

# IN THE HIGH COURT OF SINDH AT KARACHI

**Present:**

Irfan Saadat Khan &  
Sana Akram Minhas JJ

**High Court Appeal No.21 of 2018**

***(Government of Sindh vs. Mrs. Hailey Vincent D'Abreo & Others)***

Appellant: Government of Sindh  
Through M/s Syed Aley Maqbool Rizvi & Ziauddin Junejo,  
Additional Advocate General

Respondents No.1 to 5: (1) Mrs. Hailey Vincent D'Abreo (2) Vincent Gerland D'Abreo  
III (3) Mrs. Jessica Pamela D'Abreo (4) Glenn D'Abreo  
(5) Mrs. Pamela Rosario through their Attorney, Sajjad  
Bashir  
Through Mr. Shahenshah Hussain, Advocate

Respondent No.6: Karachi Metropolitan Corporation  
Nemo

Date(s) of hearing: 18.4.2023, 24.5.2023 & 31.5.2023

## **J U D G M E N T**

1. **Sana Akram Minhas, J:** This High Court Appeal (“**HCA**”) calls in question the ex parte judgment 27.10.2017 and decree dated 6.11.2017 (“**Impugned Judgment**”) passed by a learned Single Judge (Original Side) of this Court in Suit No.1151/2011 (“**Suit 1151**”). The Suit 1151, filed by the Respondents No.1 to 5 through their Attorney (Plaintiffs in Suit 1151), was decreed for default in payment of rent by the Respondent No.6 (Defendant No.2 in Suit 1151) and whilst only the latter was directed to pay arrears of rent, both the Appellant and the Respondent No.6 (Defendants No.1 & 2 in Suit 1151) were ordered to handover possession of the two plots of land bearing Plot No.325/1 (measuring 1327 sq. yards) and Plot No.356 (measuring 4321 sq. yards), situated in Garden East Quarters, Karachi (“**Suit Properties**”) where a long-standing government school is operating.

**Misdescription of Appellant**

2. Even though the Appellant has been sued as Province of Sindh in Suit 1151, it has misdescribed itself in the title of this HCA as “Government of Sindh” whereas the correct nomenclature is Province of Sindh inter alia, in terms of section 79 of the Code of Civil Procedure, 1908 (“**CPC**”). This misnomer, however, is not fatal to the present proceedings where the Government itself files the appeal with misdescription, as held in **Province of Punjab v. Murree Brewery Company Ltd** (2021 SCMR 305 [paragraph 19]).

**Factual Background**

3. An age-old school known as “*Jufelhurst Primary & Secondary Government School*” (“**School**”) is established and currently operational on the Suit Properties (which two plots of land jointly measure 5648 sq. yards).
4. The Plaintiffs (i.e. Respondents No.1 to 5 through their Attorney Sajjad Bashir) filed Suit 1151, the contents of which aver as follows:
  - i) The Suit Properties belonged to (late) Mrs. Julia Florence D’Abreo, who executed a Will dated 16.5.1948 (“**Will**”) under which a life interest was given to her children (three daughters and one son viz. Vincent D’Abreo who expired in 1968) and after their demise the estate and effects, or such part that remained, were to pass to the children of her said son. The Will was probated and a Letter of Probate was granted on 29.8.1967 by this Court (then the High Court of West Pakistan, Karachi Bench).
  - ii) (Late) Ms. Sybil D’Abreo (one of the daughters of (late) Mrs. Julia Florence D’Abreo and also executrix of her Will), gifted the Suit Properties to the then Roman Catholic Archbishop of Karachi through Gift Deed dated 5.9.1989 which was registered on 19.10.1989 (“**Gift Deed**”). The Gift Deed was challenged by the children and grand-children of (late) Vincent D’Abreo through a Civil Suit No.182/2003 (bearing old Suit No.301/1993 which was initially filed in this High Court but later transferred to the lower court due to a change in pecuniary jurisdiction). This Civil Suit was compromised and the III<sup>rd</sup> Senior Civil Judge, Karachi passed a decree dated 28.4.2010 (“**Compromise Decree**”) in terms of which the registered Gift Deed was “*treated as cancelled*” and the Respondents No.1 to 5 (Plaintiffs in Suit 1151 and who are the grand-children and children of the said son (late) Vincent D’Abreo) were declared as owners of the Suit Properties and their names were mutated in the property register maintained by the Mukhtiarkar, Jamshed Town Revenue, City District Government of Karachi.

