JUDGMENT SHEET.
IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

I.C.A No.102 of 2016
Shahid Chanzaib
Versus.
C.D.A, etc.

Date of Hearing:	**02.06.2016**
Appellant by:	**Mr. Riaz Hanif Rahi, Advocate,**
Respondent No.1 by:	**Raja Muhammad Adnan Aslam, Advocate.**

MIANGUL HASSAN AURANGZEB J. Through the instant Intra Court Appeal, the appellant, Shahid Chanzaib, impugns the judgment dated 07.03.2016, passed by the learned Single Judge-in-Chambers, whereby Writ Petition No.3325/2015, instituted by the appellant, was disposed of with the following directions to the Capital Development Authority (respondent No.1):-

"(i) To nominate an authorized officer to afford an opportunity of hearing to the petitioner and then to decide the pending representation dated 28.10.2013 through a speaking order.

(ii) The petitioner shall be at liberty to raise any ground, legal or factual, before the officer authorized to decide the representation dated 28.10.2013.

(iii) The authorized officer shall take into consideration the grounds raised by the petitioner and shall not in any manner be influenced by the comments filed by the respondents in the instant petition.

(iv) This Court expects that a speaking order shall be passed by the authorized officer nominated by the he Chairman, preferably within thirty (30) days from the date of receipt of this order."

2. The question that calls for consideration in this appeal is whether respondent No.1, after the acceptance of the appellant's highest bid for a plot, was justified in forfeiting 10% of the total bid amount on account of the appellant's failure to deposit the remaining bid amount.

3. Learned counsel for the appellant submitted that the learned Single Judge-in-Chambers, instead of deciding the writ petition on merits (in compliance with the order dated 26.08.2015, passed by the Hon'ble' Supreme Court in Civil

Petition No.1741/2014), decided to refer the matter to the Chairman of respondent No.1, with the direction to decide the appellant's representation dated 28.10.2013, through a speaking order. Learned counsel further submitted that the learned Single Judge-in- Chambers should have decided the case on merits. He further submitted that the forfeiture of 10% of the bid amount by respondent No.1 did not have any backing or sanction of the law; that respondent No.1 could have deducted 10% of the 40% of the bid amount which had been deposited by the appellant with respondent No.1, but could not have forfeited 10% of the entire bid amount; and that the appellant had addressed several letters to respondent No.1, requesting the return of the amount wrongfully forfeited by respondent No.1, but to no avail. Learned counsel for the appellant prayed for the appeal and the writ petition to be allowed and a direction be issued to respondent No.1 to forfeit only 10% of the amount deposited by the appellant.

4. In order to strengthen his arguments, learned counsel for the appellant placed reliance on the case titled Shahul Hamid Vs. Tahir Ali (1980 SCMR 469), wherein it has been held that neither any court of law nor any agreement can estop a party from pleading law, and that an agreement not to raise the plea of *res judicata* in any future litigation was against public policy and void under Section 23 of the Contract Act, 1872. Furthermore, learned counsel relied upon case law titled "Muhammad Ikhlaq Memon Vs. Capital Development Authority (2015 SCMR 294), wherein the petitioner had participated in an open auction of plots, and after being declared as the successful bidder for two plots, deposited 25% of the bid amount. The balance amount was not paid, because CDA was not in a position to give him vacant possession of the plots. The petitioner filed a writ petition praying for a direction to CDA to hand over possession of the plots to the petitioner. The Hon'ble Lahore High Court decided the petition by directing CDA to refund

the amount paid by the petitioner along with profit. The Hon'ble Supreme Court upheld the judgment of the Hon'ble High Court. Learned counsel for the appellant further submitted that the appellant should be granted the same relief as was granted by the Hon'ble Lahore High Court to the petitioner in Writ Petition No.2460/2000, vide judgment dated 04.12.2003.

5. On the other hand, learned counsel for respondent No.1 submitted that under the provisions of the Islamabad Land Disposal Regulations, 2005, the appellant had the right to file an appeal before the CDA Board against respondent No.1's decision to forfeit 10% of the total bid amount, therefore, an Intra Court Appeal is not maintainable under the provisions of the Law Reforms Ordinance, 1972; that respondent No.1 was fully competent to determine the terms and conditions of an auction; that in this case, the terms and conditions of the auction were approved by the CDA Board; that the appellant was well aware of the terms and conditions of the auction, therefore, he could not complain against the forfeiture of 10% of the total bid amount, which forfeiture is strictly in accordance with the said terms and conditions of the auction, contained in the brochure; that the successful bidders were required to pay the 40% within 10 days, and 60% in two quarterly installments – the first installment within three months of the bid opening process; and that a stigma is placed on a plot when it becomes disputed. Learned counsel for respondent No.1 prayed for the appeal, to be dismissed.

