

was receiving rent from the tenants. It was further averred that each plot No.584, 585, 586 and 587 is the main number which is allotted by KMC (Kachi Abadi) CDGK, and each of these main plots consist of 4 sub plots measuring 80 sq. yards each. When the Government declared entire area as Kachi Abadi and proper survey was made new numbers were allotted to these plots such as plot No.1252, 1399 and same were read along with plot Nos.584, 585, 586 and 587. All plots are situated in sheet No.1 Baba Wilayat Ali Shah Colony, Orangi Town, No.11, Karachi. Similarly, the other plot Nos.207, 208, 209, situated in sheet No.2, Baba Wilayat Ali Shah Colony, Orangi Town No.11, Karachi are also owned and in possession of Respondent No.1 and the same are also duly constructed by him. It was also averred that the applicant is real brother of Respondent No.1 and permanent resident of Lahore and ***even other brothers having no concern or legal right over the suit property.*** The applicant had started visiting the suit property and claiming to have obtained lease from Respondents No.2 & 3 but he has no legal right as he has obtained lease by way of fraud by filing false documents and affidavits and also in connivance with the officials of Respondent No.2. It was further averred that the applicant/ defendant No.1 had served a legal notice dated **08.4.2008** to Respondent No.1/Plaintiff which was replied by him on **14.5.2008** and thereafter Respondent No.1 has also received a notice from UC No.5, Madina Colony Orangi Town, Karachi and when he was called there he came to know that the applicant has obtained lease in respect of the suit property and also in respect of plot Nos.208 and 209. It was further averred that the applicant/ defendant No.1 is not entitled for obtaining lease from Respondent No.2 while Respondent No.1/Plaintiff is in possession and occupation of the suit property, therefore, he is right person and also entitled for

grant of lease in his name from Respondent No.2, therefore, Respondent No.1 filed suit for declaration, cancellation and permanent injunction with the following relief(s):-

1. *To declare that being lawful owner and occupant the plaintiff is entitled for lease in respect of Al Khalil Market situated at Plot No.584, 585, 586 and 587 in sheet No.1 and plots No.207, 208 and 209 in sheet No.2, Baba Wallayat Ali Shah Colony, New L Block Sector 11, Orangi Town, Karachi.*
2. *That the lease granted in the name of defendant No.1 in respect of plot No.585, 586 in sheet No.1 and plots No.208, 209, in sheet No.2 situated at Baba Wallayat Ali Shah colony Orangi Town Sector 11 New L Block Karachi is obtained by way of fraud misrepresentation which is forged and is liable to be cancelled.*
3. *To grant permanent injunction in favour of plaintiff and against the defendant in which the defendant, their agent, attorney, legal heirs employee or anybody claiming through them be restrained from interfering into the affair and dispossessing the plaintiff from Al Khalil Market situated at plots No.584, 585, 586 and 587 in sheet No.1 and plots No.207, 208 and 209 in sheet No.2 situated at Baba Wallayat Ali Colony New Block L Orangi Town 11 Karachi without due course of law.*
4. *Cost of the suit and any other relief in circumstances of the case may also be awarded.*

3. After notice/summon, the applicant/Defendant No.1 filed his written statement wherein he contended that the suit is not maintainable as it is based on concocted story. He further contended that Respondent No.1 has miserably failed to produce any credible documentary evidence which could substantiate his stance in the plaint. He further contended that no proper Court fee has been affixed on the plaint. The applicant/ Defendant No.1 also claimed that he is absolute and lawful owner of the suit property and monthly rent upto April 2007 has been received by him from all tenants but since May, 2007 monthly rent has not been received by him from the tenants and when he visited tenants to recover monthly rent, it came

to his knowledge that all tenants have started paying rent to Respondent No.1/Plaintiff. He further contended that Respondent No.1/Plaintiff is illegally claiming possession of suit property. It has also been categorically averred that all properties were assets of deceased father and other legal heirs including the shops, therefore, he is not entitled to the relief as prayed.

4. Respondents No.2 and 3 had also filed their written statement wherein they stated that a market known as Al Khalil Market is constructed on the suit plots. They further contended that the lease of the suit property was executed by CDGK after completing all formalities such as verification of possession of the suit property by way of regularization of physical possession and the applicant/Defendant No.1 was in physical possession of the suit property at the time of execution of lease.