- iii) The buildings on the Suit Properties were in occupation of the Respondent No.6 who was running the School there as a tenant of the Respondents No.1 to 5 on a rent of Rs.816/- per month. Due to non-payment of rent by the Respondent No.6 since August 1994, the Respondents No.1 to 5, therefore, filed Suit 1151 against the Appellant and the Respondent No.6 (Defendants in Suit 1151), inter alia, for eviction of the School, possession of Suit Properties and payment of mesne profit/rent – as the *Sindh Rented Premises Ordinance, 1979* was not applicable to the Suit Properties (in view of Government of Sindh's Notification dated 29.7.1980 exempting the premises of nationalised schools and colleges taken over under Martial Law Regulation No.118 of 1972 from the purview of the Ordinance 1979).

### **Proceedings in Suit 1151**

5. In Suit 1151, there were only two Defendants – Defendant No.1 being the Appellant (which was sued as “Province of Sindh through the Secretary, Ministry of Home Affairs”) and the Defendant No.2, which at the time of filing of the Suit 1151 was the defunct City District Government Karachi (“**CDGK**”) (which has been succeeded by Karachi Metropolitan Corporation (“**KMC**”) i.e. Respondent No.6 herein).
6. By order dated 26.5.2016 (at HCA File Pg. 129), a learned Single Judge directed that the Appellant be proceeded against ex parte. This order was passed in view of the State Counsel's submission, who supplied an undated Statement (“**Undated Statement**”) to the Single Judge (at HCA File Pg. 421 & 699), stating that the dispute was between the Respondents No.1 to 5 (Plaintiffs in Suit 1151) and the Respondent No.6 (Defendant No.2 in Suit 1151) and there was no direct or indirect involvement of the Appellant in the issue in Suit 1151. As for the Respondent No.6 (the then CDGK), it had already been debarred from filing written statement vide Additional Registrar's diary dated 13.11.2012 (at HCA File Pg. 103).
7. On 17.12.2016, the Plaintiffs filed Affidavit-in ex parte proof and on 15.9.2017, the evidence of Plaintiffs' witness (viz. their Attorney Sajjad Bashir) was recorded in Court and matter was adjourned for final arguments. On 13.10.2017, the Suit 1151 was reserved for judgment and was decreed vide the Impugned Judgment, which has now been challenged by the Appellant in this HCA.

### **Respective Arguments**

8. The learned Counsel for the Appellant contended that the Suit 1151 had been filed against the wrong department of the Province of Sindh (viz. Secretary, Ministry of Home Affairs) which had no concern with the matter and the Province ought to have

been sued through the Secretary, Ministry of Education as the latter department was in possession of the Suit Properties since the School came under it and was also the one paying the rent; that the CDGK had been wrongly and malafidely impleaded as Defendant No.2 in Suit 1151 when it had already ceased to exist in July 2011 i.e. even prior to filing of Suit 1151 (which Suit 1151 was presented on 21.9.2011) and its successor was KMC (Respondent No.6); that the eighty (80) year lease of the Suit Properties which had commenced on 1.8.1915 had expired on 1.8.1995, whereafter the Suit Properties vested in the Government of Sindh; that neither the copy of the lease document nor the Gift Deed had ever been produced by the Plaintiffs (Respondent No.1 to 5) to show what was the nature of the Suit Properties, the terms and conditions on which it was leased/granted or what were the terms of the gift; that the Plaintiffs had failed to produce their title document in support of their claim; that mutation by itself did not create title and the entries in the revenue record were not conclusive proof of ownership; that the Suit 1151 itself was incompetent as it was filed unauthorisedly; that the Impugned Judgment had allowed claim of arrears of rent even for a period that was time barred.

