

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

Suit No.455 of 2015

DATE	ORDER WITH SIGNATURE OF JUDGE
1. For hearing of CMA No.4721/15 (U/O 39 Rule 1 & 2 CPC) 2. For hearing of CMA No.4722/15 (U/O 18 Rule 18 CPC) 3. For hearing of CMA No.16020/16 (U/O VII rule 11 CPC)	

5.12.2017

Mr. Khawaja Shamsul Islam, Advocate for Plaintiff.
 Mr. Muhammad Najeeb Jamali, Advocate for Defendant.

3. This is an Application under Order VII Rule 11 CPC filed on behalf Defendant No.1 on the ground that instant Suit is barred in law. Learned Counsel for the defendant No.1 submits that through instant Suit the Plaintiff has impugned the notice of Mukhtiarkar dated 2.12.2014 and 10.2.2015 for carrying out demarcation of the property in question and in terms of Sections 117 and 172 of the Land Revenue Act, 1967, the said notice cannot be challenged before a Civil Court and the appropriate remedy is to approach the revenue officials. Per learned Counsel the Plaintiff has encroached upon a part of the land of Defendant No.1 and as soon as the same came to their knowledge, they approached the concerned Mukhtiarkar for demarcation on which impugned notice was issued and instant Suit has been filed. He further submits that demarcation is the exclusive domain of the Revenue Officials, whereas, no prejudice would be caused to the plaintiff and therefore listed application be allowed and plaint be rejected. In support he has relied upon **2013 MLD 1602 (Hafiq Mehboob and 6 others v. Province of Sindh through Secretary Revenue Board of Revenue and 4 others), 2016 YLR 1699 (Sindh Board of Revenue Employees Co-**

operative Housing Society through General Secretary and another)* and **2017 MLD 112 (*Pir Bux Soomro and another v. Province of Sindh through Senior Member Board of Revenue and 5 others*).*

On the other hand, learned Counsel for the Plaintiff has contended that Plaintiff is owner of land bearing Plot No.11, Survey No.88, admeasuring one acre (4840 Sq. Yds.) situated in Deh Drigh, Taluka and District Karachi East (Now District Korangi), Karachi, which stands regularized since 2011 and at least thrice demarcation has already been carried out by the office of the same Mukhtiarkar, who has issued the impugned notice. He further submits that plot number and the area of the Plaintiff's plot has no concern with Defendant No.1, whereas, the Plaintiff is already running a School on this property. Per learned Counsel the bar contained in the Land Revenue Act is not absolute and is always subject to challenge, if the same is tainted with malafides and is without jurisdiction. He has further contended that once demarcation is carried out the revenue officials have no further power to review the order and recall the same. Learned Counsel has referred to Section 53 of the Land Revenue Act and has contended that if the Defendant No.1 is out of possession they may file a Suit for possession, which is the appropriate remedy. He has also referred to various provisions of Colonization of Government Lands (Sindh) Act, 1912. In support of his contention he has relied upon **2007 MLD 884 (*Ahsan Ali through L.Rs and others v. Province of Sindh through District Coordination Officer Thatta and 4 others*), *1996 SCMR 78* (*Rasta Mal Khan and others v. Nabi Sarwar Khan and others*), **2005 YLR 163 (*Abdul Aziz v. City District Government Karachi through District Coordination Officer and another*), **2017 PTD 730 (*Artistic Denim Mills Ltd. v. Federal Board of Revenue and others*), **2017 PTD 959 (*Engro Elengy Terminal (Pvt) Ltd. through Authorized Representative v.*********

Federation of Pakistan through Secretary Revenue Division and 6 others), PLD 2003 Karachi 222 (M.Y. Corporation (Private) Ltd. v. Messrs Erum Developers and 2 others), PLD 2017 Peshawar 70 (Torsam and 2 others v. Ibrahim Khan and 5 others).

