

IN THE HIGH COURT OF SINDH CIRCUIT COURT HYDERABAD

R. A No.47 of 2018

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of Hearing : 05.03.2018

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***Mr. Allah Bachayo Soomro, Additional A.G for applicants.
Mr. Imran Qureshi, Advocate for respondents No.2 & 3.***

ORDER

AGHA FAISAL, J: This revision application was filed impugning the order dated 20.01.2018 (*hereinafter referred to as the "Impugned Order"*), passed by the Court of the learned District Judge, Jamshoro (*hereinafter referred to as the "Trial Court"*). The contents of the Impugned Order are reproduced herein below:

"By this order, I intend to dispose of application under Order XIV Rule 5 r/w Section 151 CPC, filed by DDA on amalgamated reference No.02/2014 with the prayer for framing the amended legal issue.

Learned DDA requested on behalf of plaintiffs that as per record produced by the Assistant Commissioner, Kotri, which was rewritten on the directions of Supreme Court, the acquired land is agricultural since Award passed in the year, 2012 but the khatedars were compensated as per sikini land, therefore, legal issue involved in the matter i.e. "Whether Survey Nos. 175, 180 & 363, Deh Railo Taluka Kotri are agricultural or sikini land?. He further requested for framing of legal issue for deciding the matter on the merits and not on technicalities.

Learned counsel for defendants in this reference and plaintiffs in amalgamated reference No.02/2014 filed counter affidavit to the application and submitted that the issues must be based on the assertion made in the pleadings and not on evidence. He further submitted that the location of the acquired land has not been disputed by

the plaintiffs and issues would be framed only when a material proposition of fact or law was asserted by one party and denied by the other. He further submitted that the plaintiffs are not entitled to set up their case on issues which do not arise from their pleadings. Lastly he submitted that the application is not maintainable, which has been filed only to prolong the matter and same may kindly be dismissed. He relied upon the cases reported in 1996 MLD 2011 (Peshawar), 1993 MLD 243 (Lahore), 1995 CLC 729 (Peshawar), 1995 CLC 43 (Peshawar), 2000 SCMR 1172 & PLD 2004 SC 512.

A careful perusal of the record shows that the Land Reference No.01/2013 filed by the Government of Sindh through Secretary Irrigation Department was amalgamated with Land Reference No.02/2014 filed by defendants. The parties have already led their evidences before this Court after framing and settlement of amended and consolidated issues of both references and sides of evidence have been closed by both the parties and case is at the final stage. The question is not in the pleadings of the reference by the plaintiff's side and only question of the market value of the land is challenged by the plaintiffs' side. Therefore, framing of additional issue is not called for. As such application is hereby dismissed with no order as to costs.

2. The Province had also filed an interlocutory application, wherein the suspension of the Impugned Order had been sought pending disposal of the subject revision application. However, it was considered proper by this Court that instead of merely hearing the interlocutory application it may be prudent to hear the main revision application and pass the appropriate orders therein, after hearing the parties concerned.

3. It was contended by the learned A.A.G that by virtue of the Impugned Order the learned Trial Court dismissed an interlocutory application, by which the applicants had prayed as follows:

“It is respectfully prayed on behalf of Applicants/Plaintiff(s), that this Hon’ble Court may be pleased to frame the amended legal issue as controversy between the parties on the consideration of facts and grounds mentioned in the accompanying affidavit.

1. Whether the S.Nos.175, 180, 363, in Award No.44-A, and S.Nos.247, 283, in award No.44-B, of Deh Railo Taluka Kotri are Agricultural or Sikini land?

4. It was contended that by virtue of Section 53 of the Land Acquisition Act 1894 (hereinafter referred to as the "Act"), the provisions of the Civil Procedure Code are applicable to the proceedings under the Act. Further that, since Order XIV Rule 5 CPC empowered the Court to frame additional issues at any time, hence the applicants were entitled to the grant of the same.

5. It was contended by the learned A.A.G that the framing of the additional issue was imperative to demonstrate before the trial Court that the subject land is *sikni* land and not agricultural land. Further that dismissal of the said application was detrimental to the cause of justice as the correct factual position could no longer become apparent to the learned Trial Court.

