

IN THE HIGH COURT OF SINDH, KARACHI

Civil Revision Application No.112 of 2013
[Naseer Khan vs. Nisar Khan and others]

Date of hearing : 12.02.2024

Applicant
[Naseer Khan] : Through Mr. Muhammad
Tamaz Khan, Advocate.

Respondents No.1-Nisar Khan
Through legal heirs
(a) Asif Khan (b) Araib Khan
(b) Hassan Khan, (d) Arman Nisar
All sons and daughter of
Nisar Khan and (e) Saba Naz
widow of Nisar Khan. : Through M/s. Zia-ul-Haq
Makhdoom, Muhammad
Azhar Mehmood and Hira
Agha, Advocates.

Respondent No.1(f)
[Mst. Naheed-ur-Rehman] :

Respondent No.2
[Project Director Land and Revenue :
KMC, Katchi Abadi]

Respondent No.3
[Karachi Metropolitan Corporation] : Nemo

JUDGMENT

Muhammad Faisal Kamal Alam, J: This Civil Revision Application is preferred against the conflicting findings. Learned Trial Court has dismissed the Suit No.543 of 2008 instituted by Respondent No.1, but, the learned Appellate Court overruled the Decision through the Impugned Judgment.

2. Succinctly, Respondent No.1, as Plaintiff has claimed that he is the owner of various Plots in Sheet Nos.1 and 2, Baba Wallayat Ali Shah Colony, Orangi Town No.11, Karachi, which are Plots No.584, 585, 586

and 587 [80 Square Yards], re-numbered as Plots No.1252 and 1399; averred that the Respondent No.1 from his own funds, constructed a commercial market on the above Plots, known as '*Al-Khalil Market*', **consisting of 52 Shops; also claimed ownership of** the Plots No.207, 208 and 209. The area is under the control of official Respondents No.2 and 3; contented that he [*the Respondent No.1*] remained in possession of the above Plots since beginning and the Shops are let out to different Tenants, who are paying the rentals to the Respondent No.1 / Plaintiff; that the Applicant (*who is the real brother of Respondent No.1*) has surreptitiously and fraudulently obtained the leases in respect of few Plots in his favour, hence, sought cancellation of Plots No.585 and 586 [in Sheet No.1] and Plots No.208 and 209 [in Sheet No.2].

3. The Suit was contested through Written Statement of the Applicant; averred that the Tenants in the above Market are of the Applicant. Defended the execution of the Leases in respect of the above Plots in favour of the Applicant. By way of Counterclaim has also requested that damages of Rs.5,000,000/- (*rupees five million only*) be awarded in favour of the Applicant for the losses caused by the Respondent No.1 to the former.

4. Mr. Tamaz Khan, Advocate, has stated that the impugned Decision of the Appellate Court suffers from illegality, because it has not evaluated the evidence properly and decided the Appeal on the basis of one sided version of Respondent No.1. Contented by referring to his Written Statement, [available in the Lis Record at page-157] that the Applicant is defending his proprietary interest in respect of Plots Nos.585-A, 586 and 586-A in Sheet No.1, so also Plots No.208-A and 209 in Sheet No.2; that if the pleadings of both the Applicant and Respondent No.1 is compared

then the Plots in dispute are only, 586 and 209. That leases were granted after survey of the area and the Report is available at Page-287.

5. Whereas, the official Respondent in its Written Statement has confirmed the fact that after completing codal formalities and verification of possession, the above Plots were regularized in favour of the present Applicant, but, they did not participate in the evidence proceeding.

