

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

**IInd Appeal No. 51 of 2017**

Nazeer Ahmed .....Appellant

Vs.

Additional District Judge,  
Sehwan & 07 others .....Respondents

**IInd Appeal No. 52 of 2017**

Ali Asghar .....Appellant

Vs.

Additional District Judge,  
Sehwan & 07 others .....Respondents

Date of hearing: 28.10.2019

Date of decision: 08.11.2019

Nazeer Ahmed Dahio &  
Ali Asghar Rahpoto  
Appellants: through Mr. Sohbat Ali Lund, Advocate.

Mukhtiar Ahmed Lashari &  
Sardar Ali Lashari  
Respondents No.2&3: Nemo as per Bailiff's report dated  
12.10.2019, they are still at large.

Allah Bux Maree  
Respondents No.4: Nemo

Respondents 1,5to8: through Mr. Wali Muhammad Jamari, Asstt:  
A.G.

**J U D G M E N T**

**ADNAN-UL-KARIM MEMON, J:** - By consent of the parties, the above referred Appeals are taken up together and are being disposed of by this common Judgment as the issues raised are similar in nature. These Second Appeals under Section 100 CPC are filed against the Judgment and Decree dated 12.9.2017 passed by the learned Additional District Judge, Sehwan, in Civil Appeals No.16 & 17 of 2017, whereby the learned Judge while dismissing the Appeal of the Appellant maintained the order dated 3.5.017 passed by learned Senior Civil Judge, Sehwan in Suits No. 79 & 80 of 2017.

2. Brief facts of the case are that Appellants / Plaintiffs filed Suit for Declaration & Permanent Injunction in the Court of learned Senior Civil Judge, Sehwan seeking declaration to the effect that they are lawful tenants/lessee of Agricultural land bearing survey No. 749 (2-09 acres) 754 (3-09 acres) 755(3-12 acres), 804(0-28 acres) total 9-18 acres, 757(2-26 acres) 758(2-17½ acres), 760(1-28½ acres), 761 (1-11 acre) total 10-18 acres, situated in Deh Jhandiyani Taluka Sehwan, for a period of 12/15 years with effect from February 2013. The Appellants claimed that they remained in possession of the aforesaid land as lessee, however in the month of March 2017, they came to know that the subject land had been attached by the learned Judicial Magistrate-II Sehwan in proceedings initiated under Section 88 Cr.P.C. against the owners of the subject land (i.e. Respondents 2 & 3). The Appellants being aggrieved by and dissatisfied with the aforesaid attachment order approached the learned trial Court and filed the above Suits; however, learned trial Court vide orders dated 3.5.2017 rejected the plaint under Order VII Rule 11 C.P.C on the premise that Section 56 of the Specific Relief Act, 1877, bars the Court to grant injunction against any Court not subordinate to it and the Court has no jurisdiction to restrain learned Judicial Magistrate-II Sehwan / Defendant No.4 from passing any lawful order during proceedings under Section 88 Cr.P.C, thus the suits of the Appellants/plaintiffs are not maintainable.

3. They being aggrieved by and dissatisfied with the aforesaid orders, preferred statutory Appeals before the learned Additional Sessions Judge, Sehwan, which too were dismissed vide Judgments and Decrees dated 12.9.2017 on the analogy that the appellants/plaintiffs are lessee of the suit land vide agreement dated 16.3.2013 and are in cultivating possession of the suit land since 2013. However, the Appellants based their claim on the strength of aforesaid unregistered agreement.

4. During the course of arguments, I put a query from learned Counsel of the Appellants that, how the suits filed by the Appellants before the learned trial Court were maintainable, in view of attachment orders of learned Judicial Magistrate as he passed judicial orders against the owners/lessors of the subject land, who were declared absconders in Cr. Case No. 143 of 2015 arising out of Crime No. 03 of 2015 of Police Station Khairo-Dero and their

agricultural property was attached under Section 88 Cr.P.C, vide Entry Nos. 09 & 10 dated: 06/01/2012.