6. The learned A.A.G relied upon the case of *REHMAT KHAN V/S. IFTIKHAR AHMAD AND 08 OTHERS*, reported as 1991 MLD 981, and drew the Court's attention to the following passage:

"Rule 5, Order XIV, C.P.C provides an ample guideline in respect of the authority and power of the Court, to raise, amend the strike down the issues, during the trial of the civil action. It postulates that the Court may, at any stage before passing decree, amend issues or frame additional issues as may be necessary for the decision of matters in controversy between the parties, shall be so made and framed, to enable the Court to decide the points at issue conclusively. Sub-rule (2) of Rule 5, further empowers the Court to strike out any issue that appears to it to be wrongfully framed or introduced, at any time before passing the decree. The aforesaid scheme of procedure provides a line of guidance that the Court is vested with discretion to frame issues or to modify them or to strike out the irrelevant issues, at any stage of the proceedings before passing a decree. The aforesaid authority, in

estimation of this Court, includes the authority to frame issues at any stage of proceedings irrespective of the fact that the evidence has already been recorded or not. The second object of framing of issues, as laid down in the procedure, is for the facility to let the parties understand that they have to prove their respective claims by adducing relevant evidence in their support. The procedure is introduced for safe administration of justice and to eliminate confusion and ambiguity likely to cause misunderstanding and misdirection to the parties.”

7. The learned Counsel for the respondents No.2 & 3 entered an appearance today, in response to the notice issued to the respondents on 02.03.2018, and submitted a Counter Affidavit, which was taken on record.

8. The learned Counsel for the respondents argued that the subject revision application had been preferred under Section 115 of the CPC and in order to succeed the applicants have to demonstrate that the Impugned Order was not in conformity with the law within the parameters laid down in Section 115 of CPC, which states as follows:

“Sec. 115.—Revision.—[(1) The High Court may call for record of any case which has been decided by any Court subordinate to such High Court and in which no appeal lies thereto, and if such subordinate Court appears--

- (a) to have exercised a jurisdiction not vested in it by law, or
- (b) to have failed to exercise a jurisdiction so vested, or
- (c) to have acted in the exercise of its jurisdiction illegally or with material irregularity.

the High Court may make such order in the case as it think fit]”

[Provided that, where a person makes an application under sub-section, he shall, in support of such application, furnish copies of the pleadings, documents and order of the subordinate Court and the High Court shall, except for reasons to be recorded, dispose of such application without calling for the record of the subordinate Court.”

9. It is stated by the learned Counsel for the respondents that nothing has been pleaded by the Province or argued by the learned A.A.G which would suggest that the Impugned Order merits the interference of this Court under the provisions of Section 115 of CPC.

10. The learned Counsel for the respondents referred to the record of the case available on file and demonstrated therefrom that the objection being taken herein, regarding the subject land being *sikni*, was not a constituent of the pleadings and nor was the same a part of the evidence in the suit pending before the Trial Court.

11. The learned Counsel for the respondents further stated that the issue of agricultural land versus *sikni* land is not before the learned Trial Court and the only issue pending thereat is that of the quantum of compensation and the same could only be decided by leading evidence.

12. The learned Counsel referred to the case of *PROVINCE OF SINDH though Collector of District Dadu and others V/S. RAMZAN & OTHERS*, reported as *PLD 2004 Supreme Court 512* and drew the Court's attention to the following passage:

"7. The most important aspect qua the lands compulsorily acquired is, that the mandatory returns proposed to be given to the landowner is the compensation and not the market value. Very section 23 provides for various matters to be brought under consideration while determining compensation. Market value is only one of such matters to be considered by the Collector or Courts. Compensation is a very wider term indicating that the landowners, for various reasons, to be compensated and no merely paid the price of land which is just an interaction of supply and demand fixed between a willing buyer and willing seller.

8. Section 23 was subsequently amended through West Pakistan Ordinance 49 of 1969 whereby the ambit of matters to be considered was widened and it was in this background that the Courts in the country emphasized the phenomenon of potential value of the land. This terms can be put to. In *Mali Aman's case (PLD 1988 SC 32)* this Court had explained the feature of potential value and had differentiated the same from the term 'market value'. It was held that market value was normally to be taken as one existing on the date of Notification under section 4(1) of the Act under the principle of willing buyer and willing seller while the potential value was explained to be one to which the similar lands could be put to any use in future. Factors for determining compensation of land are not restricted only to the time of the aforesaid Notification but can also relate to period in future and that is why in a large number of cases the 'potential value' has been held to be a relevant factor.

9. This Court had also taken notice of the fact that the announcement of award is sometimes unreasonably delayed after the issuance of Notification under section 4 of the Act. In *Malik Aman's case*, the period that had elapsed was seven years. Obviously any escalation in the value of property during such period is a potential value of land which must be taken into consideration.