I have heard both the learned Counsel and perused the record. The precise objections so taken in the Application under Order VII Rule 11 CPC is based on the ground that the Suit is barred in law. Learned Counsel for Defendant No.1 has relied upon Sections 117 and 172 of the Land Revenue Act, and has contended that it is the exclusive domain of Revenue Officials to demarcate any land and this Court has no jurisdiction as a Civil Court is barred under these provisions to interfere in the affairs of said officials. However, it may be observed that such rule is not absolute and is dependent on the peculiar facts and circumstances of a case before the Court. It appears that admittedly before regularization of the Plaintiff's land, demarcation was carried out and the same is available on record. The land was regularized vide letter dated 29.11.2011 & 10.12.2011, whereas, NOC was also issued by the same Mukhtiarkars office on 20.3.2012 wherein it has been stated that *"Surveyor of Shah Faisal after verifying the relevant record has reported that as Jaryan No.17, VF-II dated 19.3.2012 of Plot No.11 (Industrial, Residential and Commercial Land out of Na-Class Survey No.43, Measuring 1-00 Acre (Out of 2.00 Acres) Yds, Deh Drigh, Tappo Drigh road, Shah Faisal, District Karachi, East is stands entered in the name of M/s Imperial Builders, Planners an developers."* The Plaintiff is in possession after such demarcation and regularization. Now the question which is relevant for deciding the listed application is that once a property has been properly demarcated, can a revenue official (**merely for change of officer**) on a complaint of a third party, direct fresh demarcation. Though it would not be appropriate to give any conclusive

finding on this issue, as it may prejudice the case of any of the parties at the trial, however, in the impugned notice dated 2.12.2014 it has been stated that “*plaintiff has encroached upon 00.25 Guntas of the owner of Survey No.115 and raised illegal construction on the above land which is in your possession illegally*”. Now this finding has been reached without first confronting the plaintiff and so also with no justification about the demarcation and NOC already carried out and issued. Such act does not apparently seem to be within the four corners of law and tantamount to exercising jurisdiction which is not vested. It is needless to observe that the revenue officials must act strictly in accordance with law and the domain so available with him. It is by now a settled proposition that exclusion for exercising jurisdiction by a Civil Court in such matters is to be jealously guarded. The order passed by Revenue Authority can be impugned and challenged before a Civil Court directly without exhausting the remedy provided under the hierarchy of the department. At the same time there is no cavil to the proposition that if a statute provides a proper mechanism for availing the departmental remedy; then it must be availed by an aggrieved party. However, this Rule is not absolute and there is an exception to this proposition and by now it is settled by the Apex Court that where the order impugned is tainted with malafides or without jurisdiction or is otherwise incompetent in law; then jurisdiction of a Civil Court cannot be ousted and is not barred. Reference in this regard may be made to the case of ***ABBASIA COOPERATIVE BANK (NOW PUNJAB PROVINCIAL COOPERATIVE BANK LTD.) versus Hakeem Rafiz MUHAMMAD GHAUS and 5 others*** reported as **PLD 1997 Supreme Court 3.**, wherein the Hon’ble Supreme Court has been pleased to dilate upon the issue in hand in the following manner;

5. 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 or 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.I was challenged in the suit as contrary to the provisions of the Ordinance and M.L.O. 241.

A learned Single Judge of the Peshawar High Court in the case of ***Syed Sardar Shah v Qazi Masood Alam (2003 CLC 857)*** has been pleased to observe as under;

14. The argument of the learned counsel for the petitioners that the Civil Court under section 172 of the Land Revenue Act has no jurisdiction to entertain the suit has no force at all. The scope of section 172 of the West Pakistan Land Revenue Act, 1967 is entirely different. It only excludes the jurisdiction of Civil Court from taking in hand the functions assigned to the Revenue Courts as also the question of their methodology adopted for the discharge of such functions. The functions of Revenue Courts are to prepare the Revenue Record in the light of evidence with regard to one's title or interest, but the finality is attached to the orders passed by Civil Court which ultimately determines civil rights. Section 42 of Specific Relief Act, 1877 confers right upon aggrieved

person to seek declaration from Civil Court with regard to his rights or title to a character both in rem and in personam.

Similar view has been expressed by another learned Single Judge of the Peshawar High Court in the case of ***Mst. Gul Pari alias Gubaro v Zarin Khan (PLD 1994 Peshawar 249)*** in the following manner;