6. Ms. Hira Agha, Advocate, has referred to various documents in support of her arguments. Contended and referred to Challans issued in respect of various thirteen (13) Plots, including the referred Plots, and stated that the difference in area / measurement as mentioned in the Challans issued in favour of Respondent No.1 and the Leases issued in favour of Applicant, is because that those Plots have been subdivided and, therefore, the areas are reduced from 200 Square Yards to smaller portions; has read the Remand Order of the Hon'ble Supreme Court [*in particular, with regard to finding on the Possession*]; referred to Pages-67 onwards to show that utility bills are issued in the name of Respondent No.1, which is one of the requirements of The Sindh Katchi Abadis Act, 1987 (**the Governing Law**), because it confirms the possession, justifying issuance of Leases in favour of Respondent No.1, but the same were illegally issued in favour of Applicant. Referred to Tenancy Agreements between different Tenants of the 'Al-Khalil Market' and Respondent No.1, proving his possession over the Suit Plots besides other Plots. To a question, that what would be the effect of these Tenancy Agreements once the Eviction Orders against the Tenants in a proceeding filed by the Applicant, were maintained by this Court, Mr. Zia-ul-Haq Makhdoom, Advocate, has replied, that those Orders in number of the Constitution Petitions, CP No.S-1287 of 2011, being the leading case, were maintained, because the present *Lis* (R.A. No.112 of 2013) at the relevant time was

already decided against the Respondent No.1. The Judgment on Constitution Petitions (Rent Proceeding) is at **Page-597** (of the present Record). Referred to Paragraph-10 of the Written Statement of the present Applicant, to show that the possession of the present Respondent No.1 has been admitted, thus the impugned Leases could not have been executed in favour of the Applicant; referred to various provisions of the above Governing Law, Sections 19, 21 and Regulation 3 (3) of the Sindh Katchi Abadis Authority [Regulation, Improvement and Development] Regulations, 1993 [**the Regulations**], that the possession prior to 1985 is mandatory for obtaining leases of Plots, which is / was throughout with the Respondent No.1 and not the Applicant.

7. The above Provisions are reproduced herein under for a ready reference_

“Section 19. Declaration of Katchi Abadi.- *(1) Subject to sub-sections (2), (3) and (4) and directions of Government, if any, the Authority may, after such enquiry as deemed fit, by notification in the official Gazette, declare any area or part thereof which is partially or wholly occupied unauthorisedly before the 23rd day of March, 1985 and continues to be occupied to be Katchi Abadi.*

(2) No area which is owned by the Federal Government shall be declared as Katchi Abadi without obtaining consent of the Federal Government.

(3) No area owned by a private person or a cooperative society shall be declared as Katchi Abadi except with the consent of such person or society and the Katchi Abadi so declared shall be subject to such terms and conditions as may be agreed to between such person or, as the case may be, society and the Authority.

(4) Except as otherwise directed by Government, no area which is reserved for the purposes of roads, streets, water supply, arrangements, sewerage or other conservancy

arrangements, hospitals, schools, colleges, libraries, playgrounds, gardens, mosques, graveyards, railways, high tension lines, or such other purposes or is not safe from flood hazard, shall be declared to be a Katchi Abadi.

- (5) *Any area declared to be a Katchi Abadi shall, subject to the agreement referred to in sub-section (3), vest in the Authority.*
- (6) *Where the Authority is of the opinion that the area referred to in sub-section (3) cannot be acquired by consent or agreement, the area may be acquired and compensation therefor be paid in accordance with the provisions contained in Chapter IV of the Hyderabad Development Authority Act, 1976 which shall be deemed to have been modified for the purpose of this Act as follows:-*
- (a) *References to the Authority, its Chairman and Member shall respectively be construed as the references to the Authority constituted under this Act, its Chairman and Member;*
- (b) *The compensation for acquisition of the area shall be determined and award in that behalf shall be made by a Tribunal;*
- (c) *The Tribunal shall have all the powers of a Collector exercisable by him while determining the compensation or making award;*
- (d) *Reference to Collector in sections 44, 45 and 46 shall respectively be construed as reference to the Tribunal.*
- (7) *Government may appoint any officer in BS-17 or 18 as Tribunal.*
- (8) *Government may, by notification in the official Gazette, establish a Tribunal and specify the area in which such Tribunal shall exercise its jurisdiction.”*

Section 21, which for convenience is reproduced herein under _

“21. Schemes.-(1) *The Authority shall prepare or cause to be prepared scheme or schemes for development, improvement or*

regularization of the Katchi Abadis and the scheme or schemes so prepared shall be submitted to Government for approval.