5. The trial Court from pleading of the parties has framed the following issues:-

- i. Whether the suit is barred by the jurisdiction & maintainable under the law or otherwise?*
- ii. Whether the relief claimed is under valued, and suit is hit by section 7 of the Court Fee Act 1870?*
- iii. Whether the Defendant No.1 was entitled for lease of suit plots from Kachi Abadi (KMC)?*
- iv. Whether defendant No.1 had obtained lease of Plot Nos.(1) 585-A & 586 Sheet No.1, lease/registration No.1879 dated 22.5.2007, (2) 586-A, Sheet No.1, Lease/Registration No.1877 dated 22.5.2007 & (3) 208-A & 209, Sheet No.2, Lease/ Registration No.3788 dated 24.10.2007 accordingly or otherwise?*
- v. Whether the lease was granted to defendant No.1 by unlawful manner and by filing forged and fabricated documents and the same is liable to be cancelled?*

- vi. Whether the plaintiff is entitled for grant of lease for suit plots?*
- vii. Whether the plaintiff is entitled for grant of relief(s) as claimed?*
- viii. What should the decree be?*

6. Respondent No.1/Plaintiff had examined himself and three other witnesses namely Abdul Rasheed, Bashir Ahmed and Moinuddin and he produced different documents as Ex: P/1 to Ex: P/31. All the witnesses were cross-examined by the counsel for the applicant, thereafter his side was closed. The applicant/ Defendant No.1 has also examined himself and three witnesses namely Bahir-un-Nisa, Gul-e-Rana Khan and Muhammad Orangzaib khan. These witnesses of applicant are mother, sister and first cousin of both the applicant and Respondent No.1. All the witnesses were cross-examined by the counsel for Respondent No.1.

7. The trial Court after recording evidence and hearing learned counsel for the parties, dismissed the suit filed by Respondent No.1 by judgment dated **28.02.2012**. Respondent No.1/ Plaintiff filed Civil Appeal No.43/2012 against the said judgment which was allowed by the appellate Court by order dated **14.05.2013** whereby judgment of the trial Court was set aside and the suit filed by Respondent No.1/Plaintiff was decreed. The applicant has impugned the said judgment of the appellate Court here in this Revision Application.

8. I have heard learned counsel for the parties and perused the record as well as written arguments filed by both the parties.

9. Learned counsel for the applicant has pointed out several irregularities in the appellate judgment with reference to the lack of appreciation of evidence in setting aside the judgment of the trial

Court. It has been contended by the learned counsel for the applicant that a reference to the evidence of Respondent No.1 in the impugned judgment on the face of it is incorrect and improper appreciation of evidence. He has pointed out that the appellate Court while referring to the so-called claim of possession of Respondent No.1 since 1974 on the basis of an agreement of sale has failed to take note of the fact that in **1974** Respondent No.1 was only 17 years of age. Even the so-called agreement of sale of **1974** was neither produced in evidence nor the seller has appeared in Court to support him that he has sold the suit property to Respondent No.1. It has been further contended by the learned counsel that conclusion drawn by the appellate Court from the evidence of three PWs was also contrary their evidence available on record. The witnesses who claimed to be tenant of Respondent No.1, were badly shaken in the cross-examination. In the cross-examination it was confirmed that these witnesses were not tenants of Respondent No.1 in respect of the suit property in dispute and even their tenancy agreements were not proved. Not a single tenant from the suit property has come forward to support the claim of Respondent No.1. He has contended that without appreciating the evidence in its correct perspective the appellate Court reversed the findings of facts and concluded that the possession of Respondent No.1 on the suit property has been established, though no such evidence is available on the record.

10. In rebuttal, learned counsel for Respondent No.1 in his written arguments has not referred to the evidence led by Respondent No.1/Plaintiff himself instead he has only referred to the out of context cross-examination of Respondent No.1. It has been contended by the learned counsel for Respondent No.1 in written arguments that the judgment of the first appellate Court is to be

preferred whenever there are conflicting findings in view of the following judgments of Hon'ble Supreme Court:-

- i. *Muhammad Hafeez and another vs. District Judge, Karachi East and another (2008 SCMR 398);*
- ii. *Muhammad Hanif and another vs. Muhammad Jamil Turk and 5 others (2002 SCMR 429);*
- iii. *Mir Muhammad alias Miral vs. Ghulam Muhammad (PLD 1996 Karachi 202);*
- iv. *Samson alias Mithoo and 9 others vs. Nasim Qazi (2018 YLR 657);*

However, in the same contention at page-12 of the written arguments he has conceded that in all the above referred case-laws it has also been held that the appellate Court judgment can be set aside if it is found that the judgment of the first appellate Court suffers from misreading and non-reading of the evidence and the other reasons recorded for reversal of the judgment. Learned counsel for Respondent No.1 has also contended that Revisional Court has limited scope to interfere in the findings of facts. There is obviously no cavil to this general principle of law and he has referred to the following case-laws on this preposition:-

