ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

R.A No.109 of 2010

Date Order with signature of Judge

Present: Mr. Justice Nazar Akbar

Applicant No.1	:	Province of Sindh, through Secretary, Govt. of Sindh, Public Health Department, Karachi
Applicant No.2	:	The Chief Engineer, Public Health Department, Govt: of Sindh, Hyderabad.
Applicant No.3	:	The Superintending Engineer, Public Health Department, Govt: of Sindh, Hyderabad.
Applicant No.4	:	The Executive Engineer, Public Health Department, Govt: of Sindh, Hyderabad.
Applicant No.5	:	The Project Director, Rural Water Supply Scheme, Government of Sindh, Hyderabad All through Mr. Ghulam Abbas Sangi, Assistant Advocate General.
		Versus
Respondent No.1	:	Syed Zia-ul-Hassan Khan through M/s. Ali Bin Adam Jaffri and Syed Jawad Hayder Rizvi, Advocates.
Respondent No.2	:	Village Development Association Jhimpir, District Thatta through its Office bearer/ Chairman, Secretary and Treasurer. (Nemo).
Date of hearing	:	**15.11.2018**
Date of judgment	:	**10.01.2019**

JUDGMENT

NAZAR AKBAR, J:- This Revision Application is directed against the judgment and decree dated **11.02.2010** and **16.02.2010** respectively, whereby II-Additional District and Sessions Judge, Thatta dismissed Civil Appeal **No.48/2007** filed by the applicants and maintained the judgment & decree dated **07.04.2007** passed by Senior Civil Judge, Thatta in **F.C Suit No.46/2001**, whereby the suit

filed by Respondent No.1 was decreed. The applicants preferred this Revision Application against the said judgments of two Courts below.

2. Briefly, the facts of the case are that Respondent No.1 filed F.C Suit No.46/2001 before the Senior Civil Judge, Thatta for recovery of **Rs.51,74,680/-** with mark-up as cost/compensation and loss of land trees and crops stating therein that he is a dual national and on different occasions comes to Pakistan from United States of America to look after and manage his properties here and he is also doing business there. It was further averred by Respondent No.1 that he owned and possessed garden on land of about 20-0 acres un-survey land at Makan Ubharndo Chakhro, Deh Kohistan 7/1, Tapo Jhimpir, Taluka and District, Thatta (the subject land) since 1987. The subject land has been converted to sikni land/plots, out of which he sold some plot to different persons of Hindu community of Jhimpir and remaining area of 18-1/2 acres was duly entered in Deh form-II. The subject land was a garden of palm, date trees and he was cultivating Maize, Jower, Wheat, Losan and Barsin in the subject land. The previous owner of land was paying land revenue but after purchase of subject land by Respondent No.1, the land revenue was abolished as the Government did not supply water in hilly tract, therefore, no abiana was demanded from him. It was further averred that in **1994**, Respondent No.1 returned from USA after long time and he found that applicants had illegally constructed and laid down open drainage/sewerage lines in the subject land and cutting across so also destroying his pacca irrigation watercourse which resulted in non-supply of water to his seasonal crops and trees as a result, his 180 female and 20 male palm dates trees in the subject land withered and died. It was further averred that the sewerage lines were not laid down in planed manner and also hinder Tractor for filling the land,

therefore, he could not cultivate the subject land. The applicants did not initiate proceedings under the Land Acquisition Act nor acquired land under said Act, therefore, Respondent No.1 sent a letter dated **27.6.1994** to the applicants No.2 to 4 asking them for furnishing any legal justification for laying of drainage/sewerage line in the subject land and compensation for the loss to him but the applicants have never replied. It was further averred that in the year 1998 when Respondent No.1 was in USA he came to know that the applicants again illegally and unlawfully constructed, developed and repaired open drainage/sewerage line in the subject land without his consent and permission and without acquiring the land under the Land Acquisition Act, therefore, on **17.11.1998** he again sent a letter to applicants No.2 to 5 from USA but said letter was also not replied by the applicants. Therefore, Respondent No.1 filed said suit for recovery of Rs.51.74,680/- in **2001** alongwith mark-up with the following prayer.

a) *Decree against defendants including their successor to pay to plaintiff jointly and severally amount of Rs.51,74,680/- (Rupees Fifty one Lacs seventy four thousand six hundred eighty) to plaintiff as cost/compensation and loss of land, trees and crops alongwith markup at bank rate from 1994 till actual payment of principal amount to plaintiff.*

b) *Costs of suit may be awarded to plaintiff.*

c) *Any other relief which this Hon'ble Court may deem fit and proper may be awarded to plaintiff.*