- (2) *The scheme may relate to –*
- (a) *community planning, housing, re-housing including low cost housing and amelioration;*
 - (b) *rehabilitation of the authorised or unauthorised occupants of a Katchi Abadi in the same Katchi Abadi or where it is not possible in some other area or locality;*
 - (c) *roads and streets;*
 - (e) *terms and conditions of lease including period and procedure of lease and transfer of lease rights;*
 - (f) *lease money and development charges;*
 - (g) *any subject or matter incidental or ancillary to the purposes of this Act.*

(3) *Government may, by notification in the Official Gazette, alter or amend the list of subjects given in sub-section (2), and any such addition or modification shall take effect as if it had been enacted in this Act.*

(4) *All schemes shall be prepared in such manner and form as Government may specify, and shall contain among other things the following information, namely:-*

- (a) *description of the scheme and the manner of its execution;*
- (b) *estimate of costs and benefits;*
- (c) *allocation of costs to the various purposes to be served by the scheme;*
- (d) *date of commencement;*
- (e) *date of completion.*

(5) *At any time after sanctioning any scheme but before its completion, Government may on its own or on the recommendation of the Authority after it.*

(6) *The Authority shall execute or cause to be executed the approved scheme or schemes and take such measures*

and exercise such powers including the power of removal of encroachments in accordance with the law for the time being in force as may be necessary for the purpose.”

“Regulation-3. Preparation of a master list and survey.-

(1) [Updating of master list of katchi abadis should be a continues process but this should be done as per provisions of the Act, regulations made under the Act, and on the basis of feasibility report(s) furnished by the divisional heads.]

- (2) Every katchi abadi consisting of 40 (forty) or more dwelling units which fulfils the requirements laid down under the Act, after reconnaissance survey of such katchi abadi and listing such unauthorized occupants, prior to 23-3-1985 shall be included in the Master List.*
- (3) The Authority may ask the unauthorised occupants to submit the following documents in order to prove their occupancy of land in the katchi abadi prior to 23rd March, 1985: -*
- (i) N.I.C.;*
 - (ii) Name in the voters' list of the area pertaining to of 1985 or prior to that;*
 - (iii) Electric, gas, telephone bill, if any;*
 - (iv) Ration card issued prior to 23rd March, 1985 on the present address;*
 - (v) Area school certificate;*
 - (vi) Any type of licence (arms, driving etc.) issued prior to 23rd March, 1985 on the address of plot in katchi abadi;*
 - (vii) Death certificate showing the address of the deceased occupant;*
 - (viii) Birth certificate of the occupant born prior to the date fixed by the Act, with address of the katchi abadi;*
 - (ix) Any other document(s) as required by the authority.”*

8. From the Pleadings, following Issues were framed_

- “1) *Whether the suit is barred by jurisdiction and maintainable under the law or otherwise?*
- 2) *Whether the relief claimed is undervalued, and suit is hit by Section 7 of the Court Fee Act, 1870?*
- 3) *Whether the Defendant No.1 was entitled for lease of suit plots from Katchi Abadi (KMC)?*
- 4) *Whether defendant No.1 had obtained lease of Plot Nos.(1) 585-A and 586 Sheet No.1, Lease/Registration No.1879 dated 22.05.2007, (2) 586-A, Sheet No.1, Lease/Registration No.1877 dated 22.05.2007 and (3) 208-A and 209, Sheet No.2, Lease / Registration No.3788 dated 24.10.2007 accordingly or otherwise?*
- 5) *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?*
- 6) *Whether the plaintiff is entitled for grant of lease for suit plots?*
- 7) *Whether the plaintiff is entitled for grant of relief(s) as claimed?*
- 8) *What should the Decree be?”*

9. In support of his stance, the Respondent No.1 / Plaintiff testified, besides his other witnesses, namely, Abdul Rasheed [PW-1], Bashir Ahmed [PW-2] and Moinuddin [PW-3].

10. Whereas, in defence the present Applicant deposed, besides, Mst. Bashir-un-Nisa [DW-1]-the mother of both the Applicant and Respondent No.1, Gule-e-Rana [DW-2] the real sister of both Applicant and Respondent No.1 and Muhammad Orangzaib Khan [close relative of the Parties hereto].

