

IN THE HIGH COURT OF SINDH, KARACHI

Revision Application No. 266 of 1987

Present:

Mr. Justice Nazar Akbar

Applicants	:	Syed Ghazanfar Hussain & 17 others Through Mr. Vizarat Hussain Zaidi, Advocate (Applicant No.9 also)
Respondents	:	Nooruddin & another
Date of hearing	:	29.01.2016
Date of Announcement	:	15.04.2016

JUDGMENT

NAZAR AKBAR J:- This Revision Application is directed against judgment dated 18.02.1987 passed by IIIrd Additional District Judge, Karachi whereby Civil Appeal No.142/1985 filed by the Applicants was dismissed and the Judgment & Decree dated 20.03.1984 in Suit No.2392 of 1980 passed by XXXIIIth Civil Judge (East) Karachi was maintained.

2. Briefly stated, the Applicants/Plaintiffs filed suit for permanent injunction against the respondents for restraining them from raising construction on **open spaces** in Motumal Compound bearing Evacuee property No.GRE/672 and blocking any of the lane leading towards tenement of Applicants bearing No.GRE-VII-A/E-663-G/I-A, measuring 1130 square yards in the said Compound situated at Clayton Road, New Town, Karachi. The predecessors in interest of the Applicants / Plaintiffs were living in the Motumal Compound, Clayton Road, New Town, Karachi since 1948. The said compound was declared as an evacuee property and assigned GRE/672 (Custodian No.VIII, AE-663) admeasuring 7429 square yards containing shops and houses as well as open spaces. The Settlement Authorities took over the control of the said property in terms of Displace

Persons Act, 1958 and the Deputy Settlement Commissioner by order dated **01.09.1960** partitioned the said Motumal compound into **19** portions with complete site plan showing the provisions of lanes for egress and ingress of occupants of the various portions in the said compound. The Applicants' predecessor in interest Syed Aftab Hussain were assigned tenement No.10 measuring 1130 square yards which was officially transferred to him by P.T.D. dated **13.01.1964** and P.T.O. dated **01.09.1969**. The Respondents were occupying another portion near the tenement of the Applicants though they were not recorded tenant of the Custodian. The Applicants' tenement is surrounded by four lane as shown in the original site plan prepared by the Deputy Settlement Commissioner in terms of order dated **01.09.1960**. The e of the Applicants on the central lane by expanding his existing structure and, therefore, the Applicants/Plaintiffs filed suit **No.166/1963** for identical relief which was decreed and the Respondents were compelled to remove the encroachments through the court in execution proceedings **No.68/1966**. Prior to execution, the Respondents had preferred Misc. **Appeal No31/1964** which was also dismissed.

3. In the year 1980 the Respondents again intended to raise construction on the same passage which was subject matter of suit No.166/1963 and for that purpose they collected constructions material on the land in dispute. Therefore, the Applicant/Plaintiff again filed suit bearing **No.2392/1980 for permanent injunction restraining the defendants, their agents, from occupying / obstructing or raising any sort of construction in any of the lane (to) of the plaintiff's plot bearing No.GRE-VII AE-663-G/I-A Motumal Compound, Garden East, Clayton Road, Karachi.**

4. The Respondents/Defendants filed joint written statement. They admitted the earlier litigation with the Applicants/ Plaintiffs but evasively stated that the said suit has no concern with the present suit and contended that Defendant No.1 is raising construction on his own plot of land and the apprehension of the Applicant/Plaintiff is baseless. They also denied the locus standi of the Applicants on the ground that the title of Applicant is under dispute in C.P. No.1322/1975. They also disputed the site plan of Settlement Department annexed with the plaint on the ground that the Applicants have no clear title of the tenement claimed by them.

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

- 1) Whether the plaintiffs are the owners of plot No.GHE-672, VII-A-E, 663/G-I-A, measuring 1130 sq. yds. Garden East, Clayton Road, Karachi and the same is surrounded by four lanes on each side?
- 2) Whether there is any northern and eastern lane which started from the outside of the plaintiffs house and passes through the defendants house and the same was used as passage by the plaintiffs?
- 3) Whether the defendants two days before the institution of the suit collected material in the disputed land with intention to raise construction in the lane as to block the passage?
- 4) Whether the suit is hit for non-joinder of parties?
- 5) What should decree be?