The thirist contention raised by the learned counsel hardly needs much discussion as in the suit in hand the respondents, besides seeking correction of the revenue record, and bringing challenge to the impugned 'Fard Badr' and the impugned mutation, have claimed a decree for declaration as to their title to and confirmation of their possession over the disputed land. The contention of the learned counsel that the order of the learned Civil Judge to the effect that section 172 of the West Pakistan Land Revenue Act, 1967, created no bar to the filing of suits to challenge the action of the revenue authorities was hardly maintainable is untenable. Section 53 of the West Pakistan Land Revenue Act, 1967, itself creates a right in favour of an aggrieved person to approach the Civil Court for declaration of his right under section 42 of the Specific Relief Act, 1877. On the other hand, as held by a Division Bench of Balochistan High Court in Mir Rehman Khan and another v. Sardar Asadullah Khan and 14 others (PLD 1983 Quetta 52) and to which I respectfully subscribe, that "the scope of section 172 of the West Pakistan Land Revenue Act, 1967 is entirely different. It only excludes the Civil Courts from taking in hand the functions assigned to the Revenue Courts as also the questioning of H their methodology adopted for the discharge of such functions". I have, therefore, no doubt in my mind that the function of Revenue Courts is to prepare the revenue records in the light of the evidence with regard to one's title or interest, but the finality is attached to the orders of the Civil Courts who shall determine civil rights such as the claim of the petitioner being daughter of Said Khan deceased by leading cogent and reliable evidence before them. The view of the learned Civil Judge does not, therefore, suffer from any legal infirmity. Section 42 of the Specific Relief Act, 1877, confers a right upon an aggrieved person to seek declaration from a Civil Court with regard to his/her status (i.e. her claim of being -daughter of Said Khan deceased in this case), right or title to a character both in rein and in personam.

Further reliance can also be placed on the case of ***Ahsan Ali (supra)***, wherein, a learned Division Bench of this Court has been pleased to hold as under:-

9. After careful examination of the averments made in the plaint and the impugned order passed by the revisional Court, dated 18-12-2004, we are clear in our mind that the revisional Court while taking into consideration the averments made in the written statement by the respondents Nos. 13 and 14 i.e. defence pleas, deviated from the set principle of law as regards the scope and applicability of Order VII Rule 11, C.P.C. which provides that only the averments made in the plaint with presumption of correctness attached thereto or at best the admitted and undisputed documents could be taken into consideration for this purpose and not the pleas setup in defence. We are also not impressed by the submission of the learned counsel Mr. Aijaz Ali Hakro that findings of the authorities under the Revenue hierarchy regarding entry No.40 in Deh Form VII have debarred the petitioners from approaching the Civil Court for claiming their ownership over the suit-land by way of inheritance, as entry in the Revenue Record is not in itself proof of title in favour of the party in whose favour such entry exists, but entitlement/ownership is to be proved by such party independently and for this purpose appropriate Forum available is the Civil Court, being the Court of ultimate civil jurisdiction (See 1986 SCMR 598). Even under section 53 of the Land Revenue Act, 1967 it has been provided that in case any person considers himself aggrieved by any entry in the record of rights or in any periodical record as to any right which he possesses, he may institute a declaratory suit for this purpose under Chapter VI of the Specific Relief Act, 1877. In such circumstances, the submission of Mr. Noor Ahmed learned counsel for the petitioners that the averments made in the plaint needed evidence seems to have force. Moreso, as there are specific allegations levelled by the petitioners in their plaint challenging the legality of the orders passed by the Revenue Authorities on the ground of lack of jurisdiction and mala fide, and details of such mala fide have also been unfolded in the plaint.

10. Besides, the revisional Court also overlooked plethora of case law of the Superior Courts, wherein it has been constantly held that where the allegations of lack of jurisdiction or mala fide were attributed to the tribunal/authority passing the impugned order (s) then it was within the domain of Civil Court to examine the propriety of such order in the context of such allegations, being the Court of ultimate civil jurisdiction by virtue of section 9, C.P.C. and the bar of section 172 of the Land Revenue Act will not oust the jurisdiction of Civil Court in such case, (For ready reference, see 1974 SCMR 356 and 1997 MLD 1309).

Moreover, it is also to be noted that there may be a case that ultimately the Suit at the trial is dismissed as not maintainable, but on the same issue it is not necessary that the plaint may also be rejected under Order 7 Rule 11 C.P.C. The Hon'ble Supreme Court in a recent judgment in the case of ***Al-Meezan Investment Management Company Ltd & Others V. WAPDA First Sukuk Company Limited, Lahore, etc*** reported as PLD 2017 SC 1 has observed that *...Suffice it to say that the*

question of whether a suit is maintainable or not is moot with respect to whether or not a plaint is to be rejected as being barred by law. Both are a different species altogether and it may well be that a plaint is not rejected in terms of Order 7 Rule 11 CPC but the suit is dismissed eventually as not maintainable for a possible host of reasons.

In the circumstances, application listed at Serial No.3 under Order VII Rule 11 CPC being misconceived was dismissed by means of a short Order dated 05.12.2017 and these are the reasons thereof.

J U D G E

Ayaz P.S.