11. Since this Revision is preferred against the conflicting findings, therefore evidence is re-appraised.

12. The Appellate Court has framed a formal Point of Determination, that whether the Impugned Judgment and Decree of the learned Trial Court are bad in law and on facts. The Judgment of learned Trial Court was overturned by the Impugned Judgment (of the Appellate Court) by accepting the version of the Tenants of Respondent No.1, who deposed as his Witnesses [PW-2 and PW-3], that they were paying rent to the Respondent No.1; has not seen any other person to be the owner of the Suit Plots, but, since last two years, the Applicant made visits at the Suit Plots. It is held in the impugned Judgment, that Respondent No.1 has proved his possession since long and earlier also Challans were issued by the official Respondent No.2 in favour of the Respondent No.1 for grant of Lease, therefore, it is the Respondent No.1, who is entitled for the same, because he was the actual occupant of the Suit Land and not the present Applicant, which is a mandatory requirement of the Governing Law *[ibid]* in terms of its Section-21, coupled with the fact, that since no Survey Report is filed, thus, stance of the Official Respondents, that the present Applicant was found to be in possession [of the Suit Plots] is incorrect. This finding of non-availability of a Survey Report, is contrary to Record, and is a result of mis-reading and non-reading of the Evidence, because the Survey Reports are available in the Lis Record at Pages-207, 245 and 287.

13. **Evidence evaluated.**

The Respondent No.1 [Plaintiff] claimed that he is living in the locality-Orangi Town since 1974 and purchased the above Plots from one Momin Khan. Neither any evidence is given in support of this assertion nor any witness, including [above named] Momin Khan was examined.

During cross-examination has stated that he does not know the area of 52 Shops constructed on seven Plots and four sub-Plots; acknowledged

that he has not submitted any proof of purchasing the Plots and construction thereupon; that no site plan has been submitted in the proceeding and evidence; admitted that he has not mentioned Plot No.427 in his Suit, which is also situated in Khalil Market, which was leased to the said Respondent No.1 in the year 2006; admitted that from 1982 to 1990, he was in Saudi Arabia and went again in 1993 and came back in 2006; admitted that the Deceased Father of Respondent No.1 and Applicant did not have any Property; admitted that he is not paying any Property Tax nor has any NTN Number, although his claim in the pleading is that he has constructed 52 Shops, rented out to different tenants, who are paying rentals to the Manager of Respondent No.1. Admitted that no Receipt of rent has been produced in the evidence. During evidence, produced Form PT-1 (Exhibit P/32), for the years 2010 and 2011, to show that Respondent No.1 is paying Property Tax for Plots No.207 to 209 and 584 to 587; however, in cross-examination, he has **admitted** that this Document-Exhibit P/32 is neither mentioned in the plaint, nor in the List of Documents or before the Commissioner; further admitted that he has not produced the Assessment Order of the concerned Department; admitted that he has not produced the supporting challan, that the amount assessed was paid, therefore, the stance of Respondent No.1 that **he has paid the Property Tax could not be proved by him.** Thus, the Exhibit P/32 has no evidential value and the arguments of Legal Team of Respondent No.1 in this regard, are unacceptable. The utility bills, Exhibits P/1 to P/8 produced by the Respondent No.1 in his evidence, in support of his arguments that he is making the payments of these bills at the Suit Property, which substantiates his possession and lease should have been given to him instead of the Applicant; these Bills have been perused, which are not of the Suit Property; rather Exhibit P/2 the Gas Bill is of Plot No. KMC/427, which is owned by Respondent No.1 and during

his cross-examination, he admitted that he did not disclose this property in the Plaint, not the same is part of the present dispute. **In his cross-examination he has admitted that the electricity bill of one property mentions the Address as 1252, which is not the Suit Plots.** Respondent No.1 has contradicted himself when in cross-examination he has stated that he does not know that where from the Applicant got the leases of the Suit property in his favour, **so also not denied the suggestion that whether they [Leases in question] are properly issued or not.** Whereas, in the examination-in-chief his assertion was that it is the result of collusion between Applicant and official Respondents; contradicted himself, when in cross-examination he stated that he filed Objection before Respondent-KMC about the leases in favour of Applicant, but did not file copy of the said Objection with his Plaint; rather, he never pleaded this fact. In his examination-in-chief, the Respondent No.1 has stated that he has applied for leases of the Suit Property but no survey was done; this assertion is belied by the Survey Reports available in the Lis Record [*as discussed in the preceding Paragraphs*], in which possession is shown to be with the Applicant; mentioning the measurement / area of the Suit Plots as 399.99 and 298.66 square yards; **whereas**, the Plots claimed by the Respondent No.1 is of lesser area (as mentioned here-in-above).