6. The Applicants in support of their case examined Farasat Ali one of the Applicants for self and on behalf of other Applicants as Ex-1 and produced following documents:-

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|------|--|--------------|
| i) | Site Plan issued by Settlement Department
alongwith order dated 01.09.1960 | Ex.2 |
| ii) | Copy of extract | Ex.3 |
| iii) | Copies of Power of Attorneys executed
in favour Applicant | Ex.3-A & 3-4 |
| iv) | Site plan prepared by Settlement Department
on the directions of High Court | Ex.5 |
| v) | Copy of Judgment in suit No.166/1963 | Ex.6 |
| vi) | Copy of Mushirnama in execution No.68/1966 | Ex.7 |
| vii) | Copies of orders on injunction application | Ex.8 & Ex.9 |

Applicant also examined one Syed Shamsul Qamar as witness at Ex.10, who was appointed as Commissioner and he produced following documents:-

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|------|---|--------------|
| i) | Inspection report dated 07.10.1980 | Ex.11 |
| ii) | Another inspection report dated 26.11.1980 | Ex-12 |
| iii) | Photographs | Ex.13 to 16. |

7. Respondent No.1 Muhammad Nooruddin was examined as D.W-1 at Ex.17 and he also produced following documents:-

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|-------|--|--------------|
| i) | Copy of P.T.O. | Ex-18 |
| ii) | Copy of P.T.D. | Ex-19 |
| iii) | Mutation slip | Ex-20 |
| iv) | Certified copy of site plan dated 13.7.1970 | |
| v) | from suit No.360/1979 | Ex-21 |
| vi) | Reply to letter of Respondent No.1 by Settlement Department dated 26.2.1981 | Ex-22-A |
| vii) | Copy of order passed by High Court in C.P. No.1372/1975 between Izhar-ul-Haq and Applicants | Ex-22-B |
| vi) | Copy of order dated 29.9.1981 in suit No.360/1979 and decree | Ex-22 & 23 |
| vii) | Photographs; one showing lane and other showing lane closed by door | Ex.23-A & 24 |
| viii) | Copy of order passed in C.P. No.178/1981 | Ex.28 |
| ix) | Copy of plan of the plot issued by the Settlement Department | Ex.29 |
| x) | Certified copy of the statement of the plaintiff | Ex.30 |
| xi) | Copy of order of Deputy Settlement Commissioner dated 28.09.1981 in favour of applicant on remand of case by High Court | Ex.31 |

Respondent also produced witnesses namely **Nazeer Ahmed** and **Ilamdin** as D.W-2 & D.W-3. However, Respondent No.2 neither appeared in witness box himself nor led any evidence.

8. The learned trial after recording evidence and hearing the parties, answered the issue No.1 in affirmative that the Applicants are owner of tenement No.10 bearing GRE-672, VII-A-E, 663/G-1-A measuring 1130 square yards and the **same is surrounded by four lanes on each side**. However, by answering issue No.2 & 3 about the passage blocked by respondents by raising construction in the lane were answered in negative.

Issue No.4 was declared as not pressed and on the basis of findings on issue No.2 & 3, the trial Court without discussing anything about contempt held that no contempt was committed by the Respondents and thereby ignored contempt and dismissed the suit. The Applicants preferred an appeal which was also dismissed by the Court of IIIRD Additional District Judge (East) Karachi, therefore this revision.

9. The Respondents were served and by a detailed order dated **20.01.1988** this revision application was admitted for regular hearing as the controversy was only to the effect that the respondents have encroached upon the **open spaces** and to appreciate the actual controversy in the instant Revision the relevant portion of the admission order is reproduced below:-

“As submitted by the counsel, respondent No.1 again made the encroachment of the said lane. The applicants then brought suit No.2392/1980 for declaration and injunction and removal of encroachment, which was, however, dismissed. The appeal was also dismissed.

It is now contended by the counsel that the learned courts below have acted illegally and with material irregularity in the exercise of their jurisdiction in as much as (i) **they have misread the evidence about the lane in question**, with particular reference to **the effect of the decree passed in the earlier suit between the same parties**, and (2) **the plan produced by the respondent No.1 which was held to be fabricated in the other suit filed by the respondent against Mst. Bilquis and others** and (3) **the finding based on the said plan is perverse**.