5. On the second point that survey number 760(03-17 acres) which had already been mortgaged in favour of the Court of learned Additional Sessions Judge, Sehwan, as per mortgage note recorded on the face of entry and another note exists that Sale Certificate in respect of survey number 758(2-17½ acres) has been issued. Therefore, the remaining area viz. 24-15 acres has also been attached in favour of the learned Court as per attachment note recorded on the face of Entry No. 09 of VF-VII-B of Deh of Jhandyani, Taluka Sehwan. As per record, further Entry No.10 dated 06.01.2015 of VF.VII-B of Deh Jhandyani shows that survey number 749(02-09 acres) has already been mortgaged in favour of this Court Circuit Bench, Hyderabad as per Entry No.31 dated: 23-05-2013, while the remaining area 12-04½ acres under survey number 754(03-09 acres) 755(03-12 acres), 784(02-24 acres), 781(02-11½ acres) has also been attached in favour of the Court as per attachment note recorded on the face of original entry No. 10 dated 06/01/2012 of VF.VII-B of Deh Jhandyani.

6. He in reply to the query submitted that Respondents 2 & 3 owned agriculture land at 50 paisa share, situated at Deh Jhandiani Taluka Sehwan; that in the year of 2013 Respondents 2 & 3 leased out their lands for 12/15 years to the Appellants at the rate of Rs.12,50,000/- per acre, per year and received total lease money of Rs.27,19,899/- in lump sum. Such agreement was reduced into writing and signed by both the parties and their witnesses. The agreement was also attested by the Oath Commissioner. The Appellants thereafter remained in possession of the land but in the month of March 2017 the Appellants came to know that official Respondents 6 & 7 (Mukhtiarkar & SHO) were making enquiries in respect of possession and cultivation of the subject land under the orders of learned Judicial Magistrate/ Respondent No.5; however, later on the Appellants came to know that Respondents 2 & 3 had already been declared as proclaimed offenders in Cr. Case No. 143 of 2015 arising out of Crime No. 03 of 2015 registered under Section 337-H (ii), 54, 506/2, 147, 148 and 149 PPC at Police Station Khairo Dero and their land had already been attached under Section 88 Cr.P.C; that Respondent No.4 moved an application on 3.2.2017 before the learned Judicial Magistrate-II Sehwan / Respondent No.5,

who on the said application ordered Respondents 6 & 7 to make enquiry and submit report. On coming to know about the proceedings of the application, Appellants filed objections. Respondent No.5 directed the Respondent No.6 to file the report personally; therefore, the Appellants due to apprehension filed the Suits No. 79 & 80 of 2017 before the learned trial Court.

7. On the legal issue, learned Counsel for the Appellants submits that the impugned Judgments and Decrees passed by both the learned Courts below are bad in law and based upon misreading and non-reading of material available on record; that the impugned Judgments and Decrees are perverse as such are not sustainable in law; that both the Courts below did not consider Order VI Rule 17 CPC and wrongly rejected the complaints of the Appellants; that the complaint can be amended at any stage of the proceedings and both the Courts below did not consider this aspect of the case and without providing opportunity of hearing on the issue rejected the complaint in *limine*. He next submitted that if a party seeking declaration had failed to claim consequential relief he should not have been nonsuited on technical grounds; that even if one prayer clause is maintainable the entire Suit is maintainable hence the learned Trial Court has wrongly rejected the complaint under Order 7 rule 11 CPC; that both the Courts below did not consider the material facts that the Appellants got lease of agricultural land from Respondents 2 and 3 and also got possession of the subject land, in this regard the lease agreement was reduced into writing and lease amount was also paid by the Appellants in advance, thus they had the interest in the subject property which could not have been closed; that both the Courts below did not consider the real facts mentioned in the complaint which prima-facie showed that there was a cause of action to file the suit and due to rejection of complaint in *limine* the Appellants sustained financial loss; that both the Courts below failed to consider that the appellants were in possession of suit land, thus in view of above facts and grounds the interference of this Court is required by setting aside the impugned orders passed by both the Courts below. In support of his contention, he relied upon the cases of Muhammad Younus Shaikh v. Corex Enterprises and another (2007 MLD 508), Muhammad Nasim Siddiqui v. Ali Akbar (PLD 2018 Sindh 703), Nisar Ahmed Japanwala v. City District Government, Karachi through District Coordination Officer (2018 YLR 1341), Bore Muhammad v.