14. The next witness is Abdul Rasheed son of Shaikh Ismail-PW-1, who is a Chowkidar (Guard). He has reiterated the stance of Respondent No.1 that the owner of the Suit Properties is Respondent No.1. In his cross-examination, he has admitted that he used to give rent to the Mother [DW-1] of Respondent No.1 on his instructions; did not deny the suggestion that the witness used to maintain the record from taking the rent from the tenants but that record is not submitted in the Court; denied

the suggestion that since April 2007, the present Applicant used to receive the rent.

15. PW-2 is Bashir Ahmed son of Munshi. He has deposed that he is tenant of the Respondent No.1 since almost two decades; that the Respondent is owner of the Market and he resides in the same area. In his cross-examination, he has admitted that there is no tenancy between him and the Respondent No.1; the witness paid rental of Rs.100/- (*rupees one hundred only*) to Respondent No.1 but did not produce any Rent Receipt. Did not deny the suggestion that the present Applicant was a Government Employee and hence was transferred to different cities as part of the employment. The evidence is not convincing and does not prove the stance of Respondent No.1 about tenancy.

16. PW-3 is Moinuddin son of Salahuddin, claiming to be the tenant of Respondent No.1. In his examination-in-chief, he has reiterated that he is tenant of a Shop rented out by Respondent No.1. Market was constructed by Respondent No.1 and he took the connection of utility; that present Applicant is not the owner of the Market and all the tenants used to pay rentals to the Respondent No.1. In his cross-examination, he has produced the Tenancy Agreement of the year 1992, whereas, the Tenancy Agreement was made from 07.05.2007 for eleven months; admitted that he has not produced a fresh Tenancy Agreement; stated that he is paying Rs.900/- (*rupees nine hundred only*) as rent but has not produced any Rent Receipt; admitted that he has not mentioned the Shop number in which he is tenant, as it does not have any number. The evidence is self-contradictory, because if there is an electricity connection and utility bills are received, then there has to be a specific shop number and address; **secondly**, it is not believable that a person is a tenant of a Shop, but, without a number to determine its exact location.

17. Testimonies of the Applicant [Defendant] is taken into account. Deposited that he got the Subject Leases of the Suit Property from official Respondents and Respondent No.1 [Plaintiff] facilitated the Applicant. Rented out 21 Shops in the Building, received rentals but when the Tenants defaulted, the Applicant filed Rent Cases which were decided in his favour.

The Applicant categorically denied the suggestion about any collusion with the government officials for obtaining the Subject disputed Leases of the Suit Property; reiterated that he was in possession; admitted that he was residing in Lahore since 1981. Reiterated that the Suit Plots are part of inheritance. In his cross-examination, he has stated that challans appended with the lease documents were paid by him in the year 2007, while further stated that such challans were issued to Respondent No.1 in the previous year (2006), for the purpose of lease which was paid by him. **Admitted** that utility bills for the shops situated over the Suit Property are in the name of Respondent No.1.

18. The Mother of Applicant and Respondent No.1, Mst. Bashir-u-Nisa [DW-1], Sister Gule Rana Khan [DW-2] and one Muhammad Aurangzeb Khan (relative)-DW-3, deposed in favour of the Applicant. Their common stance is that these Suit Properties are given to the Applicant as part of the family settlement and consultation, but, no such document was produced. Denied the question that the Suit Plots were in possession of the Respondent No.1.

19. The leases of these Suit Plots are available in the Record, viz. Exhibits D/1, D/2 and D/3 [*Pages 169, 219 and 267*]. All these are registered Instruments, executed by the Official Respondent in favour of the Applicant. The Lease for Plot No.208/A and 209 was granted on 11.09.2007 admeasuring 399-99 Square yards; Lease for Plot No.586/A,

admeasuring 298-66 Square Yards, granted on 22-5-2007; Lease for Plots No.585-A and 586, admeasuring 298-66 sq. yards, is of 22-05-2007, *whereas*, the Respondent No.1 claiming plots of 80 Square Yards. If the Plots [and their respective numbers] as claimed by the Respondent No. 1 is compared with the above Subject Leases, contention of the Applicant's Counsel appears to be correct, that in fact only Two Plots are in dispute, viz. Plots 209 and 586.