The contention requires examination. Admit. Notice.”
(The emphasis is provided in the above order to appreciate the possible issues involved in this revision and required to be answered by this Court.)

10. This revision is pending since 1987 and during almost **29** years several orders were passed in this revision, which were frustrated by delaying tactics of the respondents. Amongst others, the orders dated **30.03.1993**, Commissioner’s report dated **07.04.1993** and after five years order dated **30-11-1998** for re-inspection and Nazir report dated **22.05.1999**

after re-inspection are worth mentioning. Relevant portions from order and reports are reproduced below:-

Order 30.3.93.

Accordingly and by consent, I appoint Mr. Ziauddin Nasir as Commissioner to go and inspect the disputed site in the light of **Exhibit 2** above and or any other plan that the parties may submit before him. The learned Commissioner is present in Court and is apprised of this order. Inspection would be made tomorrow at 2.00 p.m. when parties or any of them would call upon the learned Commissioner in the High Court Bar Room and from there they would proceed for the execution of the commission. Commissioner's report would be submitted on 01.04.1993 with advance copies to the parties."

Relevant portion of Commissioner's report dated 07.4.1993 available at page-265 & 267 is reproduced as under:-

"Respondent's learned advocate supplied photocopy of the plan as Ex. P/2 alongwith Annexures A, B, C, D, E/1, E/2, G/1, G/2 and F. He also gave a photo copy of site plan Ex. Z/1. The applicant also supplied photocopy of site plan Z/2. **All these three site plans show the lane between plot No.9 and 13 as 12 feet whereas on measurement I found same to be 5'- 8"**. It is however, not 20 feet at all. **This lane on western side is closed by occupant of two houses and there is encroachment in the lane.**

So far as plot No.10 on eastern side is concerned **the lane as shown in the three plans is 17 feet in width starting from plot No.9 and is 12 feet in width**, it is not of 20 feet at all. The plans Ex.P/2, Ex. A, B, C, D, E/1, E/2, G/1, G/2, F and Z/1 and Z/2 together with notice to the learned advocates are filed herewith."

Relevant portion of Nazir's report dated **22.5.1999** on re-inspection after five years, available at page 301, is reproduced below:-

Accordingly, the Nazir visited the site in question in presence of above-named persons in the light of **Ex.2**, i.e. the Map of Settlement Department in question. **The relevant record produced by the Settlement Department.** However, the Nazir gone through the map of Settlement Department as Ex.2, and demarcated the purported lane of 20-0 ft: wide on Eastern side of bifurcated Plot No.10 and 12-0 ft: wide lane between bifurcated Plots 9 and 13, with the assistance of Surveyors which found in the manner below:-

As per plan of Settlement Department Ex;2, the 12 ft: wide lane is situated between the Plot No.9 and 13 which is joined with 20-0 ft: wide lane, situated in front of Plot No.10, belonged to the applicant.

As per plan the 12-0 ft: wide lane is 136 ft: length (As per Scale 1" = 40').

But at the present the width of said lane is 5'.9" instead of 12' ft, and its original length is 136' ft: which is blocked by Respondent No.1, Nooruddin from 77'.3" where he has constructed a house and leading ahead at little distance one Rahimuddin has also built a Katcha house on remaining some portion of 12' wide lane. Due to which 12 ft: wide lane become narrow as 5'.9" and also blocked by the Respondent No.1 Nooruddin from 77'.3" by fixing Iron Gate and covered the said lane area where he has constructed a Pucca House.

So far as the 20 ft. wide lane which is situated in front of Plot No.10, the same is not existed physically and it is only upto the sketch as Ex.2. As the 20 ft. wide lane is entirely under encroachment of one Ilimuddin, Rahimuddin and Syed Wazarat H. Zaidi, owner of Plot No.10 by making katcha and Pucca house.

Since Nooruddin the Respondent No.1 has blocked the 12' ft. wide lane within the area of 77'.3" x 12', while the remaining portion of said lane has been narrowed by inhabitants residing on both the sides of 12 ft. wide lane, which shown in sketch in Green Colour.

As such Mr. S. Wazarat H. Zaidi, one of Applicant and Ilimuddin as well as Rahimuddin have encroached 20' wide lane, while 12-0" ft. wide lane has encroached by Respondent No.1 Nooruddin by blocking the lane and other inhabitants residing on both the sides of 12' ft. wide lane which shown in Red Colour in Skethc.

