

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

W.P No. 95-M/2023.

**The Deputy Commissioner Bajaur and others Vs. Mst. Mahi
Sultan and another**

Present: Khwaja Salah-ud-Din, A.A.G for Petitioners.
M/S. Muhammad Waqas and Haya Khan, Advocates for
Respondent No.1.

Date of hearing: **16.05.2023**

JUDGMENT

MUHAMMAD NAEEM ANWAR, J.- Impugned through instant petition filed under Article 199 of the Constitution of Islamic Republic of Pakistan, 1973 are the orders of respondent No.2 i.e., Additional District Judge/Izafi Zila Qazi, Bajaur/Tribunal constituted under the Khyber Pakhtunkhwa Public Property (Removal of Encroachment) Act, 1977 (the Act of 1977) dated 13.01.2023 & 28.12.2022, with the prayer that same may be declared as illegal, void, without lawful authority and of no legal effect and hence may be reversed. It was also prayed that the suit instituted by plaintiff/ respondent No.1 was without substance, unjustified, illegal before the learned Tribunal, therefore, the plaint may be rejected.

- 2.** Arguments heard and record perused.
- 3.** Record annexed with the instant petition reflects that plaintiff/ respondent No.1 filed a suit against the present petitioners before the Tribunal for declaration to the effect that she is the allottee of quarter No.43 (BA-V-22) situated at Civil Colony Khar, consisting upon three rooms, through office order dated 09.03.2022,

thus, the notice issued by petitioner No.3/ defendant No.3 directing her to vacate the premises of the quarter is illegal, unwarranted, against the law, without jurisdiction and illegal reflection of order dated 22.11.2022, hence, same is ineffective upon her rights. The decree for perpetual as well as mandatory injunction with an embedded relief for recovery of possession was also sought. The contention of learned counsel for plaintiff/respondent No.1 pertaining to the competency of the suit was that the respondent/plaintiff was not dealt with under the provisions of the Khyber Pakhtunkhwa Provincial Residential Accommodation at District (Procedure for Allotment) Rules, 2018 (**the Rules of 2018**) and Khyber Pakhtunkhwa Provincial Buildings (Management, Control and Allotment) Act, 2018 (**the Act of 2018**) because under no authority petitioner No.3 was competent to issue notice under the provisions of the Act of 1977. With able assistance of learned A.A.G representing the petitioners and learned counsel for respondent No.1, we have gone through from the Rule No.31 of the Rules of 2018, whereby the Estate Officer has been equipped with additional powers under the Khyber Pakhtunkhwa Public Property (Removal of Encroachment) Act, 1977. More-so, neither in the Act of 2018 nor in the Rules of 2018, there is any provision to serve the allottee with a notice for vacation of the premises allotted to him/her. When the Estate Officer is equipped with powers under the Act of 1977, then the jurisdiction for issuance of notice could not be questioned, however, it shall be seen as to whether the Tribunal has got the jurisdiction to entertain the suit and adjudicate thereupon or not?

4. Record is suggestive of the fact that suit was filed on 24.12.2022 whereas the allotment in favour of respondent No.1 namely Mst. Mahi Sultan was cancelled by the Deputy Commissioner, *Bajaur* through office order No.8518/ESTATE/DC (B) dated 13.12.2022 and as such, the date on which, the suit was filed, the respondent/ plaintiff was not the legal allottee of the disputed quarter. A person whose allotment has been cancelled by the competent authority and still enjoying the possession was required to be served with a notice to get vacate the premises of the quarter allotted to him/ her and even if he/she has not responded to the notice then ultimately for the Estate Officer, the possession of the allottee, whose allotment has already been cancelled, was nothing but unauthorized/unjustified. No doubt, that the quarter in question was allotted to the respondent/ plaintiff but when it was cancelled and that too earlier to the institution of the suit, thus, the date on which the suit was instituted, the possession of the respondent/ plaintiff was not legal. It is pertinent to mention here that an allottee whose allotment has been canceled or against him an adverse order was passed by the Estate Officer has not been left remediless by the law i.e., the *ibid* Act/Rules. A person feeling himself aggrieved from the order of cancellation of his allotment could challenge it under rule 35 of the *ibid* Rules of 2018 before the appellate authority. When an appropriate forum is available to the respondent/ plaintiff then she was supposed to approach to the concern authority/ forum for redressal of her grievance and in such an eventuality, the

maintainability of the suit before the Tribunal being based upon section 13 of the Act of 1977 requires proper determination.