3. Summons were issued to Respondents and written statement was filed on behalf of Applicant No.4 which was adopted by rest of the applicants. In written statement applicant No.4 contended that there was no garden of palm, date trees and other crops at the subject land because the subject land was an irrigated water/barani land and the same was cultivable at rainy season and no open

drainage/ sewerage lines were constructed in the subject land destroying pacca irrigation watercourse and crops/trees of Respondent No.1. He further contended that the drainage/sewerage was constructed in the year **1960** according to the planned manner and the control of said scheme was handed over to Respondent No.2, therefore, applicants have no concern with it and that the applicants never constructed any new drainage/sewerage in the subject land nor damaged any garden and any kind of crops.

4. The learned trial Court framed the following issues:-

1. *Whether plaintiff owns possess 18-1/2 acres of garden land in Makan Urban Chakhro, Deh Kohistan 7/1, Tapo Jhimpir, Taluka and District Thatta?*

2. *Whether defendants illegally constructed open drainage/ sewerage lines in garden land of plaintiff cutting across and destroying plaintiff's pacca irrigation water course?*

3. *Whether due to construction of sewerage line illegally and un-authorizedly by defendants, 200 trees of fruit bearing palm date and 20 male palm date trees of the plaintiff withered away and died?*

4. *Whether due to illegal construction of sewerage line by defendants, plaintiff's said land has been rendered un-cultivated?*

5. *Whether plaintiff has suffered loss of Rs.51,74,680/- due to illegal construction of sewerage line by defendants in plaintiff land and defendants are individually and collectively liable to pay this amount to plaintiff with mark-up at bank rate?*

6. *Whether suit is time barred?*

7. *Whether suit is not maintainable under law?*

8. *Whether this court has no jurisdiction to try this suit?*

9. *What should the decree be?*

5. Learned trial Court after recording evidence and hearing learned counsel for the parties, decreed the suit by judgment & decree dated **11.02.2010** and **16.02.2010** with 6% mark-up per

annum at Bank rate by way of damage from the date of institution of the suit till realization of principle amount. The applicants preferred civil appeal **No.48/2007** before II-Additional District Judge, Thatta, which was dismissed by judgment and decree dated **11.02.2010**, hence the applicants preferred the instant Revision Application against the said judgment.

6. I have heard learned counsel for the parties and gone through the written arguments submitted by the learned counsel for the respective parties and perused the record.

7. Learned counsel for the applicants has contended that the suit was hopelessly time barred as well as there was no evidence to substantiate the claim of Respondent No.1/plaintiff for damages and loss caused by the applicants. He has referred to the evidence and claimed that merely on oral statement by politically motivated representative of Union Council the burden was not discharged from Respondent No.1 and as such the applicants were not even required to lead any evidence. He further contended that it usually happen in the state cases that even formal evidence was not produced in Court. In any case the first burden was on the respondent/plaintiff which was not discharged and, therefore, suit ought to have been dismissed.

8. The counsel for Respondent No.1 contended that Respondent No.1 has purchased the suit land in **1987** and construction of drainage lines was developed in his land in his absence without informing him. Both the Courts below have relied on the evidence which has established that Respondent No.1/plaintiff has suffered losses. According to him since applicants have not produced evidence in rebuttal and statements of Respondent have gone unchallenged,

the counts were bound to accept the claim of Respondent No.1. He further contended that this Court is not supposed to set aside the concurrent findings based on the evidence in the revisional jurisdiction.

9. In the light of respective arguments of learned counsel I have also minutely examined the evidence and record to appreciate whether the two Courts below have properly exercised their jurisdiction vested with them and whether they have committed material irregularity in decreeing the suit of Respondent No.1/ plaintiff.

10. The learned trial Court while dealing with legal issues No.6, 7 and 8 declared that the burden of proof of limitation for filing suit was on the applicants/ defendants and the appellate Court endorsed it without realizing the fact that it is the duty of the Court to apply law of limitation by itself even before issuing notice to the defendant. The learned trial Court and appellate Court were supposed to examine the plaint for determination of issue of limitation. The perusal of plaint shows that Respondent No.1 himself stated in para-5 of the plaint that in **1994** he came to know that the defendants have illegally constructed and laid down open drainage and sewerage lines in suit land cutting across and destroying plaintiff's pacca irrigation water course and 180 female and 20 male palm date trees. He did not show any grievance against such loss which was permanent in nature except sending a legal notice in 1994. In para-7 of the plaint it is stated that he was still in America in 1998 when he came to know that the defendants have again illegally and unlawfully reconstructed and repaired open drainage system lines in the suit land without his consent. The reconstruction was not a fresh cause of

action, if at all we believe that there was re-construction in 1998, he remained silent from **1994 till 2001** on the same cause of action whereby he has been deprived of his land by raising construction of Nala and in the process he has lost garden of 200 trees.