9. Exercising his right of reply, the learned Counsel for the Respondents No.1 to 5 relied upon the latter's Counter-Affidavit dated 13.11.2018 filed in the instant HCA (at HCA File Pg. 679) and supported the Impugned Judgment. He averred that the HCA was not maintainable as the Appellant was not an aggrieved party in view of its Undated Statement stating that it had no direct or indirect involvement with the dispute in Suit; that this HCA has been filed by an individual in his personal capacity; that the Single Judge's order dated 10.5.2012 reflected that Ministry of Education was aware of proceedings of Suit 1151 yet neither it nor any Counsel for Appellant raised any objection over the non-joinder of Ministry of Education despite ample opportunities; that the Respondents No.1 to 5 sought only one relief mentioned in Prayer clause (iv) of the Plaint against the Appellant, which relief was neither pressed nor granted.

**Primary Issue For Determination**

10. We have heard the arguments of the respective parties and have also considered the record available in the files of HCA and Suit 1151. The primary issue before this Court is to determine whether relief has been granted and Impugned Judgment has been passed against the Province of Sindh without impleading its proper/correct department as a Defendant in Suit 1151

**Analysis Of Arguments Of Both Counsel**

11. Maintainability of HCA: The Counsel for the Respondents No.1 to 5, on the basis of the said Undated Statement, has challenged the very maintainability of this HCA on

the ground that this HCA has been filed by a person (i.e. Appellant) who is not an aggrieved person after the latter's own admission in the Undated Statement that it does not have any kind of involvement in the Suit 1151 matter.

12. The short answer to the objection as to maintainability and the question whether the Appellant is an aggrieved person or not, is that regardless of the Appellant's protestations and stance (as set out in its Undated Statement that it had no concern with the dispute in Suit 1151), the Impugned Judgment and decree has been passed against it and not merely against the CDGK (Respondent No.6's predecessor). The Impugned Judgment orders both the Defendants of Suit 1151 (i.e. Appellant and the defunct CDGK), inter alia, to "*forthwith handover possession of the Suit Properties*". For this reason alone, this HCA filed by the Appellant is maintainable. Thus, the reliance of the Counsel for the Respondents No.1 to 5 on the Appellant's Undated Statement or his claim that the only relief sought against the Appellant in Prayer clause (iv) of the Complaint was neither pressed nor granted become immaterial.
  
13. Additionally, examining the question of Appellant being an aggrieved person from a different standpoint, the very fact that the Respondents No.1 to 5 had joined the Province of Sindh (irrespective of the department) as a Defendant No.1 in Suit 1151 itself shows that they were mindful of the fact that the Province of Sindh was relevant to the dispute. The instant HCA has been filed by the same department (Ministry of Home Affairs) through whom the Province of Sindh was made a party in the Suit 1151. Now, the Respondents No.1 to 5 cannot be allowed to backtrack and take advantage of their own choice (whether right or wrong) by challenging the competency of the same department (Ministry of Home Affairs) to maintain this HCA. Even otherwise, insofar as the right to file an appeal is concerned, any person aggrieved by an order, whether or not he was a party to the proceedings, has the right to challenge that order before the appellate forum. The foundation for this seminal principle is the case of ***H.M. Saya & Co. v. Wazir Ali Industries*** (PLD 1969 SC 65) which has been recently reiterated in ***Munir Ahmed v. Rawalpindi Medical College*** (2019 SCMR 648).
  
14. The Counsel for the Respondents No.1 to 5 also fleetingly argued that this HCA has not been filed by the Province of Sindh but has been filed in an individual/personal capacity and referred to the affidavit to the memo of main Appeal to buttress his argument. Whilst the affidavit to the memo of the main Appeal that has no doubt been filed by one Jawad Ali son of Anwer Ali, without specifying his official capacity or designation, nevertheless, subsequently on 14.9.2018 he has filed an urgent application with affidavit (at HCA File Pg. 657) on behalf of the Appellant wherein he categorically states that (at the relevant time) he is posted as Deputy Director in Education Department, Government of Sindh.

