

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A. No.111 of 2016

Shabir Ahmed and others -----Applicants.

versus

Muhammad Rahim and others -----Respondents

Barrister Jawad Ahmed Qureshi advocate for Applicants.
Mr. Naeem-ud-din Sahito Advocate for Respondents No.1 to 5.
Mr. Muhammad Yousuf Rahpoto Assistant AG.

Date of Hearing: 10.04.2025

Date of Decisions: 22.04.2025

J U D G M E N T

MIRAN MUHAMMAD SHAH, J.- This revision application under Section 115 CPC is filed against the judgment and decree passed by the learned Additional District and Session Judge Matli in Civil Appeal 43 of 2015 dated 22.01.2016 whereby the learned Addl. District Judge dismissed the appeal of the applicants and upheld the order dated 23.05.2015 in FC Suit No. 130 of 2011 whereby Plaintiff was rejected under Order 7 Rule 11 of the CPC. The relevant facts of the case in a nutshell for the disposal of this revision application are that the applicant filed FC Suit No. 130 of 2011 for declaration, cancellation, mandatory and permanent injunction against the Respondents stating therein that they are owners of the agricultural land bearing survey no. 1,4,9,12,18,21,34,35,41,42,17,19,32,59,84 to 87,60,61,70,72 and others situated in Deh Sonaro Taluka Matli and Survey No. 126 to 130, 141, 145,146, to 148,155 and others admeasuring about 200 acres in Deh Kharari Taluka Matli district Badin. These lands of the Applicants are situated with lands of other landowners including Respondent No.1 to 5 situated in above-mentioned Dehs and in Deh Khachar Taluka Matli who lifted the water for irrigation from watercourse no. 7/R and 8/R of Soomarki distributary of Rohri canal of Sukkur barrage.

Above-mentioned lands of the Applicant and private Respondent and other landowners being in the tail of the Somarki distributary and due to non-remodeling of it and shortage of irrigation water could not receive water therefore most of the lands of the landowners remain uncultivated for several years prior to the excavation of Murad Wah from Phulleli canal of Kotri Barrage in the year 1988/89. Therefore, an effective solution and source was provided to these lands through Murad Wah. After the excavation of Murad Wah all the tail landowners of Soomarki distributary as well as of other minors were directed to irrigate their lands from Murad Wah. Since then the Applicants and the Respondents and other landowners of the watercourse 7/R and 8/R of Soomarki distributary are irrigating their lands from watercourse no. 21/L and RD/35/2 of Murad Wah without any hindrance from any corner. The Applicants have stated in their Complaint that they approached the Respondents for having the command plan for the same watercourse its copy of the Karia register and its alignment but they were told by the Respondents that these documents have not been so far sanctioned/approved by the competent authorities. Appellants further stated in their Complaint that three (03) months prior to the filing of the Civil Suit before the Senior Civil Judge Matli when they wanted to irrigate the lands as usual but the Kamdar of the Respondent No.1 to 5 restrained them from irrigating their lands from the said watercourse. Upon enquiry, the Kamdar disclosed that the lands of Respondents No.1 to 5 have been transferred to a different watercourse at RD/36/2 of Murad Wah and under the instructions is restraining the Applicants. The Applicants then approached the Respondent No.6 and 7 who provided the proposed sketch showing command plan of watercourse RD/36/2 wherein the lands of the Applicants are not included but this proposal of watercourse has not yet been sanctioned and as soon as the proposed watercourse is sanctioned the watercourse no. 21/L at RD/35.2 of Murad Wah would be closed and the Applicants would not be able to irrigate the lands from the purposed watercourse RD/36.2 and they would be left no option but to irrigate the lands from the original watercourse no. 7/R and 8/R of Soomarki distributary.