11. The perusal of the order of the trial Court reveals that suit No.46/2001 presented on **01.8.2001** was found maintainable by application of **Article 93** of the Limitation Act, 1908. There was no reference to the date and time of filing of the suit and the date of cause of action. How and on what basis **Article 93** of Limitation Act, 1908 was applicable in the case of recovery of losses suffered by the plaintiff prior to 1994 was not discussed in the impugned judgment. The suit for compensation of loss suffered prior to **1994** was filed in **2001**. The limitation even by application of wrong **Article 93** of the Limitation Act could not be more than three years. According to Respondent No.1 himself he came to know of this loss in **1994** then he was under statutory obligation to file suit in three years by reference to an incorrect and wrong provision of Limitation Act applied by the two Courts below, otherwise limitation for claiming such compensation is ONE year from the date of injury/ loss etc. The reference to **Article 93** of the Limitation Act was totally out of context. Learned appellate Court has not touched the question of limitation and the maintainability of suit and allowed the appeal hardly in four short paragraphs after reproducing whole facts of the case including issues framed by the trial Court but without referring to the evidence and mostly on the ground that the applicants/ Respondents have failed to produce their evidence before learned trial Court without reasonable explanation.

12. On merit, from his own statement in the plaint he claimed to have purchased suit land in 1987 and the drainage system was already in place as it was constructed in **1960**. Even his own witnesses DPW-3 Ghulam Rasool, who claimed to be Nazir of Union Council stated that *"there are drainage/ sewerage nallies built in Town Jhampir, which were constructed by Public Health Engineering department in the year 1984-1985"* meaning thereby that, if at all, Respondent No.1/plaintiff was the owner of the land from 1987 then he has knowingly purchased the land already having Nala and drainage system and its reconstruction/ repair in 1998 was not supposed to cause him any loss at all. The allegation of repair and reconstruction of Nala was not proved. Merely an oral statement that such construction work was done is not enough proof of such construction/ repair only because other side has not brought any evidence. It should have been proved through documentary evidence by calling record of relevant agency who has done the job. Then in his plaint he has also claimed losses of 200 fruit trees because of non-supply of water owing to laying of drainage lines without any proof. How the losses were calculated and proved? Respondent No.1 has not produced any receipt of having purchased the trees and nor produced anyone who can confirm the market value of trees at the time of loss. Even the loss of trees also dates back to **1994** or earlier.

13. Beside the above, on **17.11.2011** this Court had been informed that a similar suit has again been filed by Respondent No.1/Plaintiff in **2008** bearing **Suit No.142/2008** in respect of the same land with identical cause of action for the losses sustained by him and that suit has been dismissed, therefore, it was ordered that learned Additional Advocate General should place on record copy of the judgment and pleadings of suit No.142/2008. By statement dated **16.12.2011** the

record of that case was placed on record. I have gone through the judgment in suit No.142/2008. The suit land in both suits is one and the same and in **2008** again palm trees in same land and fodder grass were damaged but this time due to choking of drainage/ sewerage lines. The difference is only that this time loss includes death of flock of goats by drinking unhygienic water. In the suit in hand on the same line Respondent No.1 has claimed loss of 200 fruit trees and damage to various crops in 10 acres of suit land. Despite knowledge, the learned counsel for Respondent No.1 has not offered any comments on this judgment in identical suit on identical evidence. Even appeal has not been filed against its dismissal.

14. In view of the above, both the Courts below have failed to decide the question of limitation without reference to the date of cause of action and thereby assumed the jurisdiction which was hit by **Section 3** of the Limitation Act, 1908. Similarly, both the courts below failed to appreciate that plaintiff/ Respondent No.1 evidence in line with the principles of burden of proof was material irregularity. Consequently both the impugned orders are set aside, the suit filed by Respondent No.1 is dismissed and this Revision Application is allowed.

JUDGE

Karachi
Dated:10.01.2019

Ayaz Gul/P.A