10. Similar view was taken by this Court in *Land Acquisition Collector Abbotabad v. Muhammad Iqbal (1992 SCMR 1245 at 1255-K)*. In the case of *Pakistan Burmah Shell (1993 SCMR 1700)*, it was once again reiterated that consideration of market value at the time of Notification under section 4 of the Act was merely one of the modes for ascertaining the market value and was not absolute yardstick for assessment of compensation. Numerous matters to be considered for determining compensation were elaborately laid down by this Court in *Murad Khan's case (1999 SCMR 1647)* which was again relied upon in *Nisar Ahmed's case (PLD 2002 SC 25)*. The crux of the matter is that mere classification or nature of land may be taken as relevant consideration but not as absolute one. An area may be 'bunjar' or 'Barani' but its market value may be tremendously high because of its location, neighborhood, potentiality or other benefits. All these factors, therefore, cannot be ignored."

13. The learned Counsel then cited the case of *LAND ACQUISITION COLLECTOR & OTHERS V/S. MST. IQBAL BEGUM &*

OTHERS, reported as *PLD 2010 Supreme Court 719*, and drew the Court's attention to the following passage:

"5.....The nature of land has been considered by taking into consideration its potentiality and locations. It is worth mentioning that the potentiality of land should not be determined merely at the time of issuance of notification under Section 3 of the Act but it should be also with reference to the use to which land is reasonably capable of being put in the future. Reference in this regard can be made to Market Committee v. Rayyal Ali (1991 SCMR 572). Here at this juncture we may like to point out that the main object of Land of Acquisition Act is to provide complete indemnity to the owner and no property is to be acquired without proper and adequate compensation. (Chairman, Seramore Municipality v. Secretary of State for India AIR 1992 Calcuta 386, West Pakistan WAPDA v. Hiran Begum 1972 SCMR 138). The learned ASC on behalf of appellant was asked pointedly that the compensation as determined by the learned High Court in accordance with the plus factors contained in Section 23 of the Act and minus factors contained in Section 24 of the Act and why it should be reversed but no satisfactory answer could be given by the learned ASC on behalf of appellant except that the compensation appears to be on high side. He, however, could not substantiate "high side" by mentioning any cogent and concrete evidence. "The principles laid down for determination of compensation reflect anxiety of law-giver to compensate those deprived of property adequately enough so as to be given gold for gold and not copper for gold." (Nazarul Hussain v. Collector PLD 1990 Lahore 472, Land Acquisition Officer v. Kamber Ali Beg (1981 CLC 556). Various factors have to be taken into consideration i.e. the size and shape of the land, the locality and its situation, the tenure of property, the user, its potential value, and the rise or depression in the value of the land in the potential value, keeping in view all the relevant factors have been determined and it is unexceptionable. It is well settled by now that "to determine compensation the Court must ascertain the value on the date of notification, considering various factors including nature and location of acquired land and sale price of adjoining lands. In assessing market value of land, its location, potentiality and price evidenced by transactions of similar and at the time of notification are factors which should be kept in view. One year's average of sales taking place before publication of notification under section 4 of similar land is merely one of the modes of ascertaining market value and is not an absolute yardstick for assessment of compensation. Moreover, status of acquired land, its potentialities and its likelihood

of development and improvement would be necessary factors for determining rate of compensation. “(Water and Sanitation Authority v. Niaz Muhammad PLD 1992 Quetta 75, Pakistan Burmah Shell Ltd. v. Prov. Of N.W.F.P PLC 1993 SCMR 1700, Land Acquisition Officer, Badin District v. Altaf Hussain Shah 1994 CLC 160, Government of Sindh v. Shakir Ali Jafi 1996 SCMR 1361). We are not impressed by the contention of learned Advocate Supreme Court on behalf of appellants that the determination of compensation should be based merely on the “past sales” for the reason that the potentiality of land cannot be determined without examining its future prospects and therefore, compensation cannot be based merely on the basis of “past sales”. In this regard, we are fortified by the dictum laid down in the following authorities:--

Collector, Land Acquisition v. Abdur Rashid (1996 CLC 1193), West Pak. WAPDA v. Hiran Begum (1972 SCMR 138), Islamic University, Bahawalpur v. Khadim Hussain (1990 MLD 2158), Government of Pakistan Rawalpindi and another v. Malik Muhammad Aslam and 5 others (1978 SCMR 5).

6. We cannot overlook the well entrenched principle i.e. “what a willing purchaser would have paid for the land for the land in question which is to be followed while fixing the compensation. If any authority is needed, reference can be made to Government of Pakistan Rawalpindi and another v. Malik Muhammad Aslam and 5 others (1978 SCMR 5).”