Accordingly, the Applicants filed FC Suit No. 130 of 2011 on 13.12.2012. That the Respondents were served notices to which they filed their written statements and denied averments made by the Applicants. They also filed the application under Order 7 Rule 11 on the ground that the Plaintiff has no cause of action and suit is not maintainable and said court has no jurisdiction to shift the sanctioned water of the Plaintiff/Applicant from one watercourse to another watercourse which is purely the function of the irrigation department and then the Chief Minister Sindh as the suit is not maintainable under the law. That on 23.05.2015 after hearing both the parties the learned trial court rejected the Plaint under u/O 7 Rule 11 CPC. Thereafter, the Applicants preferred Civil Appeal No. 43 of 2015 under Section 96 CPC before the District Judge Badin and the same was transferred and decided by Additional District Judge Matli by Judgment dated 22.01.2016. Against the concurrent findings of both the courts below the Applicants filed this Revision Application.

I have heard the learned counsels of the parties and perused the material available on record.....[to be continued]

The learned counsel for the Applicants raised the following contentions:

1. That the impugned Judgment, Decree and order passed by the Learned Senior Civil Judge Matli and Additional District Judge Matli are against the law, facts and equity.
2. That the Learned Trial Court and Appellate Court have failed to Exercise their Jurisdiction so vested by Law.
3. That the leaned Senior Civil Judge Matli and Learned Additional District Judge Matli have not discussed in their Judgments regarding the claim of the Appellants and entire Judgments are to be passed on erroneous, filmy and baseless findings.
4. That the learned Trial Court as well as Appellate Court have unlawfully illegally rejected the plaint as well as Appeal through the Impugned Judgment Decree and order and as such impugned

Judgment, Decree and order are liable to be set aside, as it is settled law that while rejecting the plaint U/O7, Rule 11 CPC the court is required to deem all the contents of the plaint to be true and correct and to consider those averments of Written Statement which have been admitted by the Appellants, proposed water course at RD-36.2 has not yet been sanctioned by the competent authorities the Trial Court must have called the sanctioned order from Respondents but instead thereof the trial court rejected the plaint on the ground that the Appellants should have approached to Irrigation authorities U/S 91 of Irrigation Act for transfers of their peach to that water course which is still not approved by the competent authorities as such this direction or finding or observation of the Learned Trial Court and Appellate Court is based upon surmises and conjectures.

5. That Learned Trial Court as well as first Appellate Court have not correctly considered the respective submission of the Appellants.
6. That it is wrongly observed by the Learned Trial Court that the Appellants have admitted in the plaint that the Respondents No:1 to 5 have got their peach transferred to Water Course at RD-36.2 of Murad Wah of Kotri Barrage after adopting due process. It is submitted that neither the Appellants have admitted nor the plaint reveals that the Respondents No:1 to 5 have got transferred their peach to water course at RD-36.2 of Murad Wah after adopting due process.
7. That the learned Trial Court as well as Appellate Court have failed to consider that Appellants in their plaint have mentioned that the lands of Respondents No:1 to 5 along with the lands of the Appellants were being irrigated from water course at RD-35.2 of Murad Wah since 1988-89, when the Murad Wah from Phulleli canal was excavated and Respondents No:1 to 5 have applied shifting their lands to water Course on RD-36.2 of Murad Wah, but the same is not sanctioned /approved by the competent authorities.
8. That Learned Trial Court as well as Appellate Court also ignored to consider the contents of the plaint wherein it is clearly mentioned that module of Water course at RD-36.2 has been constructed and Respondents No:1 to 5 are restraining the Appellants from receiving water through this water course.