20. Adverting to the crucial issue of Possession. Legal Team of Respondent No.1 has argued that the Applicant was never in possession as envisaged in the aforementioned provisions of the Governing Law, and the Respondent No.1 was in possession of the Subject Plots (rather, in unauthorized possession of these plots) regularizable under the afore-referred statutory Provisions. The onus of this fact is on the Respondent No.1 being Plaintiff, which he has failed to discharge, *inter alia*, when he has **admitted** that he was residing in Saudi Arabia since 1982 and came back in the year 1990; went again in 1993 and came back in 2006; his monthly income was Saudi Riyal 450. Under the above statutory provisions [*as it was, when the above Suit was filed*], a person who is unauthorizedly occupying land **before 23rd March 1985 can apply for the regularization and lease.** The Respondent No.1 in view of his testimony, was not present in Pakistan during that time; his second material contradiction is, when he stated that he brought his family members from Bangladesh in 1995; *whereas, it is the stance of the Applicant that he was in possession of the above Plots and since was in the government service, thus, was transferred to different places*, has not been disputed by the Respondent and his witnesses. If this evidence is read with the other testimonies of Family Members of the Applicant and Respondent, the evidence of the Applicant is more convincing and

credible, which is further supported by the afore discussed Official Documents, viz. Registered Leases and Survey Reports. The argument of Respondent's Counsel that the prior possession of Respondent No.1 is admitted in Paragraph No.10 of the Written Statement, becomes insignificant, in view of the above discussion.

The impugned Judgment has not decided this Issue [of Possession] correctly. The finding of the Appellate Court is rather contrary to Record when it determines that nothing is brought on Record to prove the possession of the present Applicant, by overlooking the official Survey Reports [*ibid*]. Thus, the impugned Finding [of the Appellate] Court is set-aside.

21. In view of the above testimonies, onus is on Respondent No.1 to prove his case in terms of Articles 117 and 118 of the Qanun-e-Shahadat Order, 1984. The evidence of Respondent No.1 and his witnesses have failed to discharge the burden of proof, in particular, about allegations of connivance between Applicant and official Respondents, when the Respondent No.1 himself has replied in cross-examination that "*he did not know from where the Applicant got the leases of the Suit property*" **and**, that he does not know whether the Suit Properties were leased to Applicant "*properly or not*". Despite having knowledge of the Leases, he did not file any Complaint before the Official Respondents. Similarly, the evidence of Guard (Abdul Rasheed) and the Manager are also discussed here-in-above, which have failed to lend any credible support to the evidence of Respondent No.1. **Interestingly, Respondent No.1 as Plaintiff himself produced a Legal Notice, Exhibit P/14 (dated 08.04.2008) addressed to him by his brother Lt. Col. (R) Khan Muhammad Nazir, *inter alia*, demanding insertion of the names of all the legal heirs / family members in respect of all the properties.**

Since collusion between the Applicant and official Respondents is not proven, therefore, Article 129(e) would be applicable, a presumption that official act has been regularly performed, which means that the above Subject Leases in favour of the Applicant has been given by the Official Respondents as per Rule and Procedure. Therefore, the impugned Judgment has illegally Decreed the Suit of the Respondent No.1, *inter alia*, having effect of cancelling the above Leases [in favour of the Applicant].

Secondly, the Rent Cases filed by the Applicant against the Respondent No.1 and different Tenants were decided in favour of the Applicant by the Judgment dated 16.03.2020 [*supra*], handed down by this Court, which is still in the field.

22. The conclusion of the above discussion is that the impugned Appellate Court Judgment has not exercised the jurisdiction properly and reached at the wrong conclusion, *inter alia*, by mis-reading the evidence; hence, the impugned Judgment is not passed within the parameters of law, is set-aside, and the Judgment and Decree of the learned Trial Court is upheld and restored. This Revision is allowed.

23. Parties to bear their respective costs.

Karachi.
Dated: 31.12.2024
M.Javid.P.A.

JUDGE