6. We have heard the arguments of the learned counsel for the contesting parties and have perused the record with their able assistance.

7. Respondent No.1 derives the power to dispose of land from Section 49 of the Capital Development Authority Ordinance, 1960, ("CDA Ordinance"), which reads as follows:-

"49. Power to dispose of land.- The Authority may retain, or may lease, sell, exchange, rent or otherwise, dispose of any land situated in it."

8. Section 51 of the CDA Ordinance empowers respondent No.1 to make regulations, not in consistent with the rules, if any, on all matters for which regulations are necessary or expedient. In exercise of this power, respondent No.1 has made the Islamabad Land Disposal Regulations, 2005. Regulation No.6 of the said Regulations *inter-alia* provides that all commercial and business plots shall be sold or leased out through an open auction.

9. The record shows that the respondent No.1 had offered allotment of lease hold rights in various plots in Islamabad, through an open auction. One of the plots so offered, was plot No.26, Markaz F-11, Islamabad, measuring 822.22 square yards ("the Plot"). This plot could be used for commercial purposes, and the purchaser could construct a basement plus a four-storey building (ground floor plus three floors) thereon. The auction was held on 29.12.2010. The appellant and one Maqsood-ur-Rehman participated in the auction proceedings and turned out to be the highest bidders for the Plot. Their highest bid was Rs.3,58,000/- per square yard which comes to Rs.294,354,760/- for the Plot.

10. The CDA Board in its meeting held on 08.03.2012, decided to accept the appellant's said bid for the Plot. The highest bidders paid an amount of Rs.117,742,000/- (i.e. 40% of the total bid amount) within time. On 15.01.2011, a letter of acceptance was issued by respondent No.1, requiring the appellant to pay the balance 60% amount (i.e. Rs.176,612,856/-) in two equal installments of Rs.88,306,428/- each, on 12.04.2011 and 12.07.2011. Since the appellant did not pay the first installment, which was due on 12.04.2011, respondent No.1, on 16.04.2012, cancelled the appellant's bid. Thereafter, respondent No.1, forfeited an amount equivalent to 10% of the total bid amount, and refunded the balance to the appellant.

11. The Estate Management Directorate of respondent No.1, had issued a brochure containing the terms and conditions of the auction. This brochure set out the details and dimensions of the plots to be auctioned, the mode of auction, the mode of payment, the eligibility of the bidders and other conditions. According to the said brochure, plots were to be auctioned on "as is where is" basis. The bidder was required to satisfy himself about the location, ground position and surroundings of the plots, and no claim at a subsequent stage could be entertained. Clause V.1 and 2 of the said terms and conditions are reproduced herein below:-

> *"V. **Mode of Payment***
>
> *i) The successful bidder has to pay 40% of total price of plot within 10 days of the fall of hammer after adjusting the token money and remaining two quarterly installments. Possession of plot however, would be handed over subject to payment of all dues or production of Bank guarantee from A-rated Bank for balance amount.*
>
> *ii) In case the bid is finally accepted by the CDA Board, the successful bidder will be informed accordingly requiring him to pay the remaining 60% of the premium in two equal quarterly installments, first of which would be payable within three months from the date of issuance of acceptance of bid letter. The bidder will be required to submit undertaking regarding payment of CVT to the Government in case imposition of said tax by the Government at any later stage, other duties i.e. advance tax and/or charges, if any, levied and payable on such transactions will be deposited in Govt. treasury or authorized branches of Banks and submit receipts to the CDA within 45 days. **In case of non-payment of the premium and taxes, etc, by him/her after acceptance of the Bid, the acceptance of the bid will stand withdrawn and 10% of total price of the plot shall be forfeited.**"*
>
> **(Emphasis added)**

12. Auction is basically an exercise for raising revenues for the Government and it goes without saying that non-payment of price by the auction-purchaser visits the public exchequer with loss of revenue, and defeats the very purpose of holding an auction to fetch maximum price.

