

IN THE HIGH COURT OF SINDH AT KARACHI

Present: Mr. Justice Salahuddin Panhwar
Mr. Justice Khadim Hussain Soomro

C. P. No.D-2920 of 2017

Petitioner: Mst. Asma Shakeel
Through Special Attorney Muhammad Khalid

Respondents: Province of Sindh & others

C. P. No.D-7210 of 2019

Petitioner: Muhammad Naveed Ahmed
Through Special Attorney Muhammad Shoaib

Respondents: Province of Sindh & others

C. P. No.D-4305 of 2016

Petitioner: Habibullah
Through Special Attorney Muhammad Khalid

Respondents: Government of Sindh & others

Date of hearing: 22nd May 2024.

Date of announcement: 31st May 2024.

APPEARANCE:

Syed Wajahat Abbas, advocate for the petitioners in CP.No.D-2920/2017 and CP.No.D-7210/2019.

Ms Naushaba Haque Solangi, Assistant Advocate General Sindh a/w Syed Jawwad Muzaffar, Deputy Commissioner, Korangi, Mukhtiarkar Korangi and Mukhtiarkar Landhi.

Mr. Shabbir Shaikh, Advocate for the Board of Revenue, along with Aziz Chandio S.O. Litigation L.U. Department.

Mr. Khurram Ghayas, Advocate for KDA, along with Jamil Ahmed Baloch, Additional Director (E&E) KDA.

Mr. Abdul Haleem Jamali advocate for respondent No.6 in CP.No.D-2920/2016.

Mr. Muhammad Sajjad, Law Officer, Pakistan Rangers.

J U D G M E N T

KHADIM HUSSAIN SOOMRO J : Through this consolidated judgment, we intend to decide the above-captioned petitions filed by petitioners under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (**The Constitution**), as they involve a common question of law.

2. Brief facts involved in these petitions are that in C.P.No.D-2920 of 2017 and C.P.No.D-7210 of 2019, the petitioners claimed themselves lawful and bonafide owners of industrial plots allotted to them after fulfilling the requisite formalities. However, it is the case of the petitioners that respondent No. 6 raised illegal and unauthorized construction, and though the petitioners approached the official respondents, it was all in vain. It is further contended that litigations are also pending between the parties. In C.P.No.D-2920 of 2017, it is inter-alia prayed that:

"It is under the circumstances prayed that this Hon'ble Court may be pleased to hold and declare that the Petitioner being a legal, lawful and bonafide owner of industrial open plots bearing Nos. 126, 144 & 145, each measuring 600 Sq. Yards situated in Sector 7-A, Korangi Township, Karachi, as such, is entitled to use and utilize the same in accordance with law."

In C.P.No.D-7210 of 2019, it is *inter-alia* prayed as under:

"A) It is under the circumstances prayed that this Hon'ble Court may be pleased to hold and declare that the Petitioner being legal, lawful and bonafide owner of industrial open plots bearing Nos 148,149 and 150 measuring 712.711 and 711 Sq yards respectively situated in Sector 7-A, Korangi Township as such, is entitled to use and utilize the same in accordance with law

B) That this Hon'ble Court may be pleased to direct the Official Respondents to remove encroachers from Petitioner's plots bearing Nos 148,149 and 150 measuring 712,711 and 711 Sq yards respectively situated in Sector 7-A, Korangi Township and to ensure that the right of Petitioner to said property is not being violated in the future."

3. Karachi Development Authority (**KDA**) filed their comments in which it is mentioned that the land in question was encroached upon by respondent No.6, and KDA shall remove the encroachment if the cooperation of law enforcement agencies is provided to them. Respondent No.6 also filed a reply in which he denied the allegations and contended that the land belongs

to the Board of Revenue and KDA has nothing to do; that on the land in question, a village is situated, and the process for regularization of the village was stopped for want of decision of Government with regard to fixation of Malkano/price of involved land and issuance of differential Malkano challans etc; that matter is still pending with Board of Revenue.