14. The learned Counsel submitted that the determination of price of land is predicated upon the location and vicinity thereof and that the respondents’ contention regarding the same, pertaining to subject land, has not been controverted by the applicants at any stage whatsoever.

15. The learned Counsel further stated that the evidential stage has been concluded before the learned Trial Court and no challenge to the determinants, of the rate fixed for the subject land, has been made by the applicants.

16. The leaned Counsel for the respondents further stated that the applicants cannot be allowed at this belated stage to change the very

nature of the proceedings when the same are at the stage of conclusion.

17. The learned Counsel submitted that the additional issue sought to be framed was not borne out of the pleadings and that the same was in fact alien thereto.

18. The learned Counsel for the respondents cited the case of *PROVINCE OF PUNJAB THROUGH CHIEF SECRETARY AND 05 OTHERS V/S. MALIK IBRAHIM AND SONS AND ANOTHER*, and drew the Court's attention to the following passage:

*"8.....Since there was no occasion to establish registration of the firm or to rebut the allegation of petitioners before the trial Court, recovery suit filed by the respondents in the name of the firm can hardly be said to be incompetent for alleged lack of registration. It is well settled that the parties are not entitled to set up a case or to lead evidence on issues which does not arise from their pleadings and their evidence must be restricted to the points in controversy in the strict sense. Reliance on the judgment of this Court reported as *Iftikhar Hussain Khan of Mamdot v. Ghulam Nabi Corporation Ltd., Lahore (PLD 1971 SC 550)* and Single Bench judgment from the High Court of Sindh reported as *Province of Sindh v. Royal Contractors (1996 CLC 1205)* is wholly misplaced and out of context in the peculiar facts of the case in hand."* (Underline added for emphasis).

19. The learned Counsel also cited the case of *MESSRS ASWAN TENTAGE AND CANVAS MILLS LTD., LAHORE V/S. MESSRS M.A. RAZZAQ & COMPANY*, reported as 1993 MLD 243, and drew the Court's attention to the following passage:

"7. As the existence of the arbitration agreement was not disputed, there was hardly any need to frame any issue. It needs no gain saying that an issue arises only when a material proposition of fact or law is asserted by one party and is denied by other. In the written reply filed by the appellant, the only plea taken was that the agreement has been procured from the respondent through fraud and misrepresentation, but again no details of fraud or

misrepresentation were pleaded. It has been rightly observed by the trial Court that the question of fraud or misrepresentation has to be determined by the Arbitrator and not by the Court.”

20. The learned Counsel has further cited the case of *MUHAMMAD DARWAISH KHAN V/S. BAHADAR NAWAZ KHAN & OTHERS*, reported as *1996 MLD 2011*, and drew the Court’s attention to the following passage:

“5.....it would be for the party interested to get an issue framed to apply to apply to the Court. Having said that the perusal of the evidence even otherwise shows that both the parties were alive to the question of the ‘Iqrarnam’ since the defendants-respondents alleged and the plaintiff-petitioner admitted its execution. The effect of the ‘Iqrarnama’, however, can be seen from its contents and the evidence of the parties. The lower Courts, therefore, did not err by not framing additional issues.”

21. The learned Counsel further stated that the subject matter, pending before the learned Trial Court, was also deliberated upon by a Divisional Bench of this Court in C.P.No.D-487 of 2013, in which the following order was passed on 06.11.2013:

“At the very outset learned Additional Advocate General Sindh submits that since the award was obtained by fraud, therefore, award has been assailed before District Judge Jamshoro, hence respondents are not required to deposit the amount. Besides, the entire exercise has been made in flimsy manner without observing legal and codal formalities.

Be that as it may, let respondents shall deposit the amount passed in the ward with the Court of learned District Judge, Jamshoro within 15 days and process the application dated 09.07.2012 without further delay. The petitioner shall not withdraw the said amount till final adjudication of the matter by the learned District Judge, Jamshoro. The concerned District Judge is directed to decide the matter within four months. The amount deposited by the respondents shall be invested in any Govt. profitable scheme till final determination of the case.”

22. The learned Counsel states that in the aforesaid order the learned Trial Court was directed to decide the matter within four months, however, the same has not happened as yet due to the delaying tactics employed by the applicants, of which the present proceedings are yet another constituent.

23. In view of the foregoing, it was prayed by the learned Counsel that the subject revision application be dismissed forthwith so as to enable the learned Trial Court to conclude the case in due conformity with the law.

24. This Court has considered the submissions made by the learned A.A.G and the learned Counsel for the respondents and has also reviewed the record available on the file.