5. The jurisdiction of the Tribunal is limited and it may adjudicate upon the matters; (i) whether the property is not a public property; and (ii) whether any lease or license in respect of such public property has not been determined? The provision of section 12 of the Act of 1977 is unambiguous, explicit and open only to one interpretation and this fact has been admitted even by the learned counsel for the respondent/ plaintiff that the quarter in question allotted to her was public property. In view of such a clean breast admission of the respondent/ plaintiff, it requires no discussion that the matter before the Tribunal was not regarding the determination that the property in question set out in the impugned notice was a public property. Next, the license of the respondent/ plaintiff was dependent upon the existence of the life of the allotment, which as per the record, has already been cancelled, thus, the lease created or license under which the respondent/ plaintiff was given the authority to occupy the quarter in question has already been determined under the provision of the Transfer of Property Act, 1882. Thus, both the questions i.e., the factum of the property as public and the lease as determined were requiring no adjudication within the parameters of jurisdiction of the Tribunal.

6. Significantly, the Hon'ble Supreme Court of Pakistan in the case titled "Mian Hakim Ullah and 2 others Vs. Additional District Judge/ Tribunal, Nowshera and 4 others" (1993 SCMR

907) has held that there is no need to file a review petition before the authority in terms of section 4 of the Rules of 1981 [the Khyber Pakhtunkhwa Public Property (Removal of Encroachment) Rules, 1981] rather even without filing any review application, the matter can be adjudicated upon by the Tribunal. It was held in the *ibid* judgment that:

“These disputes are triable exclusively by the Tribunal constituted under section 12 of the Act. It is, therefore, quite obvious that of in a review application filed under section 4 of the Act against an order passed under section 3, *ibid*, the party takes the ground that the property in respect whereof the order has been passed by the Authority, under section 3, *ibid*, is either not a public property or its lease or licence has not been determined for the purposes of the Act, the Authority will not be able to decide the Review Application for want of jurisdiction to adjudicate upon such disputes. Sub-rule (2) of rule 4 is squarely designed to take care of such a situation, and in such a case, the Authority hearing a review application under section 4 of the Act instead of dismissing the review application for want of jurisdiction can refer the dispute, under rule 4 (2) of the Rules, to the Tribunal for adjudication. Rule 4(2) of the Rules, therefore, does not come in conflict with section 4, or contravenes any other provision of the Act. On the contrary, it supplements and promotes the objectives and working of the Act. We, therefore, do not find any inconsistency between sub-rule (2) of rule 4 of the Rules and the provisions of the Act.”

7. Furthermore, the impugned order 13.01.2023 was passed on the application of the respondent/ plaintiff, whereby she had sought restoration of possession of the quarter in question on the plea that there was an interim injunction order in her favour. It is a century old principle that for grant of an injunction either perpetual or temporary and for that matter mandatory the co-existence of three essential ingredients is *sine qua non*. The respondent/ plaintiff must

place before the Court a *prima facie* case pertaining to her legal rights, character/ status. When the allotment has been cancelled earlier to the institution of the suit then the respondent/ plaintiff even on the date of filing of the suit had no *prima facie* case in her favour rather it was requiring recording of evidence, if at all, to be resolved, in favour of the respondent/ plaintiff and it is settled law that in absence of one of the ingredient i.e., *prima facie* case, the other ingredients i.e., balance of convenience and irreparable loses its significance as held by the apex Court in the case titled "Puri Terminal Ltd. vs. Government of Pakistan through Secretary, Ministry of Communications and Railways, Islamabad and 2 others", (2004 SCMR 1092), wherein it was observed that:

"21. No doubt an injunction is a form of equitable relief and is to be issued in aid of equity and justice, but not to add injustice. For grant of such relief, it is mandatory to establish that in order to obtain an interim injunction, the applicant has not only to establish that he has a *prima facie* case, but he has also to show that the balance of convenience is on his side and that he would suffer irreparable injury/ loss unless he is protected during the pendency of suit."