15. Suing the Province of Sindh through incorrect department in Suit 1151: The pivotal contention of the Appellant's Counsel is that the Suit 1151 is bad for non-joinder of necessary party as the correct department through which the Province of Sindh ought to have been sued was the Ministry of Education as the Suit Properties are in its possession and on which it is running the government School and the rent is also paid by it. Since the matter in Suit 1151 pertains to the nationalised School functioning on the Suit Properties, the Ministry of Home Affairs cannot possibly have any interest in or concern with it and we find it rather baffling that the Province of Sindh has been sued through this department in Suit 1151. The Counsel for the Respondents No.1 to 5 without addressing the fundamental question why the said Respondents have chosen to sue the Province of Sindh through the department of Ministry of Home Affairs (which question, so to speak, is the elephant in the room) has defended the joinder of the Province of Sindh, without adverting to the said department, for reasons stated in paragraph 7 of the Plaint (relevant extract of which is reproduced in paragraph 15 below) and has further contended that after the position adopted by the State Counsel in the Undated Statement, the Province of Sindh is no longer a necessary or proper party.
16. As regards the Undated Statement, considering the allegations specifically levelled, inter alia, against the Appellant in paragraph 5 of the Plaint (accusing it of indifference towards protecting lives and properties of citizens), in paragraph 6 of Plaint (accusing it of raising unauthorised construction in violation of the *Sindh Building Control Ordinance, 1979*) and in paragraph 7 of the Plaint (alleging "*it now has covetous eyes on the subject properties which in due course of time had become very valuable*"), it was in this context that the aforesaid laconic Undated Statement was filed stating that there was no direct or indirect involvement of the Appellant with the dispute in Suit 1151; no more and no less. Neither the Appellant volunteered any further information in its Undated Statement nor the Respondents No.1 to 5 bothered to inquire or probe which department then was the concerned department (if not the Ministry of Home Affairs).
17. There is yet another essential aspect. The fact that the Respondents No.1 to 5 are aware that the Ministry of Education is a necessary and proper party/department is established from their own subsequent conduct in another suit instituted by them in April 2016 in this High Court (Original Side) in respect of the same Suit Properties. The Appellant's Counsel vide Statement dated 17.2.2020 has filed copy of the amended as well as original plaint of Suit No.828/2016 (*Mrs. Hailey Vincent D'Abreo & Others v. Province of Sindh & Another*) instituted by the said Respondents (wherein they have impugned a Notification dated 29.1.2016 declaring the Suit Properties as a protected heritage site by the Government of Sindh, which Suit has been decreed and presently forms subject-matter of HCA No.269/2022 (*Province of Sindh & Others vs. Mrs. Hailey Vincent D'Abreo & Others*) pending in this Court). What is striking is that

in this subsequent Suit, the Respondents No.1 to 5 have themselves sued the Province of Sindh through both the Ministry of Home Affairs and the Ministry of Education and have, inter alia, prayed for a direction that the defendants “*hand over the management & possession of the School known as ‘Jufelhurst School’ to the plaintiffs*”. This is not only a testimony to the fact that the Respondents No.1 to 5 are fully cognizant that the correct/proper department is the Ministry of Education but this act of theirs also decimates and proves as conflicting and inconsistent their obdurate insistence and/or stance that the Province of Sindh or the Ministry of Education are not or are no longer necessary or proper parties.

18. Knowledge of representative(s) of Ministry of Education of Suit 1151: We now turn to the other contention of the Counsel for Respondents No.1 to 5 that the Ministry of Education was aware of proceedings of Suit 1151 as its presence has been recorded in Single Judge’s order dated 10.5.2012 and yet it did not object to the maintainability of Suit 1151 over its the non-joinder despite opportunity.

19. Prior to the order of 10.5.2012, the Order Sheet of Suit 1151 shows that the Single Judge on 17.4.2012 (at HCA File Pg. 115) had ordered that:

17.4.2012

*“ Alleged Contemner No.1 Mr. Muhammad Shafiq is present and states that there are four schools, two secondary and two primary, which are running in the subject premises and he is the head Master of one of the Secondary School. **He states that these schools come under the supervision of the District Officer Education and he is the proper person to whom notice should be given.** The current holder of this office is Mr. Ghulam Rasool Jokhio. Notice may be sent to this officer for the next date. .... ”*

***[Emphasis added by us]***

It was in compliance of the aforesaid order that officials of the Ministry of Education appeared before the learned Single Judge on 10.5.2012 (at HCA File Pg. 117). Thereafter, the aforesaid officials of the Ministry of Education again appeared before the learned Single Judge on 30.5.2012 (at HCA File Pg. 121-A) and lastly in order dated 15.2.2017 (at HCA File Pg. 141) the Single Judge directed that on the next date “*some responsible officer from the concerned Education Department shall also be in attendance*”.