The Nazir has prepared a Rought Sketch of the side with the help of Surveyors in which the encroachment is shown in Red Colour, while the lane area shown in Green Colour is open.

A Rough Sketch of the side is enclosed with this report marked "A".

During inspection, the Nazir snapped the photographs of the site, the same are annexed with this report as marked P/1 to P/3."

11. It is pertinent to mention here that Nazir report is on record and from May 1999 till date the respondents have not filed any objection on the said

Nazir report. The record further reveals that way back on **04.10.2007** and **30.10.2007**, the Applicants and Respondent No.1 have filed their respective written arguments and copies were supplied to other side. However, immediately after filing of written arguments, on **08.10.2007** one Mst. Bilquis against whom Respondent No.1 has filed suit in respect of some other dispute, not relevant to these proceedings, filed an application bearing **CMA No.2963 of 2007** for the first time at the revisional stage to become a party. Pending her application, to cause further delay in decision on merit, she filed first contempt application on **11.11.2009** and another on **15.12.2009** bearing CMA No.3879/09 and 4351/09 respectively but never seriously pressed them. However, her application to be impleaded as party in the instant Revision was dismissed by order dated **28.10.2010**. She filed High Court Appeal No.**277 of 2010** against dismissal of her application which was also dismissed on **21.04.2011**.

12. Thereafter, on **24.09.2011** her son namely Shad Hussain, claiming to be attorney of Respondent No.3, the so-called intervener, filed an application under Section 151 C.P.C. (CMA No.**4409/2011**) with the prayer to return the R&P of suit No.2392 of 1980 to trial court which was allowed on **06.10.2011**. The perusal of the said application (CMA No.4409/2011) reveals that it was intended to frustrate further proceedings of the instant Revision in this Court. In fact the intervener / Respondent No.3 had had no justification to seek return of R&P of suit No.2392/1998 to trial Court as neither the trial Court was any more seized of suit No.2392/1998 as the trial Court after dismissal of suit by judgment and decree had become functus officio nor any execution was pending in trial Court. Even otherwise, since the Respondent No.3 was never impleaded as Respondent as her application to become party for the first time at revisional stage was

dismissed. She was stranger to the proceedings of suit No.2392/1980 from trial Court to the High Court, thus she had no business to deal with in trial Court for which R & P could be requested to be returned. The R&P of suit No.2392 of 1990 is missing since then. Several attempts were made by High Court to get R&P returned to this Court from trial Court but the R&P has not come back to High Court. Even office of MIT-II was directed to take up the issue of R&P of original suit which was available in High Court till October, 2010. On **26.10.2011**, Applicants have also filed an application (**CMA No.5003/2011**) for re-calling order dated **06.10.2011** whereby R&P of suit No.2392/1990 pending this Revision was ordered to be returned. This application is also pending. In the above circumstance and conduct of Respondents I decided to hear the case without R&P of the suit, however, R&P of Appellate Court is available and sufficient documents were available in Court file.

13. Beside critically analyzing the proceeding of 29 years as above, I have gone through the written arguments submitted by the parties in 2007 as well as available evidence in paper book form and perused the impugned judgments. On the face of it, as noted by this Court in the admission order dated **20.01.1988**, it is very well evident from the perusal of the impugned judgments that both the Courts below have not taken into consideration the proceedings of earlier identical suit bearing No.166/1963 filed by the Applicants' predecessor against the four individuals including Respondents herein. In this context, the prayer in suit No. 166/1963 and prayer in suit No. 2392/1980 should have been examined by the court below. The prayer against the Respondents in suit No.166/1963 was identical with exception of expression with the prayer in suit No.2392/1980 after 17 years of earlier suit. I reproduce prayers in both suits as below:-

SUIT No.166/1963	SUIT No.2392/1980
1. Declaration that the plaintiff herein has an absolutely free right of way and the defendants cannot restrict / obstruct or block the said passage. 2. Permanent injunction against the defendants No.1 to 4 or anybody else claiming through or under the restraining the defendants from raising any walls structures or in any other interfering with the free access from the said passage to the premises of the plaintiff.	“It is, therefore, prayed that this Hon’ble Court may be pleased to pass judgment and decree by issuing permanent injunction restraining the defendants, their agents, employees and servants from occupying / obstructing or raising any sort of construction in any of the lane of the plaintiff’s plot bearing No.GRE-VII AE-663-G/I-A Motumal Compound, Garden East, Clayton Road, Karachi

