

**IN THE HIGH COURT OF SINDH,  
CIRCUIT COURT, HYDERABAD**

**Civil Revision Application No.56 of 2015**

Abdul Wahid Jehajo	-----	Applicant
	Vs.	
Punhoon	-----	Respondent

Date of hearing: 21.9.2020

Date of decision: 25.9.2020

Mr. Imdad Ali R. Unar, Advocate for the Applicant.

Mr. Allah Bachayo Soomro, Additional Advocate General, Sindh.

**ORDER**

**ADNAN-UL-KARIM MEMON, J. -** In this Revision Application, the Order dated 3.2.2015 passed by the learned Additional District Judge, Sehwan in Civil Appeal No.22 of 2014 and Order dated 24.11.2014 passed by learned 1<sup>st</sup> Civil Judge, Sehwan Sharif in F.C Suit No. 06 of 2011 are impugned.

2. Precise facts of the case are that the Applicant filed 3<sup>rd</sup> Class Suit No. 06 / 2011 (Re-Abdul Wahid Jehajo Vs Punhoon) for Permanent Injunction before learned Civil Judge, Sehwan. Upon service, the Respondent/Defendant filed written statement denying the averments and assertions made in the plaint. In view of the divergent pleas raised by the parties, learned Trial Court framed 04 issues on 04.11.2011, including the issue of maintainability of the suit. The Applicant/Plaintiff examined two witnesses in support of his contentions. However, the Respondent/Defendant failed and/or avoided to lead any evidence and moved interlocutory application under Order VII, Rule 11 C.P.C. after framing of issues and recording of evidence. In reply to the said application, the present Applicant filed counter affidavit. However, no affidavit-in-rejoinder thereto was filed. Learned Trial Court allowed the above specified application and rejected the Plaint vide order dated 24.11.2014. Against said order, the present Applicant filed Civil Appeal No.22 of 2014 before learned Additional District Judge, Sehwan; however, the said appeal was also dismissed vide order dated

3.2.2015. Feeling aggrieved by orders passed by the two courts below, the instant Revision Application has been filed.

3. Mr. Imdad Ali R. Unar, learned counsel for the Applicant contends that once issues were framed and evidence of the Plaintiff was recorded, then in such eventuality the trial court should have decided the suit on merits. Besides, learned counsel submits that evidence led by the Applicant/Plaintiff has also gone un-rebutted. Learned counsel submits that both the learned courts below have committed illegality while passing the impugned orders without appreciating the material available on record. Learned counsel briefed on the legal aspect of the case as to under what conditions a suit for Permanent Injunction lies and under what facts suit for declaration and / or possession with injunction as a consequential relief lie. He referred to them briefly in the following manner:

(i) where a plaintiff is in lawful or peaceful possession of a property and such possession is interfered or threatened by the defendant, a suit for an injunction simpliciter will lie. A person has a right to protect his possession against any person who does not prove a better title by seeking a prohibitory injunction, but a person in wrongful possession is not entitled to an injunction against the rightful owner

(ii) where the title of the plaintiff is not disputed, but he is not in possession, his remedy is to file a suit for possession and seek besides, if necessary, an injunction. A person out of possession, cannot seek the relief of injunction simpliciter, without claiming the relief of possession

(iii) Where the plaintiff is in possession, but his title to the property is in dispute, or under a cloud, or where the defendant asserts title thereto and there is also a threat of dispossession from the defendant, the plaintiff will have to sue for declaration of title and the consequential relief of injunction

(iv) Where the title of the plaintiff is under a cloud or in dispute and he is not in possession or not able to establish possession, necessarily the plaintiff will have to file a suit for declaration, possession, and injunction. I may however clarify that a prayer for declaration will be necessary only if the denial of title by the defendant or challenge to the plaintiff's title raises a cloud on the title of the plaintiff to the property. A cloud is said to raise over a person's title, when some apparent defect in his title to a property, or when some prima facie right of a third party over it, is made out or shown. An action for declaration is the remedy to remove the cloud on the title to the property. On the other hand, where the plaintiff has clear title supported by documents, if a trespasser without any claim to title or an interposer without any apparent title, merely denies the plaintiff's title, it does not amount to raising a cloud over the title of the plaintiff and it will not be necessary for the plaintiff to sue for declaration and a suit for an injunction may be sufficient

(v) Where the plaintiff, believing that the defendant is only a trespasser or a wrongful claimant without title, files a suit mere for injunction, and in such a suit, the defendant discloses in his defence the details of the right or title claimed by him, which raises a serious

dispute or cloud over plaintiff's title, then there is a need for the plaintiff, to amend the plaint and convert the suit into one for declaration. Alternatively, he may withdraw the suit for bare injunction, with permission of the court to file a comprehensive suit for declaration and injunction. He may file a suit for declaration with consequential relief, even after the suit for injunction is dismissed

(vi) where the suit raised only the issue of possession and not an issue of title. In a suit for a Permanent Injunction to restrain the defendant from interfering with the plaintiff's possession, the plaintiff will have to establish that as on the date of the suit he was in lawful possession of the suit property and the defendant tried to interfere or disturb such lawful possession