25. It is *prima facie* apparent that the Impugned Order is passed on an interlocutory application and there is ample authority to suggest that interference in such orders could only be merited in exceptional or extraordinary circumstances.

26. The aforesaid principle is fortified by the judgment in the case of KHALID MEHMOOD THROUGH SPECIAL ATTORNEY V. JUDGE FAMILY COURT, FAISALABAD AND ANOTHER, reported as 2010 Y L R 336, wherein it was held as follows:

“The Impugned Order passed by the learned Judge, Family Court, is not only clothed with authority but is also fully justified. The Impugned Order dated 16-1-2009 was to all intents and purposes of interlocutory in nature. The

law does not provide any appeal or revision in the hierarchy of Family Laws. The petitioner on proper showings would have an opportunity to challenge the same if and when he would bring an appeal against the final decision/judgment in terms of section 14 of the Family Courts Act, 1964. There is no dearth of authority that the expression "decision" means final decision and the same will be read ejusdem generis with "judgment". In other words, the petitioner will have an adequate and alternative remedy at the time of appeal as aforementioned. Considering the conduct of the petitioner, the learned Judge Family Court was constrained to pass the Impugned Order dated 16-1-1999. There was no illegality or irregularity in passing these orders. The present writ petition is without any substance. It is not entertainable and is consequently dismissed in limini."

27. The issue of challenges to interlocutory orders was also expounded upon in the case of MUHAMMAD BARAN AND OTHERS V. MEMBER (SETTLEMENT & REHABILITATION) BOARD OF REVENUE, PUNJAB AND OTHERS, reported as P L D 1991 SUPREME COURT 691, wherein it was maintained as follows:

"Therefore, before a person can be permitted to invoke this discretionary power of a Court, it must be shown that the order sought to be set aside had occasioned some injustice to the parties. If it does not work any injustice to any party, rather it causes a manifest illegality, then the

extra ordinary jurisdiction ought not to be allowed to be invoked.”

28. It is observed that there is no provision for appeal against the interlocutory orders within the purview of the Act and that the final order therein is subject to appeal under the provisions of Section 54 therein.

29. It would follow that any detriment suffered by the applicants by virtue of the Impugned Order, if any, could be agitated in an appeal against the final order in the proceedings and that in the presence of such a remedy being available to the applicants the interference of the Court at this stage is not merited. Even otherwise, no extraordinary or exceptional circumstances have been demonstrated by the applicants to compel this Court to exercise its jurisdiction in this regard.

30. It is also observed from a perusal of the record that the allegations and assertions made by the applicants herein find no mention in the proceedings before the Trial Court, which has already concluded the evidence and is close to concluding the matter.

31. This Court concurs with the observations of the learned Trial Court that the amendment of issues at this stage, when the parties have already concluded their evidence before the Trial Court after framing and settlement of amended and consolidated issues, would be futile and against the interests of justice.

32. This Court has also taken notice that the present revision application appears to be an attempt to delay proceedings,

which were ordered to be concluded within four months by the Divisional Bench of this Court back in the year 2013.

33. It would be imperative for this Court to consider that no orders are passed herein that would appear to be contrary to the letter and spirit of the orders of the Divisional Bench of this Court, cited herein above.

34. It is the considered view of this Court that no grounds have been invoked by the applicants to merit the interference of this Court as there is no suggestion that the Impugned Order is either an exercise without jurisdiction or a failure to exercise jurisdiction or an act in exercise of jurisdiction illegally or with any material irregularity.

35. In view of the foregoing, it is the view of this Court that the Impugned Order is in due conformity with the law and does not suffer from any infirmity whatsoever and therefore the same is hereby upheld.

36. The present revision application, alongwith the interlocutory application therein, was dismissed vide a short order dated 05.03.2018, the contents whereof are reproduced herein below:

“The learned Counsel files counter affidavit on behalf of the respondents No.2 and 3, which is taken on record and also provides a copy thereof to the learned A.A.G. Since both the Counsel plead urgency in this matter, therefore, the matter is heard at length so that the revision application may be determined in finality. This Court has heard the arguments of the learned Counsel, for which the Court appreciates the assistance rendered by each of the learned Counsel. For the reasons to be recorded latter, the revision application, alongwith the listed application, is dismissed. The office is directed to communicate a copy hereof to the learned District Judge, Jamshoro.”

37. These are the reasons for the above short order dated 05.03.2018, wherein subject petition was dismissed.

38. It is stipulated that the observations made herein are of a tentative nature and shall have no impact upon the determination of any dispute between the parties before any forum of appropriate jurisdiction in due consonance with the law.

JUDGE

Shahid