14. Respondent No.2 has not challenged the judgment in suit No.166/1963. Only Respondent No.1 has challenged the same in civil appeal No.**31/1964** which was dismissed. The judgment and decree in civil suit No.166/1963 were produced as Ex.6 & 7 and judgment in civil appeal No.**31/1964** is available in R&P of Civil appeal No.142/1985 at page 151. The perusal of judgment of civil appeal filed by the Applicants further shows that the learned Sessions Judge himself has inspected the premises and his inspection report / observations are part of the judgment delivered by him against the Respondent No.1 in his appeal. Both the courts below also refused to give any importance to the commissioner reports as **Ex.11 and 12**. They have not assigned any genuine reason for not taking into consideration these inspection reports. If the learned courts below for whatever reason were not willing to believe these inspection reports, then the only way out for a proper and fair adjudication on the issue of raising construction in **open spaces** in Motumal Compound was to personally inspect the site in dispute. The other important aspect of the Ex.11 & 12 over-looked by the Courts below is that the commissioner who inspected the site has appeared as a witness as Ex.10 and he has also produced photographs as **Ex.13 to Ex.16** alongwith inspection reports showing the blocking of the passages. In cross examination, the Respondents’ counsel

has failed to prove anything contrary to the actual inspection reports. The Respondents have not filed any objections to the inspection reports supported with the photographs of the site.

15. It is pertinent to note that during the 29 years of proceedings, this Court with the consent of the parties, has twice ordered for inspection of the site. Two inspection reports under orders of High Court were filed which I have already reproduced in para No.9 above. These inspection reports also confirm that the inspection reports **Ex.11 & 12** were correct and the Respondents were found in occupation of open spaces. Nazir report dated **22.05.1999** reproduced in para-10 above supports the contents of inspection reports **Ex.11 & 12**. The Respondents in High Court too, have not filed any objections to the Nazir's report dated **22.05.1999** till date. Nazir report also carries photographs and details of encroachment upon the **open spaces** not only by Respondents No.1 & 2 but also by one **Ilamuddin**, who has appeared before the trial Court as **DW-3**. This witness is not only guilty of encroachment in open spaces as reported by Nazir in his report but also guilty of contempt of the judgment and decree of suit **No.3257/1978** whereby he was declared encroacher. The Applicants herein have filed the said suit against **Ilamuddin** (DW-3) which was contested by him and his legal heirs upto the Supreme Court of Pakistan. Initially civil suit **No.3257/1978** was dismissed but on appeal filed by the Applicants before the Additional District Judge, the suit was decreed and the said Ilamuddin against the appellate decree filed Civil Revision **No.19/1991** before this court. He died during the pendency of Revision and his legal heirs were brought on record. However, the Revision was dismissed on **12.09.1997** and legal heirs of Ilamuddin preferred leave to appeal against the dismissal of revision which was also dismissed on **28.10.1997** by the Hon'ble

Supreme Court. Both the dismissal of Revision by High Court and Civil Petition for leave to appeal by Supreme Court were reported in **1999 CLC 312** and **2011 SCMR 1255** respectively. The report of Nazir of this Court dated **22.5.1999** confirms that the legal heirs of said Illamuddin even after the judgments against him are encroachers on same land. From the judgment reported as **Illamuddin through LRs vs. Syed Sarfaraz Hussain through legal heirs** (1999 CLC 312). I reproduce following relevant passage since it was also about encroachment on **open spaces** in the Motumal Compound which is subject matter of present Revision:-

“The appellate Court visited the site and stated as follows:- In the impugned judgment:-

“Moreover on my personal inspection of the site I myself found that there is a lane on the western side of the plot of the appellants which is being used as passage and now a metal road has been constructed over there. I also found that the inhabitants of the houses by the side of the road adjoining with the plot of the appellants have also entered (extended) their houses by raising further construction and has reduced the width of the lane. The construction of these structures is such which clearly show that they were constructed separately and after the construction of the original structure of their houses. I also found that in front of the plot of the appellants there is a semi-constructed structure of the hutment of the respondents. This construction is adjoining with the front wall of plot of the appellants up to the side of the metal road, in the Western side of the lane.”

