

# IN THE HIGH COURT OF SINDH AT KARACHI

C. P. No. D – 2116 of 2019

[Mrs. Nighat Naeem and others *versus* Karachi Development Authority and others]

**Present:**

Mr. Irfaan Saadat Khan, J.,

Mr. Muhammad Faisal Kamal Alam, J.

Dates of hearing : 01.09.2021 and 14.10.2021.

Petitioners : Mrs. Nighat Naeem and others, through Mr. Masjood Ali Memon, Advocate.

Respondent No.1 : Karachi Development Authority, through Mr. Altaf Ahmed Sahar, Advocate.

Respondent No.2 : Chief Secretary Sindh, through Mr. Miran Muhammad Shah, Additional Advocate General Sindh.

## **JUDGMENT**

**Muhammad Faisal Kamal Alam, J:** - This Petition is preferred to question the Judgment dated 28.02.2019 passed by the learned Additional District Judge-VII, Karachi Central, in Civil Revision No.51 of 2017, dismissing the same and maintaining the Order dated 11.04.2017, passed by the learned Trial Court, being an Executing Court in Execution No.26 of 2016, whereby the plea of restoration of possession in respect of the properties in question, has been declined.

2. Succinctly, present Petitioners earlier filed a Suit No.920 of 1979, which was renumbered as Civil Suit No.4751 of 1985, challenging the action of present Respondent No.1 – Karachi Development Authority (“KDA”), which had canceled the plots allotted to present Applicants. The plots in dispute were R/502, 503, 504, 509, 510 and 511, located in North Karachi Township, Sector 16 – B – “**Subject Property**”.

3. The above suit was decreed as prayed and the Judgment dated 31.10.1992 was maintained by the learned Appellate Court in Civil Appeal No.07 of 1993, so also Civil Revision preferred by present Respondent No.1 – KDA in this Court being R. A. Nos.42 and 43 of 1997. However, the reason for filing the present petition arose, when in the execution proceeding, prayer of present Petitioners about restoration of possession was declined and maintained by the aforementioned impugned Judgment.

4. It is necessary to reproduce the prayer clause of the plaint filed in above Suit (by the present Petitioners)\_

“1. *A declaration that the order of defendant No.1 cancelling the allotment of the plaintiff's plot and his proposed action to put the same to public auction is illegal, void, ab initio and without lawful authority.*

2. *A perpetual injunction of mandatory and restitutory nature restraining the defendant No.1 & 2 its servants and subordinates from taking any action calculated to deny the plaintiffs status as the allottees of the plot in question or deprive him of the same and also restrain the defendant No.1 from demolishing the boundary wall by the defendants No.1, its servants and agents.*

3. *Cost of the suit.*

4. *Any other relief which this Honourable Court deems fit.”*

5. With the above background facts, it is argued by Mr. Masjood Ali Memon, Advocate for the Petitioners, that the specific prayer of possession was not sought earlier while filing the suit because the possession of the above Subject Property was with the present Petitioners; but the same was disturbed during the long period of litigation, which illegal act on the part of Respondent No.1 – KDA, could have been rectified by the Executing

and Revisional Courts, instead of passing the impugned judgments. He has cited the following case law to fortify his arguments\_

**1. 2005 C L C 1144**

[*Khadim Hussain and 2 others versus Waris Ali and another*];

**2. P L D 2021 Supreme Court 715**

[*Mst. Akhtar Sultana versus Major Retd. Muzaffar Khan Malik through his legal heirs and others*];

**3. P L D 1964 Dacca 202**

[*Birgis Jahan Bajiga Malik versus Muhammad Hasan and others*];

**4. P L D 2019 Lahore 97**

[*Muhammad Riaz and others versus Qaim Ali and others*];

**5. P L D 2006 Supreme Court 66**

[*Javaid Iqbal versus Abdul Aziz and another*]

6. On the other hand, Respondent No.1 – KDA has filed a formal Parawise Comments, not specifically contesting the contents of present Petition, while giving the background of the litigation, particularly, why the above Subject Property / plots were canceled. However, the reply of the contesting Respondent No.1 – KDA with regard to cancellation for the purpose of construction of the alleged fruit and vegetable market, has already been laid at rest, in the earlier round of litigation, through the judgment and decree passed in favour of present Petitioners which is maintained up to the Revision proceeding by this Court [as mentioned above], vide its judgment dated 26.04.2016, which has attained finality.

