

ORDER SHEET  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
**SUIT NO. 1137 / 2004**

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DATE ORDER WITH SIGNATURE OF JUDGE

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**Plaintiff:** **M/s Al-Momin Cooperative Dairy Farming Society Limited through Mr. Mr. Amir Malik Advocate.**

**Defendants:** **Province of Sindh and others through Mr. Suneel Talreja AAG.**

**Defendant No. 8:** **Muhammad Mumtaz Shamim through Mr. Raja Qasit Nawaz Khan Advocate.**

- 1) **For hearing of CMA No. 6811/2004.**
- 2) **For hearing of CMA No. 7815/2005.**
- 3) **For examination of parties / settlement of issues.**

**Date of hearing:** **09.02.2018.**

**Date of order:** **12.03.2018.**

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**Muhammad Junaid Ghaffar, J.** Application at Serial No.2 is under Order VII Rule 11 CPC bearing CMA No. 7815/2005 filed on behalf of Defendant No. 8 for rejection of plaint.

2. Learned Counsel for Defendant No. 8 has contended that the land being claimed by the Plaintiff was purchased by the said Defendants through auction in Banking Suit No. 969/1999 and Execution No. 218/2000 on the basis of a Decree dated 04.03.2000. According to the learned Counsel the total area purchased by Defendant No.8 is 10 Acres and 47 Ghuntas out of Survey No. 142/14/9 (2 Acres) and Survey No. 143/13/1 (8.47 Acres) in Deh Shah Mureed Tapo Songal Gadap Town, Karachi on 07.05.2001, and when Defendant No.8 sought possession of the land in question, it appears that a portion of the land is being claimed by the Plaintiff and thereafter, orders were passed in the Execution Application for demarcation and after demarcation the claim

of the Plaintiff was dismissed whereas, the orders of demarcation were impugned in the departmental hierarchy and thereafter, a fresh Suit has been filed. Per learned Counsel the appropriate remedy for the Plaintiff was under Section 47 CPC to approach the Executing Court whereas, in terms of Section 27 of the Financial Institutions (Recovery of Finance, 2001) instant Suit is otherwise barred. For such reasons he has prayed for rejection of plaint.

3. On the other hand, learned Counsel for the Plaintiff has contended that the portion of the land which the Plaintiff claims was occupied by the Judgment Debtor without any lawful authority whereas, the private partition of the land in question was approved by the Revenue Authorities and therefore, the said portion of the land could not have been sold by the Banking Court. According to the learned Counsel the Judgment Debtor was privy to such private partition and the Court has been misled in ordering the sale of entire property. He has further submitted that initially when orders were passed for possession in the Execution Application, the Executing Court was approached and thereafter, the Revenue Authorities were directed to demarcate the property in question. Per learned Counsel the order of demarcation was passed without considering the legal position and thereafter, such order was appealed and a review was filed but of no avail, therefore, the Plaintiff had no option but to file instant Suit seeking Declaration and Cancellation of the orders in question. He has further contended that for the purposes of Order VII Rule 11 CPC the contents of the plaint are to be examined, whereas, a proper cause of action has been shown in the plaint therefore, the plaint cannot be rejected summarily. Learned Counsel has read out various provisions of the Land Revenue Act including Section(s) 137, 140, 142 and 147 and

has contended that once a private partition has been approved no further orders could be passed by the Revenue Authorities.