16. The learned trial Court also failed to appreciate other documentary evidence available on record including **Ex.2, Ex.28, Ex.31** and misconstrued the effect of **Ex.21** and **Ex.22**. **Ex.2** is site plan issued by Settlement Department on **01.09.1960** showing the exact location of **open spaces** in the Motumal Compound but it has been ignored by the Courts. This site plan has been endorsed first by Civil Judge in **Suit No.166/1963** when on the basis of said site plan the present Respondents were forced to remove illegal construction from open spaces in **Execution No.68/1996**. This site plan was again endorsed/approved by the Settlement Department

in the order dated **28.09.1981** in case No.SCK-1/1979 in the following terms.

“For the reasons discussed above, I hold that the big mansion situated on Municipal No.GRE 672 consists of two sets of building adjoining each other in-continuity belonging to Hindu Evacuee Motumal Narumal has been transferred to the applicant. The constructed portion comprising of the building known as Motumal Narumal has been bounded by ABCDEF in the site plan dated 12.9.1981 prepared by the Architect appointed by me in consultation of both the parties. The big mansion thus stands demarcated accordingly. The plot transferred to the respondents measuring 1130 sq. yds. Has been demarcated vide GHIJK in the aforesaid site plan.”

The reference to site plan in above order which was produced in evidence as Ex.28 was reconfirmation of site plan issued by Settlement Department on 01.09.1960. Ex.2 showing **open spaces** in the Motumal Compound in the same manner and demarcated in above order as GHIJK. The above order of Settlement Department endorsed by the Hon’ble High Court through the judgment in C.P. No.178/1981 whereby the order of Settlement Department was maintained and petitioner was dismissed. The judgment in C.P. No.178/1981 was produced by Respondent No.1 himself as **Ex.31**. The open spaces as shown in the site plan in **Ex.2** were third time confirmed as true and correct by the Survey Department while they were assisting the Nazir of this Court at the time of inspection of the site reported on **22.5.1999**. The Nazir has visited the site in presence of Settlement Department and relevant record including site plan dated 01.9.1960 Ex.2 was produced by the Settlement Department.

17. The learned courts below ignored all the documentary evidence produced by the Applicants and relied on documents produced by the Respondents but unfortunately the perusal of those documents suggests that both the courts below have not applied their judicial mind to the evidentiary value of the documents filed by Respondent No.1. Respondent No.1 has

filed site plan dated **13.07.1970** as **Ex.21** and the learned Courts despite the judgment of suit No.360/1979 filed by Respondent No.1 himself as **Ex.22** accepted it. In the said judgment the **site plan dated 13.07.1970** (Ex.21) was held to be **not** genuine document and it was held that the plaintiff (Respondent No.1 herein) has failed to prove site plan dated **13.7.1970** as genuine document. The perusal of judgment in suit No.360/1979 (Ex.22) further reveals that Respondent No.1 in suit No.2392/1980 has filed an evasive written statement on **04.11.1980**, and suppressed the fact that way back on **19.04.1973** he has already sold **221 square yards** of his plot to one Muhammad Khaleeq-ur-Rehman and thereafter he started to reside only in the remaining portion of said plot with his family. Such observation is available in the judgment of suit No.360/1979 is reproduced hereunder:-

“This is a suit for declaration and permanent injunction. Brief facts of the case of the plaintiff (Respondent No.1 herein) are that he got transferred permanently on 2.6.1970 a portion of Evacuee Plot measuring 421 sq. yards of Plot No. GRE/672 known as Motumal Compound, New Town, Karachi by virtue of his continued occupation and possession from the Settlement Department. This area was shown in the Red Colour in the Part Plan approved and verified by the Settlement Department on 13.7.1970. He, out of 421 sq. yards sold out 221 sq. yards to one Mohammad Khaliq-ur-Rehman on 19.4.73 for Rs.15000/- and the remaining portion is in his continuous possession when he is living with his family.”