4. In C.P.No.D-4305 of 2016, the Petitioner (who is respondent No.6 in C.P.No.D-2920 of 2017) claimed that he is the lawful owner of the property bearing Plot No.194 measuring 197 sq. yards situated at Sector 7-A, Chamra Mandi Korangi Haji Ibrahim Goth, Tehsil & District Korangi Karachi vide order No.Rev/988/94 date 27.03.1994 under notification policy No.KB-11/1-38/77 Policy/144 dated 12.1.1980 issued by sub-section Government of Sindh in the exercise of powers conferred by subsection (2) of section 10 of the colonization of government lands and having registered lease deed of about 99 years along with titled documents in his name; that land in question consists about the 350 Houses, including the plot of the Petitioner's brother namely Zafarullah who is owner of the plot bearing No.180 measuring 130sq. Yards and the same is registered on the record of Government, and there is a dairy farm of the Petitioner; that on 04.08.2016, the respondent No.2 along with his staff, i.e. Magistrate, Mukhtiarkar, Police of P.S. Zaman Town appeared and removed the house of the Petitioner as well as a dairy farm and also demolished the house without notice; hence, Petitioner has filed instant petition.

5. Counsel for the petitioners in C.P.No.D-2920 of 2017 and C.P.No. D-7210 of 2019 contends that the petitioners received commercial plots by the KDA after fulfilling all requisite formalities without possession; hence, they approached the KDA officials and sought possession of the commercial plots legally allotted to them by industrial purpose.

6. On the other hand, counsel for the KDA while admitting that on the land in question, one village Haji Ibrahim Goth is situated. The focal person and counsel contend that this village was in the Malir River bed; however, due to the flood, villagers were shifted and nestled on the land where they established their village. KDA acquired the land from the Sindh Government, demarcation was made, and this village comprises around 9 acres in maps. However, they have extended their limits and are unlawfully

occupied by 21 acres. Counsel for the KDA further contends that in view of KDA Rules, the possession is not handed over to the allottees; the KDA will take coercive measures by removing illegal occupants and handing over the possession of the land in question to the allottees.

7. Counsel for the Interveners (villagers), while referring to Civil Suit No.1121/2016, contends that the village was surveyed comprising 21 acres, yet that issue is pending regularization. Accordingly, villagers are not in illegal possession, and KDA was not put into possession by the Sindh Government; therefore, KDA was/is not competent to allot this area to any person for any purpose.

8. Counsel for the Member Board of Revenue [BOR] candidly admits the claim of the villagers while referring to the documents/survey showing therein that this village is comprised of around 21 acres; however, around 9 acres were regularized, and the remaining land is pending further decision. Moreover, KDA has never ever been in possession of the land. Hence, on this account, they cannot be dispossessed, and this question of whether the KDA acquired this land is a factual controversy; civil suits are already pending.

9. In a similar vein, the learned AAG vehemently contends that petitions filed by the allottees of KDA are not maintainable as this Court, under Writ of Mandamus, cannot grant a decree of possession; KDA officials were not competent to dispossess any villagers, who are occupying the government land under the valid allotment.

10. Heard and perused the record.

11. It is a clear and undeniable fact that the land in question belongs to the Government of Sindh. KDA asserts that they have acquired it through the proper process outlined in the Land Acquisition Act 1894. In accordance with this, a notification under Section 6 of the Land Acquisition Act 1894 was issued. However, the award has not been passed till today. Furthermore, the learned AAG and the BOR representative have denied the issuance of the above notification. As per the record of the relevant Deh, the disputed land is not mutated in the name of KDA, but the counsel for the KDA produced a photocopy of the entry. As per Mukhtiarkar of the concerned Deh, the same entry is not available on the record. The Land Utilization Department [L.U.]