9. That the Learned Trial Court and Appellate Court have failed to consider that the plaint clearly provides that the required water course at RD-36.2 is also passing from the lands of the Appellants and no objection has been taken from the Appellants for passing alignment of this proposed water course from the lands of the Appellants.
10. That the Learned Trial Court and Appellate Court have not consider the due process in its legal sense to be applied in Irrigation matters which includes the no objection to be taken from the person from whose lands the proposed water course is passing through.
11. That the Learned Trail Court as well as Appellate court have illegally considered that Appellants have not approached the Irrigation authorities for the transfers of their lands from water course at RD-35-.2 to water course at RD-36.2 It is submitted that when water course at RD-36.2 of Murad Wah itself is not sectioned then how the Appellants can apply such transfer of peach to it. The Respondents No: 1 to 5 or even by the Government official of Irrigation Department have not produced the sectioned order whereby the transfer of the lands of the Respondents No: 1 to 5 were allowed from RD-36.2 of Murad Wah. Revised Modular statement (RMS) and copy of karia Register copy could not be deemed as sectioned/approval of the water course at RD-36.2 these documents are prepared after the proposal of transfer of peach from one waters course to another water course is allowed by the competent authorities and the same is not produced by the Respondents with their Written Statements or Counter Affidavits in objections to the Application U/O 39 Rule 1 & 2 C.P.C. and with application U/O 7 Rule 11 C.P.C.
12. That their Trail Court and Appellate Court have not taken the contents of the plaint and the submission made by the advocates of the Appellants in true legal sense the Appellants are not claiming the transfer of the peach of their lands over the water course at RD 36.2, but they have prayed that either they may be allowed to receive the water from the water course at RD-35-2 and if the same is not available then they may be provided water from the water courses at RD-36.2 along with the lands of the Respondents No:1 to 5 which is still not sanctioned functioning at the site.

13. That it is against the law and equity and good conscience that the Appellants are neither being allowed to irrigate their lands from their existing water course at RD-35.2 which was admittedly available there. From where the lands of the Respondents No: 1 to 5 have been proposed to be transferred to the water course at RD-36.2
14. That the Appellants are not being allowed to receive water from water course at RD-35.2 Or RD-36.2 of Murad Wah there are illegal and malicious acts of the Respondents inter se which could only be complained and redressed by the Competent Civil Court of Law and not with the Irrigation authorities U/S 91 or any other provision of Sindh Irrigation Act.
15. That the Learned Trial Court and so also First Appellate Court have misread and misinterpreted the factual and legal aspects brought to their knowledge in respect of contentions of the parties hence the Impugned Judgment, Decree and order are liable to be set aside by this honorable Court.
16. That the Learned Trial Court as well as Appellate Court have acted in exercise of the jurisdiction illegally and with material irregularities while passing the impugned Judgment, Decree and order. Hence the same are liable to be set aside by this honorable Court.
17. That the Learned Trial Court and Appellate Court have illegally held that Appellants have no any cause of action and the plaint is barred under the provision of Sindh Irrigation Act.
18. That the illegal and fraudulent Act of the authorities are always required to be checked by the Civil Court Of Law not by the authorities themselves.
19. That the Revision is well in time and further more Grounds would be advanced and argued at the time of hearing with permission of this honorable Court.
20. He has relied upon 2012 CLC 1445, PLD 2008 Karachi 458, 2009 YLR 1827 and 2024 MLD 656.

The learned counsel for the Respondents No.1 to 5 raised the following contentions:

1. That on page No: 121 of written statement filed by Assistant Executive Engineer Sub Division Matli. That the in the year 1989/90 Government of Sindh approved scheme named Murad Wah to supplementing area measuring 48320 acres of Tail channels of Nasir Division (Sukkur Barrage), as per command plan prepared by Nasir Division the area was included in the command of Murad Wah and the area of the plaintiff has not been included in the command of Murad Wah/ Kotri Barrage.
2. That plaint para No: 03 are replied that in fact that after excavation of Murad Wah system in the year 1989/90 all the khatedars, whose land were included in the command of Murad Wah were informed to take water from Murad Wah of Kotri Barrage. Water was. however received nor plaintiff approached to the higher authorities from the same, defendant No: 6 to 9 as stated by the plaintiff in their plaint.
3. That as the land of the plaintiff are not sanctioned on water course No: 24-L and 21-L Ex-Murad Wah, hence the private defendant did not allow the plaintiff to take water from Murad Wah, hence the act of the defendant No: 01 to 05 is correct and legal.
4. That it is submitted it is as the perusal form the sketch provided by the plaintiffs, it shows that the land of the plaintiff is settled on 7-R and 8-R Ex-Soomarki Distry but the land of the defendant No: 01 to 5 have transferred their lands on water course No: 21-L and 21-L Ex Murad wah legally by the competent authority.
5. That the Murad Wah scheme was approved by Government to supplement to area of tail channels of Nasir Division and the command plan was supplied by Nasir Division and that area was included in the command of supplement channel Murad Wah and the land of plaintiff was not included in the command plan in the Nasir Division.
6. That the plaintiff has never approach to defended No: 8 and 9 for transfer of their area from Soomarki Distry (Sukkur Barrage) to Murad Wah (Kotri Barrage)