Interesting enough the said Khaliq-ur-Rehman is also in the Court ever since he had purchased half of the plot shown in site plan dated 13.07.1970 (Ex.21) from Respondent No.1. Khaliq-ur-Rehman contested several suits for ejectment of illegal occupants from his portion of the plot shown in fabricated site plan relied upon by Respondent No.1. I have recently on **30.03.2016** disposed of five **IInd Appeal Nos. 02 to 05 of 2005** in favour of Muhammad Khaliq-ur-Rehman against encroachers on the half portion of the property of Respondent No.1. Therefore, the claim of Respondent

No.1 in his written statement that he was raising construction on the so-called “Part Plan approved by Settlement Department on 13.07.1970” was factually incorrect, since half of the part plan was in possession of encroachers who were also enjoying possession on the basis of stay order from Court since 1985.

18. Thus, I believe the learned trial Court and Appellate Court like the documentary evidence of Applicants have not at all appreciated the contents of **Ex.21** & **Ex. 22** i.e. judgment of suit No.360 of 1979 despite referring to it again and again in the impugned judgment. When the suit has been dismissed declaring that site plan dated **13.7.1970 (Ex.21)** was fabricated document then how the learned courts below as against the **Ex. 2**, accepted the said site plan and ignored construction on the **open spaces** which were proved to be and accepted as **open spaces** in Motumal Compound by the Settlement Department.

19. The discussion on documentary evidence herein above shows that both the Courts below have wrongly dismissed the suit by answering issue Nos.2 & 3 against the Applicants. It is pertinent to mention here that once the issue No.1 was decided in favour of the Applicants that tenement of the Applicants was surrounded by four lanes, one on each side. The existence of any structure or construction adjacent to and attached to the construction on the plot of the Applicants was illegal and negation of finding on issue No.1. This finding on issue No.1 was in fact acceptance of Ex.2 and even site plan referred in **Ex.28** the order of Settlement Department dated **28.09.1981, Ex.2** and **Ex.28** complement each other and both have origin in the official record of Settlement Department. Therefore, the Courts below ought to have directed the Respondents to remove whatever construction was on the lanes surrounding the Applicants’ premises. This

should have been done not only the legal proved/established site plan Ex.2 & Ex.28 but such exercise of jurisdiction by the Courts below could have resulted in implementation of judgment of this Court and Hon'ble Supreme Court reported in **1999 CLC 312** and **2011 SCMR 1255** respectively both titled Ilamuddin through L.Rs. vs. Syed Sarfaraz Hussain through L.Rs for removal of encroachments from the **open spaces** in Motumal Compound.

20. In his written arguments, Respondent No.1 has also raised the question of concurrent findings to be examined by this Court in Revision and also that the Revision was time barred. Regarding the concurrent findings to be examined by the revisional Court, suffice is to say that the detailed discussion on the treatment of evidence in the preceeding paras clearly indicate that both the Courts below are guilty of misreading and non-reading of several documents including inspection reports and as such warrant interference. The concurrent findings of the kind and quality of the impugned judgments cannot be treated as sacrosanct and lawful. Therefore, the same are liable to be set aside and there are several judgments of superior Courts on this proposition. I rely on the following observation of the Hon'ble Supreme Court from the latest case reported as Iqbal Ahmed v. Managing Director Provincial Urban Development Board, N.W.F.P. Peshawar (**2015 SCMR 799**).

“So far as the point raised by learned counsel for the appellant that the scope of civil revision is limited is concerned, this Court in *Rozi Khan v. Nasir* (1997 SCMR 1849) has candidly held that the scope of revisional jurisdiction could be appropriately invoked where subordinate forums had committed jurisdictional error or had misread evidence or had ignored material aspects affecting very root of case suggesting perversity. In *Muhammad Mian v. Shamimullah* (1995 SCMR 69) it is held that scope of revisional powers though hedged by conditions, is nevertheless vast and corresponds to a remedy of certiorari.