record also demonstrates that neither the land was allotted to the KDA nor was the possession handed over to them. In reference to the documents/survey, the representative for BOR said that this village covers approximately 21 acres. However, only around 09 acres have been officially approved, and the remaining area is awaiting a decision from the Chief Minister of Sindh. In this state of affairs, it can be safely observed that when KDA was not holding a perfect title of the subject land, how could they issue the allotment order/lease to various individuals, including the Petitioners in C.P Nos. D-2920 of 2017 and D-7210 of 2019. The maxim "Nemo dat qui non habet", means that no one can give what he himself has not. The principle laid down by the Honourable Apex Court of Pakistan in the case of *Muhammad Jameel and others v. Abdul Ghafoor* (2022 SCMR 348) revolves around the legal maxim "Nemo dat qui non habet", which translates to "no one gives what he doesn't have". This principle is a fundamental concept in property law that asserts that a person cannot transfer a greater right in property than they themselves possess. In the context of the case the Apex Court has discussed this maxim to determine the legitimacy of the title transferred in a property transaction. If a party attempts to transfer ownership of a property that they do not have a valid title to, the transfer is invalid, and the recipient cannot acquire a better title than the transferor had. Therefore, all the allotments and leases issued by the KDA are disputed, which can only be proved through ocular as well as documentary evidence in the wake of their proper appreciation and not in the writ petitions.

12. The extraordinary jurisdiction provided by Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973, aims to offer an expeditious remedy in cases where the illegality of an action can be proven without a lengthy investigation or evidence gathering. However, in the case at hand, there are a plethora of disputed documents submitted by both parties, and there are also disputed factual issues that can only be decided by the courts of plenary jurisdiction after recording evidence. The reliance can be placed on the case of the *Government of Khyber Pakhtunkhwa v. Intizar Ali* 2022 SCMR 472 and *Amir Jamal v. Malik Zahoor-ul-Haq* 2011 SCMR 1023. The principle established by the Apex Court of Pakistan in the case of *Government of Khyber Pakhtunkhwa v. Intizar Ali* emphasizes the

jurisdictional boundaries between superior courts and civil courts regarding factual controversies. The Apex Court clarified that superior courts are not the appropriate forums for engaging in disputes over factual matters. Instead, such controversies should be resolved through a thorough inquiry and the recording of evidence in a civil court. This principle underscores the procedural aspect of law where the superior courts, such as the Supreme Court or High Courts, primarily deal with questions of law rather than questions of fact. Civil courts, on the other hand, are equipped to handle the examination of evidence, witness testimonies, and other factual determinations necessary to resolve disputes.

13. Another important aspect of the case is the Petitioners in C.P Nos. D-2920 of 2017 and D-7210 of 2019 sought the relief of the declaration of ownership. It is evident that a declaration in civil matters, as claimed under section 42 of the Specific Relief Act, can only confirm a pre-existing right and cannot establish a new right through a court decree. Similarly, exercising its Constitutional Jurisdiction outlined in Article 199, the High Court has the power to recognize a pre-existing right. However, it cannot establish a new right through a declaration issued under Article 199. Moreover, the entire scheme under Article 199 enforces constitutional rights but does not create a right, as the Petitioners seek in the present petitions. The reliance can be placed in the case of *Director Military Land And Cantonment Quetta Cantt Quetta and others V/S Aziz Ahmed and others (2023 S C M R 860)*.

14. The Petitioners in C.P No D-7210 of 2019 claimed that the private respondent had unauthorized encroachments upon their land. "Encroachment" typically refers to the unauthorized or illegal occupation or use of their private property by an individual, group, or entity without the rightful owner's permission. This can involve physical structures, such as buildings, fences, or installations, extending beyond the boundaries of the property line. The relevant Section 2 (j) of the Sindh Public Property Removal of Encroachment Act 2010 says as under:-

"encroachment" means the unauthorized occupation of or undue interference with public property;"

15. While pointing to the records and survey that prove that this hamlet is made of around 21 acres, the counsel for the Member Board of Revenue

(BOR) agrees that the villagers' claim is true. However, only approximately 09 acres of the village have been regularised, and the issue of the remaining area is currently awaiting a decision from the Chief Minister of Sindh. Hence, no case of illegal encroachment has been made.

16. In the light of the foregoing legal and factual matrix, petitions, i.e. C.P No.D-2920 of 2017 and D-7210 of 2019 and D-4305 of 2016, are hereby dismissed. However, the petitioners, in C.P. No.D-4305 of 2016, shall not be dispossessed except in due course of law. They may approach the BOR to regularize their village in accordance with the law.

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