20. Thus, the argument of the Counsel for the Respondent No.1 to 5 that the Ministry of Education had knowledge of the proceedings in Suit 1151 is of no help to him and it is not only counterintuitive but also counterproductive. On the contrary, the Counsel’s argument immediately begs the question why his own clients (Respondents No.1 to 5) did not amend the plaint and/or file an amended title joining the Ministry of Education as a party despite the emphatic statement of the Head Master of the School (recorded in the order of 17.4.2012) that the School came under the supervision of

the Education Officer/Department followed by orders dated 10.5.2012, 30.5.2012 and 15.2.2017, when the representative(s) of the said Ministry of Education, time and again, appeared or were directed to appear before the Single Judge which again was indicative of the fact that the Ministry of Education was the concerned/proper department to be joined in Suit 1151.

21. CDGK joined as Defendant No.2 in Suit 1151 when it had already become defunct prior to filing of Suit 1151: We now advert to the Appellant's submission that the CDGK was wrongly impleaded in Suit 1151 (as Defendant No.2) as it had become defunct even before the filing of Suit 1151. The Counsel averred that the CDGK was established in or about 2001 through a local government ordinance (viz. the *Sindh Local Government Ordinance, 2001*) and ceased to exist in or about mid-2011 when the said Ordinance 2001 was repealed whereas Suit 1151 was instituted on 21.9.2011. In support of this contention, the Appellant's Counsel has furnished a copy of the *Sindh (Repeal of the Sindh Local Government Ordinance, 2001 and Revival of the Sindh Local Government Ordinance 1979) Act, 2011* published in the Gazette of Sindh, Extraordinary (Part IV) dated 15.7.2011. Prima facie, there appears to be weight in the contention of the Appellant's Counsel.
  
22. Besides the above, what is jarring and glaringly obvious from the Order Sheet of Suit 1151 is the number of times notices have been issued to the KMC (i.e. CDGK's successor) in Suit 1151 vide orders dated 26.1.2017, 15.2.2017 and 8.3.2017 (at HCA File Pg. 139, 141 & 143 ) with directions to depute an officer well conversant with the facts to assist the Court, which demonstrates a recognition of the fact that the CDGK at least at that point of time was no longer in existence and the KMC had already succeeded the former. Yet, the Respondents No.1 to 5 did not file any application to either amend the plaint and/or file an amended title to formally bring on record the KMC.
  
23. Two Probates of The Same Will: On sifting through the record of Suit 1151, we have noticed that the Respondents No.1 to 5 have attached with their Plaint a copy of Probate signed in June 1967 by Mr. Justice Feroze Nana Ghulamally of the then High Court of West Pakistan, Karachi Bench (at HCA File Pg. 73). However, as per the Deposition Sheet in Suit 1151 (available in Evidence File of Suit 1151 & also at HCA File Pg. 501), on 15.9.2017 at the time of examination-in-chief before a learned Single Judge, the Attorney of the Respondents No.1 to 5 has produced (as Exhibit PW-1/4, at File Pg. 91 of Evidence File of Suit 1151 & also at HCA File Pg. 601) a copy of Probate signed on 11.8.1950 by Mr. Justice G.B. Constantine of the then Chief Court of Sindh at Karahi (and not the Probate annexed with their Plaint). There is no explanation for this key incongruity nor for the fact why two Probates have been obtained for one and the same Will. Additionally, and significantly, the Probate signed in June 1967 specifically refers to a compromise application dated 29.8.1966 and a



compromise decree, copies of which are not available on the record. Similarly, both the Probates refer to schedules but remarkably the same are not attached with either of the Probates and are not available on the record either.