13. Undisputedly, the appellant did not pay the first installment of the balance sale consideration within the

agreed period. According to the appellant, only an amount of 10 % of 40 % of the bid money should have been forfeited and not 10 % of the total bid money. Therefore, the appellant approached this Court for seeking issuance of a Writ of *Mandamus* directing the respondents to refund the amount deposited by them after deducting 10 % out of 40 % of the bid money. If such a relief is granted to the appellant, it would amount to rewriting the terms and conditions of the auction. It would be an anomalous situation that a person who, by his own conduct, precludes the completion of a contract, is then given advantage or benefit of his own wrong by not allowing forfeiture.

14. Conditions such as Clause V.1 and 2, extracted above, are included to ensure that only genuine parties make the bids. The purpose of the said forfeiture clause is very clear and to that extent there was consensus *ad idem*. In the absence of such conditions, persons who do not have the capacity or have no intention of entering into the contract will make bids. The very purpose of such a condition in the offer/bid will be defeated, if forfeiture is not permitted when the successful bidder resiles from his bid after its acceptance by the competent authority.

15. Once the appellant decided to participate in the bidding process, these terms and conditions attained contractual force. The appellant had to comply with the terms and conditions of the auction, which as a prudent person of business, he knew or ought to have known. Hence, respondent No.1 was justified in forfeiting 10 % of the bid amount when the appellant, after the acceptance of his highest bid, did not deposit the first installment of the balance 60 % of the bid amount. When the appellant did not fulfill his obligation which had to be discharged as per the terms and conditions subject to which the plot was put to auction, the appellant had no *locus standi* to challenge the decision of respondent No.1 to forfeit 10 % of the bid amount.

16. In the proceedings under Article 199 of the Constitution, which is an extra ordinary constitutional jurisdiction, the conduct of the litigant plays an important role. Where a petitioner does not come with clean hands or the Court finds that he is not a bona fide petitioner or where his conduct is dubious, the Court may decline to go into the merits of the matter. In the facts of this case, it is clear that the appellant, having participated in the bidding process in accordance with the terms and conditions of the bidding process handed out by respondent No.1, and after the acceptance of his highest bid retracted from his position by not paying the balance bid amount, cannot be termed to have come up with clean hands.

17. As regards the case law relied upon by the learned counsel for the appellant, the same, as discussed above, is inapplicable to the facts of this case. As for the judgment dated 04-12-2003 passed by the Hon'ble Lahore High Court in writ petition No.2460/2000, it was held therein that the writ petitioner was entitled to be dealt with in the same manner as other similarly placed persons/bidders from whom only 10% of the deposited amount and not 10% of the total bid amount had been deducted by the CDA after they defaulted in paying the remaining bid amount. Paragraph 7 of the said judgment is reproduced herein below:-

> *"7. I have already stated above that it stands admitted on record that regarding all the remaining plots, which were cancelled or surrendered, 10% deductions were made on the amount deposited and not the amount of the total premium/price. The only allegation made is that regarding plot No.24, proceedings have been initiated for the recovery of the alleged excess refund. However, regarding remaining plots, no such allegation has been made after admitting that deductions were made in cases of said plots with reference to the amount deposited and not on the total amount of the premium. Learned counsel for the respondent is not in a position to explain the said discriminatory attitude particularly in the state of the said conflicting provisions regarding payment."*

18. Respondent No.1 can hardly be bound down to treat the appellant in the same way as some bidders were treated in

the year 2000. It is not the appellant's case that as regards the auction conducted in 2012, the appellant was meted out discriminatory treatment by respondent No.1. Therefore, the said judgment dated 04.12.2003 does not come to the aid of the appellant.

19. We are, therefore, of the opinion that respondent No.1 is within its limits in forfeiting 10 % of the total bid money out of the 40 % of the amount deposited by the appellant and Maqsood-ur-Rehman. Since the appellant is not keen to go before the Chairman of respondent No.1, we cannot compel him to do so. We, therefore, allow the appeal to the extent of setting aside the directions given by the learned Single Judge-in-Chambers to respondent No.1 to decide the appellant's representations against the forfeiture of the said amount. Consequently, the writ petition is dismissed, with no order as to costs.

(AAMER FAROOQ)
JUDGE

(MIANGUL HASSAN AURANGZEB)
JUDGE

ANNOUNCED IN AN OPEN COURT ON 30 August 2016

JUDGE

JUDGE

APPROVED FOR REPORTING

Qamar Khan*

Uploaded By: Zulqarnain Shah