operates on 'no profit no loss basis', it would not be able to pay for remaining construction works on the apartments. Therefore, the appellant ought to pay the amount demanded by respondent No.2 to enable respondent No.2 to complete the project/construction, and to avert the possibility of cancellation of the allotment. After all the appellants have had the benefit of appreciation of price of the apartments.

13. The appellants have disputed the position taken by respondent No.2 that the project had been delayed on account of stay orders issued by Courts, or that the delay beyond respondent No.2's control. This factual controversy cannot be resolved in the constitutional jurisdiction of this Court. If the appellants feel that the delay in the execution of the project was occasioned due to reasons attributable to respondent No.2 or that the quantum of the additional cost demanded by respondent No.2 through the letters dated 03.06.2014 is excessive and not commensurate to the escalation in the actual cost of construction material etc, they

ought to take their grievance before a Court of plenary jurisdiction.

14. Indeed, the relationship between the appellants and respondent No.2 is entrenched in a contract to hand over a constructed apartment in return for a certain price. Intricate and controversial issues regarding the cause of the delay in the construction; the quantum of escalation in the price of construction material etc, are involved in this case. Therefore, this is yet another reason why the appellants may, if so advised, invoke the jurisdiction of the learned Civil Court.

15. In view of the above, we do not find any merit in these appeals, which are dismissed with no order as to costs. Before parting with this judgment, we may observe that should any of the appellants agitate their grievances (which are the subject matter of these appeals) before the Court of plenary jurisdiction, the said Court shall decide the cases uninfluenced by the observations made herein.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON _____/2017

(JUDGE) **(JUDGE)**

Qamar Khan*