8. Another intriguing aspect of the instant matter is the dispossession of the respondent/ plaintiff from the allotted quarter on 26.12.2022 i.e., earlier to order dated 28.12.2022 when the application of the respondent/ plaintiff for grant of temporary injunction was allowed and ad-interim status quo granted in favour of the respondent/ plaintiff was confirmed for a period of six months or till the disposal of the suit whichever comes first. Irrespective of this fact that on 28.12.2022, the respondent/ plaintiff was not in possession of the disputed quarter wherefrom she was already dispossessed by the

petitioners/ defendants on 26.12.2022, therefore, in such circumstances the confirmation of interim injunction was also a question mark in view of the law laid down in the case of "Salahuddin Khan and 03 others Vs. Sultan-e-Rome and 04 others" (PLD 1973 Peshawar 95), wherein it was held that "a work complained of----- already done and completed----- no injunction could be granted". Insofar as the ad-interim injunction is concerned, which for the purpose of its efficacy requires a complete inquiry with specific reference to its life i.e., 14 days but even then, on 28.12.2022, the respondent/ plaintiff was not in possession of the quarter, as such, the petitioners could not be restrained to dispossess her from the quarter in question.

9. It is not out of context to discuss the grant or issuance of ante status quo order/ impugned order by the learned Tribunal, is very rare under the provisions of section 94 (e) read with section 151 of the Code of Civil Procedure, 1908 (C.P.C) for which, the existence of two essential ingredients was one of the requirements whereas when the order of confirmation of the ad-interim injunction issued, admittedly, the respondent/ plaintiff was not in possession of the quarter, therefore, in no way, the respondent/ plaintiff was entitled for ante status quo for lack of exceptional circumstances for the purpose of grant of extra-ordinary relief in favour of the respondent/ plaintiff. Undoubtedly, the cancellation of allotment has not been disputed by the respondent/ plaintiff either through appeal or through petition before this Court and for that matter through her suit before the Tribunal, for which, an appropriate remedy has already been provided

in the Statute for an aggrieved person and the respondent/ plaintiff may approach to the appropriate forum for redressal of her grievance. The jurisdiction of the authority is subject to the powers conferred upon it through statute and that too within the ambit of its powers. It is an established law that the jurisdiction cannot be extended or inferred in a forum even with permission, no objection or acquiescence of a party. The powers of Tribunal were subject to section 12 of the Act of 1977 in juxtaposition with Rule No.31 of the Rules of 2018 coupled with powers u/s 94 of C.P.C. Thus, viewing the case, with able assistance of the learned A.A.G and learned counsel for the respondent/ plaintiff, from all angles, we are of the considered view that the jurisdiction exercised by the Tribunal in the matter was not legally justified and the impugned order for grant of ante status quo was not in consonance with the provision of section 94 of the C.P.C. Hence, the impugned orders and filing of the suit before the learned Tribunal cannot sustain.

10. Thus, for the reasons discussed above, the instant petition stands allowed, consequently the impugned orders of the learned Tribunal dated 13.01.2023 & 28.12.2022 alongwith institution of the suit on 24.12.2022 are declared as illegal, unwarranted, without justification, void ab-initio, arbitrary and of no legal effect, as such, impugned orders are hereby set aside. It may be noted here that when the validity of the suit from its institution was questioned, it was the primary duty of the Tribunal to resolve the question of jurisdiction first as held by the apex Court in the case titled "Raja Al Shan vs. Messrs Essem Hotel Limited and others" (2007 SCMR 741) and in

the instant matter since institution of the suit by the respondent/
plaintiff before the Tribunal, we could not find any legal justification,
as such, the plaint is hereby rejected, leaving the respondent/ plaintiff
at liberty to seek her appropriate remedy before the competent forum
in accordance with law, if so advised. No order as to cost.

Date of Announcement

16.05.2023

Date of Writing Judgment

18.05.2023



JUDGE



JUDGE

office
19/5/2023
20/5/23