As far as the question of limitation for filing this revision is concerned. This civil revision was filed on **30.09.1987** challenging the concurrent findings of the trial Court and the judgment and decree of Appellate Court dated 18.02.1987. When this Revision was filed, no limitation was prescribed for filing a revision in this Court. Time period of 90 days for filing revision prescribed under **Article 162-A** of Limitation Act, 1908 was omitted from the Limitation Act in 1965 through the Act XI of 1965. The Limitation (Amendment) Act, 1965 was gazette on 03.8.1965. However, in 1992 by an amendment in Civil Procedure Code, 1908 third proviso was added in **Section 115** through the Act VI of 1992 providing a period of (90) ninety days' time for filing Revision against the decision of subordinate court. This amendment was effective from **30.5.1992**. Thus between **03.8.1965** and **30.5.1992**, no limitation was provided for filing Revision application. Therefore, at the relevant time, the period of 90 days for filing of revision was not applicable. However, the revision was filed within reasonable time and the applicants have specifically pointed out in the memo of revision that certified copies of some of the relevant documents which ought to have been filed alongwith revision application for compliance of **Section 115 CPC** were received as late as on **08.06.1987**. This position has not been disputed by the Applicants through any counter affidavit. Therefore, the contention of respondents that Revision was hopelessly time barred is misconceived. This revision cannot be dismissed on the question of limitation particularly in view of the fact that Respondents have very hopeless case and their conduct as discussed in para-11 & 12 above is also very much questionable. There are judgments and orders of various courts against the Respondents declaring them encroachers on open spaces including reported judgments as discussed in para-15 above and the encroachment is intact even till today.

21. The crux of the above discussion is that the Applicants who have challenged illegal construction on the **open spaces** in the Motumal Compound have successfully proved their contentions and beside the Respondents there are encroachers of the **open spaces** against whom even Supreme Courts orders are in field but encroachment has not been removed. These encroachments/illegal construction in **open spaces** in the Motumal Compound bearing GRE 672 (Custodian No.VIII, AE-663) measuring 7429 sq. yds. situated at Clayton Road, New Town, Karachi adversely affecting many others and the Applicants tenement No.GRE-VII-AE-663-G/I-A, measuring 1130 square yards. All these illegal constructions were perpetuated for over **29 years** directly or indirectly under the cover of pendency of the instant Civil Revision. I have already discussed the circumstances in which the delay in the disposal of this Revision Application has benefited the Respondents and the other encroachers on the **open spaces** in the Motumal Compound. The R&P of suit No.2392/1980 despite directions to MIT-II to locate the same has not been located so far.

22. In view of the aforementioned facts and circumstances, the questions/issues raised by this Court in the order dated 20.1.1988 for admission of this Revision (reproduce in para-9 above) are answered in the affirmative. Consequently, the findings of the two Courts below in Suit No.2392/1980 and Civil Appeal No.142/1985 are set aside and this revision application is allowed in the following terms:-

- i) MIT-II is directed to hold a comprehensive inquiry about the incident of loss of R.&P of suit No.2392/1980. In this connection he should also issue notice to the Applicants of CMA No.4406/1990 and call the deponent of supporting affidavit through SHO concerned and record his statement to the effect that on whose instigation he had filed such application and whether the contents of the affidavit were true

and correct. In case it is found that the contents of the affidavit in support of such application were not correct and it was intended only to serve the ulterior motive of removing the R&P from High Court of Sindh, MIT-II should initiate appropriate proceedings in accordance with law against the deponent of the affidavit in support of 4406/1990. At the same time he should also hold an inquiry about the staff who is responsible for misplacing/loss of R&P and fix the liability so that disciplinary action be taken against the concerned staff in the light of report of MIT-II. This exercise should be completed within **30 days** and the report be submitted in chamber for perusal and appropriate order, if needed.

- ii) The Nazir of this Court is directed to immediately issue 07 days' notice to all the encroachers on open spaces in the Motumal Compound and physically supervise removal of encroachment on the open spaces. The Motumal Compound should be restored to the position as shown in **Ex.2** and also in the order of the Settlement Department dated 28.09.1981 **Ex.31** since both the documents are complementing each other about the open spaces as determined by the Settlement Department, the original custodian and authority for preparing such site plan. The Nazir should keep the inspection report dated **22.5.1999** filed by the then Nazir of this Court available at page-301 of Court file with him and ensure that each and every spot shown as encroachment in the said report should be cleared by demolishing all the illegal structure.
- iii) The Nazir may in advance seek assistance of Deputy Commissioner (East) Karachi and SSP (East) Karachi and request them to provide relevant machineries, if any, required for removal of encroachment from the open spaces in the Motumal Compound within 15 days including 07 days' notice to the occupants of the **open spaces**. The SSP (East) Karachi should provide sufficient police aid through relevant SHO to ensure peaceful discharge of the duty of removal of encroachment as ordered above.

- iv) The Nazir should file his report of compliance with three weeks for perusal in chamber.

23. All pending applications in view of the above order stand disposed of and/or have become infructuous.

JUDGE

AYAZ KHAN/PS