- i. *Muhammad Rafique vs. Amar Shahzad (1999 YLR 610);*
- ii. *Muhammad Saeed vs. Muhammad Siddique and 10 others (2010 MLD 855);*
- iii. *Chaudhry Ghulam Rasool through L.Rs vs. Mistri Ghulam Rasool (2018 CLC 1099).*

11. In the light of arguments of learned counsel for either side when I examined the impugned order of the appellate Court, I have noticed that the impugned order is devoid of appreciation of evidence and even relevant Law. The appellate Court in the impugned judgment has reproduced issues framed by the trial Court and despite the fact that issue No.1 was issue of Law, the learned trial

Court has dismissed the suit of Respondent No.1, amongst others, on issue of law by holding that the suit is barred by **Section 42** of the Specific Relief Act, 1877. The perusal of relief sought by Respondent No.1 clearly shows that he has prayed for only declaration of ownership without any lawful title. The provisions of **Section 42** of the Specific Relief Act are reproduced below:-

42. Discretion of Court as to declaration of status or right.--- Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in such suit ask for any further relief:

Bar to such declaration.---Provided that no Court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so.

Explanation.--- A trustee of property is a "person interested to deny" a title adverse to the title of some one who is not in existence, and for whom, if in existence, he would be a trustee.

12. The Respondent has not filed a single title document as basis for seeking declaration of ownership. It is settled law that mere agreement of sale or even possession does not constitute any title in the immovable property, Plaintiff/Respondent No.1 in his examination-in-chief has claimed that he has purchased the suit property from Momin Khan but he has not produced even sale agreement. In cross-examination he has admitted:-

*"I did not submit any title documents. I have filed purchased parchi in my suit. I do not remember the exact date but it was bears the year 1974.-----
----- . I have not submitted any proof of purchasing plus construction charges etc. in my case. I have not submitted site plan or map in my case."*

About his own possession of suit property, he has conceded that for around crucial 17 years he himself was not in possession of the suit property as he was not in Pakistan and his case is that the applicant/ defendant was not in possession of the suit property as he lives in Lahore. In cross-examination he admitted that he was in Saudi Arabia from **1982** and came back in **1990** then he again went to Saudi Arabia in **1993** and came back in **2006** and his monthly income was only 450 Riyal as he was working there as Heavy Mechanic Hydraulic. The other evidence of the Respondent's witnesses on the issue of possession though apparently believed by the learned appellate Court but the perusal of the same shows that it was not believable nor confidence inspiring. The witness of applicant namely Bashir Ahmed (PW-2) in his brief cross-examination of just five lines has admitted as follows:-

"It is correct that there is not any tenancy between me and the plaintiff. I pay the rent of Rs.100/- to the plaintiff. It is correct that I have not produce any rent receipt before the Court. It is correct that Naseer is the Government employee. I don't know that due to government employee the defendant used to transfer in different cities of Pakistan. It is incorrect to suggest that I am deposing falsely."

Respondent's witness No.3 Moinuddin also claimed to be the tenant of Respondent No.1 but in cross-examination he, too, failed to support his such stance when he conceded that:-

"It is correct that I have not produced any receipt of rent before the Court. It is correct that I have not mentioned the shop numbers that in which number I am tenant as my shop is numberless. It is correct that in tenancy agreement there is no mention that for which purpose I am taking the shop on rent."

The evidence discussed above as well as provision of **Section 42** of the Specific Relief Act has definitely been totally ignored/ overlooked

by the appellate Court. The suit of the applicant was hit by the proviso regarding bar to declaration of title where the plaintiff/ Respondent No.1 was required to “seek further relief” but he has not prayed for it. Admittedly Respondent No.1 has no title in the suit property and he has sought mere declaration. Mere declaration of title by a Court can never confer possessory right or marketable title in the suit property. The appellate Court has failed to give its verdict on issues No.1 that “*whether the suit was maintainable under the law or otherwise.*” This issue was decided by the trial Court against the Respondent and appellate Court has not answered it.