24. Time Barred Rent: According to the Appellant's Counsel, the Impugned Judgment has allowed claim of arrears of rent from August 1994 which rent had become time barred considering the Suit 1151 had been filed on 21.9.2011 whereas under Article 110 of the *Limitation Act, 1908* the limitation prescribed is three years for recovery of arrears of rent from the date when the arrears become due. The Impugned Judgment (in paragraph 12) holds that the CDGK "*has committed wilful default by not paying the rent from August, 1994 and thus the latter is liable to pay rentals at the rate of Rs.816/- from August 1994 till date, which comes to Rs.217,056/-*". The submission of the Counsel for Appellant has force.
25. Suit 1151 instituted unauthorisedly: According to the Appellant's Counsel, the Suit 1151 itself was incompetent from inception as it was instituted unauthorisedly. The record shows that the Suit 1151 had been presented on 21.09.2011 whereas the Power of Attorney(s) of the Respondents No.1 to 5, who all resided in the USA, were executed on 20.11.2014 and 23.12.2014 i.e. well after the date of institution of Suit 1151. Now, whether or not this defect has been cured by subsequent ratification, be it express or implied, is undetermined.
26. Revocation of registered Gift Deed & Title of Respondents No.1 to 5 (Plaintiffs in Suit 1151) to Suit Properties: We turn now to the extract of the property register which records mutation of the Suit Properties in the name of the Respondents No.1 to 5, and which extract under the column "*Nature and Origin of Title*" in turn refers to the III<sup>rd</sup> Senior Civil Judge's Compromise Decree (at HCA File Pg. 83). Through this Compromise Decree, the registered Gift Deed (which gifted the Suit Properties to the Roman Catholic Archbishop of Karachi along with the educational institutions established thereon) has been "*treated as cancelled*" in consideration of an unconditional written apology and payment of Rs.1 million (Rupees one million).
27. The copy of the registered Gift Deed has not been produced by the Respondents No.1 to 5 either in Suit 1151 or this HCA. But the same has been produced by the Appellant vide Statement dated 15.5.2023 filed in this HCA. Relevant paragraphs of this Gift Deed are replicated below:

Unnumbered paragraph 4 of recital of Gift Deed

**" AND WHEREAS Mr. Vincent, Mrs. May and Miss Ena compromised in Suit No.53 of 1962 in the High Court of West Pakistan, Karachi Bench, Karachi and surrendered their rights and titles on the terms and conditions compromised in the said suit. The learned High Court of West Pakistan Karachi Bench,**

*Karachi declared and granted the probate of the Will in favour of the Donor in the said Suit on 20.6.1967. [Emphasis added by us]*

Paragraph 6 of Gift Deed

6. *That from now the Donee will hold, occupy, possess and enjoys the said properties as well as the benefits, privileges etc. of the educational institutions established or caused to be establish in the said properties without interruptions, or evictions by the Donor or any other person deriving title through or under her. ”*

28. In **Sardar Masih v. Jhon Anderias Sardar** (PLD 2009 SC 191), the Supreme Court has affirmed that the requirements of making of a gift or its revocation by a non-Muslim of an immovable property has been examined in many a case on the yardstick of the provisions of sections 122 and 123 of the *Transfer of Property Act, 1882* and the Muslim personal law is not applicable to such gifts. The Court has cited the cases of **T.V. Kalyanasundaram v. Karuppa** (AIR 1927 PC 42) and **Venkat Subba v. Subba Rama Hegde** (AIR 1928 PC 86) where it was held that where the donor of an immovable property had handed over to the donee an instrument of gift duly executed and attested, and the gift had been accepted by the donee, the donor had no power to revoke the gift even prior to the registration of the instrument.
29. Thus, the burning question whether the registered Gift Deed could have been revoked in the manner it has been done by consent vide the Compromise Decree needs determination.
30. So also, although the copy of the Compromise Decree produced by the Respondents No.1 to 5 does not show the complete list of persons who are party in this compromised Civil Suit No.182/2003, however, the title page of the application for withdrawal of the Civil Suit dated 28.4.2010 (at HCA File Pg. 613) enumerates the parties to this Civil Suit which include six (6) defendants. Whilst this withdrawal application has been signed by the Attorney of the present Respondents No.1 to 5 (viz. Sajjad Bashir) and his Advocate, however, it has only been signed by the Advocate of the defendants (of Civil Suit No.182/2003) and not by a single defendant himself. Whether the Advocate had the authority to compromise on behalf of the said defendants is not known. Likewise, whereas the office holders/representatives of the Roman Catholic Church have been made parties in this Civil Suit, why a private person (viz. one Alan Misquita) has been joined as a defendant in this Civil Suit and why the pay order has been made in his son's name (and not in the name of the Roman Catholic Church or its office holders) is again not known.
31. **Mutation Entries in the extract of Property Register**: It has been argued by the Counsel for Appellant that the Respondents No.1 to 5 have not produced any independent document of title to establish their ownership over the Suit Properties but have simply