(vii) Where the property is a building or building with apartment, there may not be much difficulty in establishing possession. The plaintiff may prove physical or lawful possession, either of himself or by him through his family members or agents or lessees / licensees. Even in respect of land without structures, for example an agricultural land, possession may be established regarding actual use and cultivation. The question of title is not in issue in such a suit, though it may arise incidentally or collaterally; but what if the property is a vacant site, which is not physically possessed, used, or enjoyed? In such cases, the principle is that possession follows title. If two persons claim to have a vacant site, one who can establish title thereto will be considered to be in possession, as against the person who is not able to establish title. This means that even though a suit relating to a vacant site is for a mere injunction and the issue is one of possession, it will be necessary to examine and determine the title as a prelude for deciding the de-jure possession. In such a situation, where the title is clear and simple, the court may venture a decision on the issue of the title, to decide the question of de-jure possession even though the suit is for a mere injunction. But where the issue of title involves complicated or complex questions of fact and law, or where the court feels that parties had not proceeded on the basis that title was at issue, the court should not decide the issue of title in a suit for injunction. The proper course is to relegate the plaintiff to the remedy of a full-fledged suit for declaration and consequential reliefs. There is some confusion as to in what circumstances the question of title will be directly and substantially in issue, and in what circumstances the question of title will be collaterally and incidentally in issue, in a suit for injunction simpliciter. Several decisions are taking a similar view that in a suit for injunction, the question of title does not arise or would arise only incidentally or collaterally.

4. I have heard learned counsel for the Applicant and perused the material available on record.

5. I have noticed that the Respondent was served through all modes including publication but he has chosen to remain absent, leaving this Court to proceed with the matter in presence of learned A.A.G.

6. Learned counsel for the Applicant has submitted a statement dated 9.10.2017 along with sale deed and Khata/Entry, prima facie show that the subject property was entered in the name of his father in the Record of Right; however, till date no Fotikhata Badal has taken place. He claims to have the suit land on the strength of aforesaid documents issued in favour of his

deceased father. According to the Applicant, the need to file the suit arose because he had serious apprehension of dispossession from the suit land by Respondent on the basis of forged documents or otherwise. The learned Trial Court framed Issues and the Applicant adduced evidence whereas, Respondent did not and filed application under Order VII, Rule 11 CPC for rejection of plaint. The learned Trial Court vide Order dated 24.11.2014 rejected the plaint under Order VII Rule 11 C.P.C. Against such rejection, present Applicant filed Civil Appeal No.22 of 2014 before learned Additional District Judge, Sehwan. However, the said Appeal was also dismissed vide Order dated 3.2.2015.

7. Contention of the Applicant is that the F.C Suit No. 06 of 2011 filled by him was not barred by law therefore civil court has jurisdiction to grant the relief as prayed.

8. Foremost point involved in the present proceedings is as to whether the learned Trial Court has rightly exercised jurisdiction vested in it while rejecting plaint?

9. To appreciate the aforesaid point of law it is important to analyze Order VII, Rule 11 of the Code of Civil Procedure, 1908 reproduced below:

a) Where it does not disclose a cause of action;

b) Where the relief claimed is under-valued, and the plaintiff, on being required by the Court to correct the valuation within a time to be fixed by the Court, fails to do so;

c) Where the relief claimed is property valued; but the plaint is written upon paper insufficiently stamped, and the plaintiff, on being required by the Court to supply the requisite stamp-paper within a time to be fixed by the Court, fails to do so;

d) Where the suit appears from the statement in the plaint to be barred by any law”.

10. I have noticed that the Court is bound by the use of word “shall” to reject a plaint if it “appears” from the statement in the plaint to be barred by any law. So the objection raised by the Respondent in the suit proceedings on the aforesaid proposition is not sustainable under the law.

11. To elaborate further on the issue involved in the present proceedings, it is expedient to refer Section 9 of the Civil Procedure Code, which confers general jurisdiction upon courts to try all suits of a civil nature. In order to appreciate the scope of Section 9 of CPC, the same is reproduced as under:-

“(9) Courts to try all Civil Suits unless barred. ---the courts shall (subject to the provisions herein contained) have jurisdiction to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred. Explanation: A suit in which the right to property or to an office is contested is a suit of a civil nature, notwithstanding that such right may depend entirely on the decision of questions as to religious rites or ceremonies.”

12. In the light of the preceding paragraph, I am of the considered view that Civil Courts are the Courts of ultimate jurisdiction with regard to civil right, duty or obligation, unless the jurisdiction is either expressly or impliedly barred.

13. Coming to the case in hand, it is not disputed that the Applicant's father was the owner of the suit land and the Applicant is one of the legal heirs. And, under the Law of Inheritance all the legal heirs automatically become share-holders in the immoveable property left by propositus, therefore, they become joint owners.

14. In such circumstances, the learned Trial Court has to see whether the Applicant (plaintiff) was able to make out all the three necessary ingredients for grant of permanent injunction with the aid of evidence, i.e. prima facie case, the balance of convenience, and irreparable loss and injury if the injunction is not granted to him.

15. Per learned counsel the applicant's father had tittle documents in his favour with regard to the suit land, and there was a prima facie case in his favour. It is for these reasons, the learned Trial Court ought to have completed the evidence rather than rejecting the plaint capriciously. In support of contention he relied upon the decision of Honorable Supreme Court rendered in the case of ASAL JANAN and others vs. ZAREEF KHAN and others (2020 SCMR 668)

16. It appears from the pleadings of the parties that the Respondent has not denied the factum that Applicant is one of the legal heirs of the deceased. Record does not reflect that Respondent has claimed possession of the subject land; therefore, the suit filed by the Applicant was required to have been decided on merits subject to arraying all the legal heirs of deceased as party in the proceedings.

17. In view of the forgoing, the findings recorded by the Courts below rejecting the plaint of the Applicant are held to be erroneous thus, reversed/set aside.

18. The matter is remanded to the learned Trial Court to record evidence of remaining witnesses and decide the case on merits within two (02) months

from the date of receipt of this order. And, in case any legal heir of deceased Haji Muhammad Alam is not made party in the suit, the same may be done in accordance with law.

19. That the observations made herein above shall not prejudice the Trial.

**JUDGE**