7. That the suit was filed by the plaintiff before Senior Civil Judge Matli in the year 2011 vide FC Suit No: 130 of 2011 which is time barred. The order passed by the Senior Civil Judge Matli on dated: 23-05-2015 also mentioned in his order "the suit is clearly barred under the provision of Section 91 of Sindh Irrigation 1879, hence the plaint of the suit is hereby rejected u/o 7 rule 11 CPC.
8. That an appeal filed by the plaintiff against order passed by Senior Civil Judge Matli in FC Suit No: 130 of 2011 before the Additional Session Judge Matli and same was also dismissed on dated: 22-01-2016 on same grounds in Civil Appeal No: 43 of 2015.
9. That Civil Revision No: 111/2016 is not maintainable and liable to be dismissed.

However, after hearing both the parties nothing substantial and material has transpired but written statement filed by the official Respondents i.e. Assistant Executive Engineer Matli Sub-Division Matli (Defendant No.6/ Respondent No.7) had clarified the situation in his Written Statement and stated in his in his written statement before the learned Trial Court that in the year 1989-90 Government of Sindh approved Scheme namely Murad Wah to supplement area measuring 48320 acres of tail channels of Nasir Division (Sukkur Barrage). As per command plan prepared by Nasir Division the area was included in the command of Murad Wah and the area of the (Respondents No.1 to 5) was included in the command of Murad Wah (Kotri Barrage). After the excavation of Murad Wah system in the year 1989-90 all the Khatedars whose lands were included in the command of Murad Wah were informed to take water from the said channel as per sanctioned sources. He further states in his Written Statement that the Plaintiffs/Applicants of this revision never received water of Nasir Division (Sukkur Barrage) from Murad Wah (Kotri Barrage) nor they approached the higher authorities for the same. According to him the lands of the applicants were never sanctioned on watercourse No.24-L and 21-L Ex Murad Wah hence the Applicants were not

allowed to take water from Murad Wah. The officials of the Irrigation Department further submits that as perusal from the sketch provided by the Applicants it shows that the land of the Applicants/Plaintiffs is settled on 7-R and 8-R of Ex-Soomarki Distributary however the lands of the Defendants/Respondents No.1 to 5 have been transferred on Murad Wah legally by the competent authority for watercourse No.21-L and 24-L of Ex Murad Wah. He further states that Murad Wah was the scheme approved by the government to supplement the tail area channels of Nasir Division from the Murad Wah. Further clarification was brought in before this Court by the reply of the Executive Engineer Phuleli Canal Division Badin (Respondent/Defendant No.8) in para No.2 which is as under:

2- That the proposed area stated above was supplied additional discharge from Murad Wah Non Perennial system of Kotri Barrage now under the Administration of Sindh Irrigation & Drainage Authority Hyderabad since operation of Murad Wah in the year 1989-90. It is further submitted that in the year 1995 on the request of Private Respondents No:1 to 6 a separate water course for their area measuring 490 Acres shaded in blue colour in the attached sketch by transferring from water course No:21-L & 24-L Ex: Murad Wah as well as some area from water course No:7-R & 8-R Ex: Soomarki Minor, which was not included in the original proposed area of 48000 Acres, necessary case papers were prepared and the off take point of new water course was proposed at RD:36.2 Left side of Murad Wah and the applicants request was considered and approval accorded by the competent authorities subject to the observation of the codal formalities. The approval was conveyed by the Secretary to Government of Sindh Irrigation & Power Department Karachi under his Memo No:7/1546-SO (H&R)/190 Dated:12-02-1995. Necessary Revised Modular Statement was sanctioned by the Superintending Engineer Left Bank Construction Circle Hyderabad. The photo stat copy of the Revised Modular Statement and sketch showing the required details on its index are attached as Annexure "A & B" respectively.

From the perusal of the statement /brief note/Written Statement filed by the concerned officials of the irrigation department it has transpired that the present applicants/appellants were never given any sanction to acquire water from the watercourses of Murad Wah. These khatedars never fell in the command area of Murad Wah as prescribed above. Contrary to that the Respondents No.1 to 5 were receiving the water from the watercourse No.21-L and 24-L from Murad Wah started receiving sanction water through a

separate watercourse. Later on the Respondents sought approval of a new watercourse proposed as RD 36.2 left side of Murad Wah. Such request was considered and approved by the competent authorities subject to the observation of the codal formalities hence the Respondents No.1 to 5 are receiving their water through a sanctioned scheme whereas as per note filed by Respondent No.8 the Applicants are irrigating their lands through Murad Wah on private negotiations with the original Khatedar and hence are not entitled for any official peach unless approved by the competent authority. In the concluding para Respondent No.8 states that “this Honourable Court is further requested to be pleased to direct the Applicants to approach in this regard to the Chief Minister Sindh who is the competent authority to transfer the area of peach from the command of Sukkur Barrage to the Kotri Barrage”.

This being the case I have come to the conclusion that the Applicants might have approached civil Court with prayer for declaring the Applicants/Plaintiffs as entitled to irrigate their lands from Soomarki Distributary of Sukkur Barrage to the Watercourse No.21-L and RD No.35.2 of Murad Wah on the ground that the Plaintiffs/Applicants are also entitled to irrigate their lands from watercourse No.RD 36.2 however such proposition is barred u/s 91 of Sindh Irrigation Act 1879. Section 91 is reproduced as under:

91. Power to change source of water-supply. - (1) ever it appears to any Canal-officer not inferior in rank to an Executive Engineer that it is expedient to change the source of water-supply of any land for the more efficient distribution of water, he shall serve a notice on the holder or holders of the land and, if he proposes to transfer the source of water-supply of the land to any existing water-course, on the owner or owners of such water-course also, calling upon them to state in writing their objections, if any, as to the source or alignment or construction of the proposed water-course.

(2) (i) If no objection is raised within thirty days from the date of service of the notice, the Canal-officer may change the source of water-supply of the land in such manner as he thinks expedient.

(ii) If any objections are received within the said period of thirty days, the Canal-officer shall give the holder or holders of ²[the land and the owner or owners of the water-course] a reasonable opportunity of being heard and

may, if the said objections are settled to change the source of water-supply accordingly.

(iii) If no settlement in respect of the said objections be arrived at between the Canal-officer and the holder or holders of ²[the land and the owner or owners of the water-course], the Canal-officer shall forthwith refer the matter to the ³[Collector] whose decision ⁴[which shall be given after giving the holder or holders of the land affected an opportunity of being heard] subject to any orders that may be passed in revision by the ¹[Commissioner], shall be final and conclusive as regards the alignment and construction of the proposed water-course and shall not be called in question in any Civil Court.