13. In addition to the above irregularities, the appellate Court has failed to appreciate from the record that the applicant and Respondent No.1 are real brothers and they are having a dispute on a market known as **Al-Khalil Market**. The market is in the name of their father late **Khalil Khan**, who had died somewhere in 1990. Respondent No.1 has claimed that all the four different plots on which Al-Khalil Market is constructed is entirely his own property since 1974 though in 1974 he was hardly 17 years of age and he has not produced any proof of acquiring the suit property and raising construction of the market from his own resources. If all the four properties were owned by him, then what was the purpose of mentioning in para-5 of the plaint that “***any other brother or legal heirs of late Khalil Khan have no concern with the suit property.***” In reply to para-5, it was averred by the applicant in written statement that all the immovable properties belong to deceased father of Respondent No.1/Plaintiff meaning thereby also father of Applicant/Defendant No.1 and other legal heirs of late Khalid Khan. In this context the evidence of the applicant and mother and sister of both the parties has been totally ignored by the

appellate Court. The applicant/ defendant No.1 in his opening statement of cross-examination has categorically stated:-

*“The suit property has been distributed amongst all the legal heirs namely myself, (2) Nisar Khan (**plaintiff/respondent No.1**), (3) mother and sisters namely Zarina Mumtaz, Gul-e-Rana W/o Rana Farooq and Hina Akram. The sisters did not lease out suit property in their favour. We are five brothers and three sisters. The suit properties which have been leased out same were received by way of inheritance”.*

The mother, sister and one cousin of Respondent No.1 appeared as witnesses and in cross-examination they all have affirmed that the suit property was owned by deceased father of the plaintiff/ Respondent No.1 and defendant No.1/applicant and this position was further clarified when it came on record that out of the four plots on which Al-Khalil Market is constructed, one plot No.427 with construction was Regularized/leased in favour of respondent No.1/ plaintiff by Respondents No.2 and 3. Here I must mention that during the course of arguments when confronted with this piece of evidence, the counsel for the applicant conceded that out of four, one property bearing plot No.427, sheet No.1, Baba Wilayat Ali Shah Colony has been regularized/leased by the Katchi Abadi Authority of KMC in favour of respondent No.1 on **17.4.2007**. He, on direction of the Court, has placed on record copy of the said lease in his favour.

14. The fact that Respondents No.2 and 3 have Regularized one property in favour of Respondent No.1/Plaintiff has been suppressed from the Court by him. The perusal of registered lease deed in favour of respondent No.1/plaintiff and perusal of registered lease deeds challenged by him shows that all have been executed through identical process and documentation in which a certificate of confirmation of possession by U.C Nazim and publication in the

newspaper for public at large for filing any objections before the office of the District Office, Katchi Abadi, situated in KMC Council Secretariat was mandatory requirement. Since the Regularization/lease of Katchi Abadi process for lease of plots/property in favour of Respondent No.1 and applicant was identical, therefore, Respondent has not given any details of alleged fraud in the plaint nor any evidence of fraud was produced in Court. Respondent No.1 has not claimed that in the Notification for declaration of Katchi Abadi in terms of **Regulation 4** of Sindh Katchi Abadi (Regulations, Improvement and Development) Regulations, **1993** when status of land was prepared under **Sub-Regulation No.(ii)** of **Regulation No.4** *ibid*, the status of Respondent No.1 was shown as land owner of all the four properties in terms of **Section 19(1)** of the Sindh Katchi Abadis Act, 1987.

15. It is an admitted position that the entire Al-Khalil Market is on four different plots and one of them was Regularized/leased to Respondent No.1 and three others which are subject matter of suit were Regularized/leased to other family member by consent. Neither in the plaint nor in the evidence it has been even alleged by Respondent No.1 that on the publication of regularization/lease of the suit plots he has raised any objection before the Directorate of Katchi Abadi within seven days or even afterwards. In this background Respondent No.1 has not sought any further relief of seeking directions to the Katchi Abadi Directorate for Regularization of the suit properties in his name. At the time of filing of suit he knew that he has not filed any objection to the grant of lease of the other plots in favour of other family members, who have chosen to allow the Katchi Abadi Directorate to Regularize one of the four plots with

construction by their consent in favour of the applicant under a formal family settlement.

16. In view of above discussion and the evidence on record the suit of Respondent No.1 has rightly been dismissed by the trial Court and the appellate Court not only failed to apply its judicial mind to the facts and evidence but also to the law that the suit was not maintainable. Mere allegations of fraud committed in Regularization and execution of lease without any details and proof of fraud and misrepresentation a registered document at the request of a stranger to the property cannot be entertained by the Court. Consequently, the instant Revision Application is allowed, the judgment of the appellate Court was bad both in law and on facts, therefore, it is set aside, the judgment of the trial Court is restored and suit of Respondent No.1/Plaintiff stands dismissed.

JUDGE

Karachi, Dated:16.03.2020

Ayaz Gul