relied upon mutation entries in the property register. It is indeed an entrenched principle of law that mutation does not confer or create title and its beneficiary is required to prove the original transaction – as has been restated in **Noor Muhammad v. Azmat-e-Bibi** (2012 SCMR 1373), **Peer Baksh v. Khanzadi** (2016 SCMR 1417) and **Nasir Ali v. Muhammad Asghar** (2022 SCMR 1054).

32. Renewal of expired lease during operation of two Status Quo orders: As per the Counsel for the Appellant (and also as reflected from the extract of property register), the eighty (80) year lease of the Suit Properties expired on 1.8.1995 whereafter the Suit Properties reverted to the Government of Sindh.
33. To rebut this, the Counsel for the Respondents No.1 to 5 on 31.5.2023 (i.e. on the day the instant HCA was reserved for judgment) at the time of conclusion of his arguments supplied to this Court a “*Synopsis of Arguments on behalf of Respondents No.1 to 5*” with which he had annexed and produced for the first time letters dated 3.10.2012, 15.10.2012 and 7.9.2021 issued by and/or addressed to the Land Utilization Department, Government of Sindh and contended that lease of one of the plots of Suit Properties (viz. Plot No.356) after bifurcation has been partially renewed while the application for renewal of the second plot of the Suit Properties (viz. Plot No.325/1) is still pending.
34. The first question that would arise is whether the Respondents No.1 to 5 even had any right to the renewal of the lease of the Suit Properties after a long interval in the year 2012 in spite of its expiration way back on 1.8.1995, as it requires determination whether the said Respondents continued in possession, with or without statutory authority or consent of the lessor, after the expiry of the lease.
35. Regardless of the above, in addition, though this fact has not been pointed out by any of the parties, but an examination of the Order Sheet of Suit 1151 reflects that not once but twice on the application of the Respondents No.1 to 5, learned Single Judge(s) vide orders dated 26.9.2011 and 26.9.2012 passed restraining orders directing the parties to maintain status quo. Why the Respondents No.1 to 5 needed to apply for a second restraining order when there was already one in field and whether the learned Single Judge was apprised of the earlier status quo order is unexplained (which reasons are easy to fathom but we do not wish to put them into words here). Be that as it may, the expired lease could not have been renewed in view of the status quo orders passed in Suit 1151 which status quo orders applied to the “*parties*” i.e. Respondents No.1 to 5 equally. How the Respondents No.1 to 5 through their Attorney have accomplished this feat in violation of and during operation of not one but two status quo orders requires explanation, as otherwise it will be akin to putting a premium on illegality. It is also not known whether or not the Land Utilization Department was specifically informed by the Respondents No.1 to 5 of the

aforesaid two status quo orders when they submitted their application for lease renewal.

36. Furthermore, an examination of the lease renewal letter dated 3.10.2012 issued by Land Utilization Department further reveals that one of the Suit Properties viz. Plot No.356 (which measures 4321 sq. yards) after bifurcation has been partially renewed (now numbered as Plot No.GRE-356/1 measuring 1426 sq. yards out of the original 4321 sq. yards). Once again, the question arises whether the bifurcation of the Suit Properties could have been carried out in the presence of status quo order(s) and whether the bifurcation itself is even permissible in law require explanation. Moreover, even today, on the Respondents No.1 to 5's own showing, only a small portion of the Suit Properties has been renewed (albeit illegally) and not the entire Suit Properties (i.e. lease of only 1426 sq. yards has been renewed whereas the Suit Properties jointly measure 5648 sq. yards). Therefore, the contention of the Appellant's Counsel that the Suit Properties after expiry of the lease have reverted to the Government of Sindh requires consideration.
37. From what has been discussed above, the title of the Respondents No.1 to 5 over the Suit Properties requires examination as it does not appear to be free from doubt. The aforesaid aspects could not be attended to by the learned Single Judge as the concerned/proper department of the Province of Sindh was not before him to assist the Court and the documents that have come to light now in this HCA were never produced before him in Suit 1151.