However, placing my reliance upon two unreported judgments of this Court (both of this Circuit i.e. Hyderabad) R.A. No.94 of 1991 and R.A. No.09 of 2023 both placing reliance on the judgments of the Honourable Supreme Court. I produce relevant paras of R.A. No.94 of 1991 below under:

12. The barring provision in a statute is only applicable when the official acts are neither tainted with mala fides nor is unreasonable. The barring provision cannot be strictly interpreted, resulting in depriving a citizen/person of his substantial rights and that too when it has been vehemently agitated that the order passed by the revisional authority suffers from material illegality and was against the principles of natural justice as no proper hearing opportunity was given to the present applicants. In this regard, guidance can be taken from a well-known judgment reported as PLD 1997 Supreme Court Page-03 (Abbasia Cooperative Bank v/s Hakeem Hafiz Muhammad Ghaus and 05 Others), wherein the Hon'ble Apex Court has laid down the rule about the ousting provision in a statute in the following words:-

“The next question which arises for consideration in the cases is, whether the Civil Court was competent to examine the validity of the auction conducted by the authorities? The Civil Court under section 9 of the Code of Civil Procedure are competent to try all suits of civil nature except those of which their jurisdiction is barred either expressly or by necessary implication. It is a well-settled principle of interpretation that the provision contained in a statute ousting the jurisdiction of Courts of general jurisdiction is to be construed very strictly and unless the case falls within the letter and spirit of the barring provision, it should not be given effect to. It is also well-settled law that where the jurisdiction of the Civil Court to examine the validity of an action or an order of executive authority or a special tribunal is challenged on the ground of ouster of jurisdiction of the Civil Court, it must be shown (a) that the authority or the tribunal was validly constituted under the Act; (b) that the order passed or the action taken by the authority or tribunal was not mala fide; (c) that the order passed or action taken was such which could be passed or taken under the law which conferred exclusive jurisdiction on the authority or tribunal; and (d) that in passing the order or taking the action, the principles of natural justice were not violated. Unless all the conditions mentioned above are satisfied, the order or action of the authority or the tribunal would not be immune from being challenged before a Civil Court. As a

necessary corollary, it follows that where the authority or the tribunal acts in violation of the provisions of the statutes which conferred jurisdiction on it or the action or order is in excess or lack of jurisdiction or mala fide or passed in violation of the principles of natural justice, such an order could be challenged before the Civil Court in spite of a provision in the statute barring the jurisdiction of Civil Court. In the case before us, the action of the Cooperative Authorities in auctioning the suit property for recovery of the loan against respondent No.1 was challenged in the suit as contrary to the provisions of the Ordinance and M.L.O 241.”

13. A close scrutiny of the above Irrigation Law leads to the conclusion that in terms of Section 21, 22 and 23, a substantial interest of a khatedar/agriculturalist/land owner has been created and such kind of a statutory right cannot be allowed to be brushed aside by invoking an ouster clause of the Irrigation Law. Both the Courts below, while deciding the case, have failed to exercise their respective jurisdiction properly and legally.

Simultaneously while placing my reliance on R.A. No.09 of 2023 which drives its strength from the order reported in 2014 SCMR 353 regarding compliance of provisions of Sindh Irrigation Act 1879.

Hence, the learned Trial Court as well as learned Appellate Court had erred in dismissing the F.C. Suit No.130/2011 and subsequently Civil Appeal No.43 of 2015 merely by allowing the Application under Order 7 Rule 11 CPC especially after framing all the issues which is illegal and irregular and against the principles laid down by the Honourable Supreme Court of Pakistan in 1992 SCMR 119 and our High Courts as submitted by the Counsel for the Applicants in 2012 CLC 1445, PLD 2008 Kar 458, 2024 MLD 565.

In light of the above made observations and in order to give fair chance to the Applicants and in order to bring entire controversy into juxtaposition I hereby remand back the matter to the learned Trial Court i.e. Senior Civil Judge Matli-I restoring the Suit to its original position with direction to the Trial Court to record entire evidence especially the evidence of official Respondents who are in a better position to bring the facts before the Court for resolving this controversy. Matter remanded. Since the matter is lingering on since long learned Trial Court is further directed to conclude the trial within 3 months positively.

JUDGE