7. Adverting to the present controversy. The crux of the judgments relied upon by the Petitioners' counsel is that in appropriate cases Courts can mould the relief; Courts can grant effective or ancillary relief even if it has not been specifically prayed for; if Court has decreed a suit for declaration then petitioners (of the reported case) although failed to claim consequential relief of possession, the same could have been granted to them by allowing them to amend the plaint by adding a prayer for

possession along with direction to affix proper Court Fee, instead of non-suiting them on the basis of technicalities. Honourable Supreme Court in Javaid Iqbal Case (*ibid*) has held “*that the High Court being a court of record with powers of supervision and correction of the orders passed by the inferior Courts cannot be said to be helpless in appropriate cases to pass such orders in order to do substantial justice and do advance the cause of justice*”.

8. In the present Case, only factor weighed with the learned Executing Court for disallowing the Prayer of possession of present Petitioners, is that specific plea of possession was not sought in the Suit and since Executing Court cannot go beyond the decree, therefore, the prayer of possession mentioned in the Execution Application was declined; whereas, the Revisional Court while passing the impugned judgment, although observed that if the decree in favour of Petitioners is of restitutory nature, then there is no necessity to ask for the relief of possession; however, instead of correcting the order dated 11.04.2017 passed by the Executing Court, the same was maintained through the impugned judgment. What both the Courts have miserably failed to observe or consider is that the present Petitioners were successful throughout in their prolonged and exhausting litigation **[spreading over three decades]** with the Respondent No.1 – KDA, up to the revisional proceedings decided by this Court, as already stated hereinabove. The judgment and decree was handed down after a full dress trial, which has its own value, giving birth to right and interest in favour of a Decree Holder, if the said judgment and decree is maintained throughout by the Higher Fora, as has happened in the present case. In these peculiar circumstances, if the relief of possession would have been given, then the same cannot be termed as that the Executing Court has traveled beyond the judgment and decree.

9. *Secondly*, in terms of Section 47 of the Civil Procedure Code, an Executing Court is empowered to decide all questions relating to the execution. In the case of *Haji Abdul wali Khan and another versus Mohammed Hanif and another* – 1991 SCMR 2457, the Honourable Supreme Court has held, ***“that every court that has an inherent power to have its orders carried out or enforced, otherwise the orders be a mere farce.... Object of this section was to save unnecessary expense and delay; and to afford relief finally, cheaply and speedily without the necessity of a fresh suit”***.

10. *Thirdly*, the learned Division Bench of this Court in a case reported as *Mansoor Ashraf versus Province of Sindh and others* – S B L R 2017 Sindh 105, which decision was maintained by the Hon’ble Supreme Court, restored the possession of the petitioner [of the reported case] who was dispossessed being a tenant from a premises in which he was running a guest house. It is further held that ***“an implied objective of law is to ensure an orderly behaviour in a society and if on one hand around for some act is left unattended on the basis of certain technicalities and on the other hand a victim of wrongful act is left to run from pillar to post, then in due course of time, an orderly system of a society would be diminished and will be replaced by a disorderly and intolerant behaviour as well as lawlessness.”***

11. Since valuable rights and interest have accrued to the present Petitioners after the above mentioned Decisions, and such rights being proprietary rights are protected by the Article 24 of the Constitution of Islamic Republic of Pakistan, 1973, thus, the relief of possession should have been granted by the learned Courts. The impugned Decisions are not in accordance with the law, as both the Courts have not properly exercised

the jurisdiction vested in them, resulting in hardship and injustice to the Petitioners, which can be corrected in this writ jurisdiction.

12. Consequently, in view of the above discussion both the impugned decisions passed in Revision Application No.51 of 2017 and Execution Application No.26 of 2016, are set aside. This Petition is accepted. Respondents No. 1 and 2, to handover the peaceful, physical possession of the Subject Property forthwith to the Petitioners.

13. Office is directed to return all the R&Ps as per the Rules and Procedure.

**Judge**

**Judge**

**Karachi.**

**Dated: 08.04.2022.**

*Riaz / P.S.*