4. I have heard both the learned Counsel and perused the record. The dispute in this Suit is to the effect that while carrying out demarcation on the directions of the Executing Court certain portion of the land on the Southern side of Survey No. 141, 142 and 143 adjacent to the Survey No. 180, 181, 182 and 183 facing the main Road, situated in Deh Shah Mureed Tapo Songal Gadap Town, Karachi has been treated as the land of the Judgment Debtor which is now being claimed by the Auction Purchaser / Defendant No. 8. The present application is only for a limited purpose and on legal grounds. The case of the Auction Purchaser / Defendant No. 8 is to the effect that the Plaintiff ought to have availed the remedy under Section 47 CPC or under Order 21 Rule 58 CPC before the Executing Court. Whereas, under Section 27 of FIO, 2001 a fresh Suit in this manner is barred. However, I may observe that insofar as Section 27 of FIO, 2001 is concerned; the same is not relevant inasmuch as the Plaintiff is not claiming any land which may be termed as subject matter of a Banking Suit. The land owned by the Judgment Debtor has already been auctioned and sold to Defendant No. 8. The only dispute is in respect of certain area which apparently was not clearly mentioned in the Suit as well as auction proceedings, and therefore, perhaps, this issue has come up before the Court. If that had not been so, then no issue would have arisen, hence, this contention to the extent of Section 27 *ibid* is hereby repelled.

5. Insofar as the provision of Section 47 CPC is concerned, it provides that all questions arising between the parties to the suit in which the decree was passed, or their representatives, and relating to the execution, discharge or satisfaction of the decree, shall be

determined by the Court executing the decree and not by a separate suit. It may be observed that it specifically provides that the dispute in respect of the execution of a Decree must be between the parties to the Suit. Admittedly, the Plaintiff before this Court was not a party to the Suit, nor like the auction purchaser, could be termed as stepping into the shoes of the Judgment Debtor as its representative. Therefore, in all fairness, the Plaintiff cannot be compelled to seek its remedy before the Executing Court mandatorily. Even otherwise, it appears that once an order was passed by the Executing Court by which the Plaintiff was aggrieved and approached the Executing Court, whereafter, the earlier demarcation order was recalled / set-aside and matter was remanded to the Revenue Authorities for carrying out a fresh demarcation after notice to all parties concerned, the maximum the plaintiff could do, has already been done. The Plaintiff is now aggrieved by the fresh and subsequent demarcation and the orders passed in Appeal and Revision, impugned in this Suit, which also includes a challenge to deviation from the private partition already consented to by the Judgment Debtor. To arrive at a fair conclusion, it was deemed necessary to examine the order sheet of the Execution Application, and after going through the entire order sheet, nowhere I could find that subsequent to directions contained in order(s) dated 28.8.2005 and 29.9.2005, when fresh demarcation was ordered, the same was ever placed before the Executing Court for passing of appropriate orders. Though at some stage the Official Assignee had placed certain reports to that effect, but no final orders were passed. It further appears (and very strangely both learned Counsel have failed to assist the Court) that the Execution Application was finally disposed of vide order dated 25.03.2013 on an application bearing CMA No. 88/2013 filed by the Decree Holder on the

ground that after sale of the properties (there were four properties in all) in question amount has been realized but entire decree has not been satisfied and as and when further assets of the Judgment Debtor are brought in knowledge, fresh application would be filed subject to limitation. Now once admittedly, the Execution Application itself stands finally disposed of, how can the plaintiff be asked to approach the Executing Court under Section 47 CPC. Neither the Counsel for the Plaintiff nor for Defendant No. 8 have assisted on this aspect of the case, whereas, admittedly a party to a dispute cannot be left remediless and as discussed earlier I have not been able to see any order in the Execution file whereby, the subsequent demarcation was accepted and taken on record or any other directions were issued, for handing over the possession to Defendant No.8 in respect of the disputed area as above. In fact as per the contention of Defendant No. 8 the same is still pending and the auction purchaser has not been handed over the entire possession as claimed. I am afraid in the given facts the Defendant No.8, after withdrawal of the Execution Application stands nowhere to seek his possession as contended, except instant Suit.

6. In view of herein above facts and circumstances of this case, I am of the view that the objections raised on behalf of Defendant No. 8 are not sustainable as the plaint cannot be rejected in this matter as the plaintiffs remedy under Section 47 CPC is even otherwise no more alive. Accordingly, the application under Order 7 Rule 11 CPC bearing CMA No.7815 of 2005 is hereby dismissed.

**Dated: 12.3.2018**

**J U D G E**