#### **Applicable Legal Principles**

38. Article 174 of the *Constitution, 1973* and section 79 CPC (read with Order 27 CPC) require that suits and proceedings by or against the Federation are to be filed in the name of Pakistan and in case of a Province, it is to sue or be sued in the name of the Province and not through any of its functionaries.
39. In **Gul Ahmed Textile Mills Ltd v Collector of Customs** (PLD 2019 Sindh 144), a Full Bench of this Court, whilst expounding the legislative intent behind section 79 CPC and Article 174 of the *Constitution, 1973* observed that:

10. ... .. In a Civil Suit after its admission, summons as prescribed are issued against all defendants to file their written statements. Now if some relief is being sought against Government without its proper impleadment as a Defendant, there would be no proper assistance or representation on its behalf, rather it would be a case of Ex-parte proceedings for all practical purposes, whereas, it is not so in Constitutional Petition, as invariably, the Attorney General's office is put to notice through Deputy Attorney General or Standing Counsel.

40. The Supreme Court in the recent case of **Muree Brewery** (supra) has pronounced:

*“14. Therefore, the legislative intent and the purpose of the operation of this provision is for the State, or the province to be adequately represented and defended through the impleadment of the proper department. This purpose cannot be achieved if the concerned and proper department is not made a party to the suit, nor can it be achieved if the State, or Province, are not named in the suit.*

*15. This Court, in previous matters before it, has held that section 79 of C.P.C. is a mandatory provision, where the State, or the Province, was either not impleaded in compliance with section 79 of the C.P.C. and Article 174 of the Constitution, or the concerned department was not made party to the suit. Reference can be made to the cases of Province of the Punjab through Member Board of Revenue (Residual Properties) v. Muhammad Hussain [PLD 1993 SC 147], Haji Abdul Aziz v. Government of Balochistan through Deputy Commissioner, Khuzdar [1997 SCMR 16 (paragraph 9)], and Government of Balochistan CWPP&H Department and others v. Nawabzada Mir Tariq Hussain Khan Magsi [2010 SCMR 115 (paragraph 7)].*

*16. ....*

*17. In light of what has been discussed above, as a matter of general principle, section 79 of the C.P.C. is a mandatory provision to the extent where the Government is wrongly impleaded or the concerned and proper department is not made party to the suit. Such actions will render the suit invalid. However, it does not close the right of the person filing the proceeding to file the case afresh, subject to limitation by impleading the correct Respondents in accordance with the provisions of section 79 of the C.P.C.”*

41. A long sequence of judgments of the Supreme Court on section 79 CPC have emphatically ruled that no suit can be filed against the Government without impleading the Federation or the concerned province as a party, as the case might be, since the procedural precondition is mandatory in nature and no relief can be sought without its strict compliance. Where the Government has been wrongly impleaded or its concerned or proper department has not been made a party to the suit, such a suit would not be maintainable but would be liable to be dismissed, as this defect goes to the root of the matter, and the plaintiff may then file a fresh suit if it is within the limitation period.

### **Conclusion**

42. For the reasons discussed above, we were initially minded to remand back the Suit 1151 to the learned Single Judge (Original Side) for a fresh trial and decision in accordance with law, inter alia, with directions to the Respondents No.1 to 5 (Plaintiffs) to file amended plaint impleading as parties the Province of Sindh through the Secretary, Ministry of Education, the Land Utilization Department (Board of Revenue),

Sindh as well as the Diocese Council, the Roman Catholic Archbishop of Karachi and the Roman Catholic Church through its representatives in Pakistan.

43. However, the series of authoritative pronouncements of the Supreme Court encapsulated in **Murree Brewery** (supra) leave us with no other choice but to accept this HCA, set aside the Impugned Judgement and decree and dismiss the Suit No.1151/2011, with option to the Respondents No.1 to 5 (Plaintiffs) to file suit afresh in accordance with law. The pending application(s) in the instant HCA stand disposed of. The parties are left to bear their respective costs.

**JUDGE**

**JUDGE**

Karachi  
Dated: 31<sup>st</sup> August, 2023