Mst. Aziza Begum and others (PLD 2003 Karachi 466), Abdul Hamid and another v. Dilawar Hussain alias Bhalli and others (2007 SCMR 945), Farman Ali v. Muhammad Ishaq and others (PLD 2013 SC 392), Allah Dino v. Ali Muhammad (2016 YLR 890), Mst. Nasreen Begum and 2 others v. Province of Punjab through District Controller, Vehari and others (2006 MLD 775), Mst. Arshan BI through Mst. Fatima Bi and others v. Maula Bakhsh through Mst. Ghulam Safoor and others (2003 SCMR 318), Nanik Ram and others v. Ghulam Akbar and 9 others (2016 MLD 53) and on unreported judgment of this Court passed in High Court Appeal No. 195 of 2017

8. Learned AAG has supported the impugned judgments and decrees passed by the learned Courts below.

9. I have heard learned counsel for the parties and perused the record as well as the case law cited at bar.

10. Contention of learned counsel for the appellants is that the suits filed by them were not barred by law as such civil Court has jurisdiction to grant declaration as prayed.

11. Foremost point involved in the present proceedings is with regard to powers of the court to either reject the plaint or dismiss the suit at any stage of the matter.

12. To appreciate the aforesaid point of law, at this juncture it would be appropriate to carry out an analysis of Order VII Rule 11 of the Code of Civil Procedure 1908, the said provision is 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”.

13. I have noticed that the Court is bound by the use of mandatory word “shall” to reject a plaint if it “appears” from the statement in the plaint to be barred by any law. So the next objection raised by the

learned Counsel on the aforesaid proposition is also not sustainable under the law.

14. Now I need to examine the ground on the basis of which the plaint has been rejected. I have examined the plaint and found that such declaration cannot be obtained under the law.

15. The pivotal questions that clinch the controversy in hand are as follows:-

- (i) Whether the Appellants/plaintiffs were entitled to enforce the lease agreement in view of attachment orders passed by the learned Judicial Magistrate against the owners/respondents 2 & 3 of the subject land being absconders in criminal case?
- (ii) Whether the suits of the Appellants/plaintiffs are barred under the law and not maintainable?

16. While dilating upon the aforesaid questions of law. I have noticed that under Section 42 of Specific Relief Act provides bar to such declaration as prayed by the Appellants in their respective suits. However, it is made clear that any person who is entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to such character or right, and the Court may in its discretion make therein a declaration that he is so entitled. However, in the present case the appellants in their abortive attempt in order to circumvent the attachment proceedings initiated against the owners of the subject land had instituted civil proceedings by obtaining such declaration against the respondent No.5 / Judicial Magistrate, which action of the appellants is barred under the law though they have not sought any declaration / relief against the private respondents 2 & 3. Section 21 of the Specific Relief Act, also provides that certain contracts cannot be specifically enforced. Section 56 also provides that an Injunction cannot be granted on the following points:-

- (a) to stay a judicial proceeding pending at the institution of the suit in which the injunction is sought, unless such restraint is necessary to prevent a multiplicity of proceedings;
- (b) to stay proceedings in a Court not subordinate to that from which the injunction is sought;
- (c) to restrain persons from applying to any legislative body;
- (d) to interfere with the public duties of any department of [the federal Government], or any Provincial Government], or with the sovereign acts of Foreign Government;
- (e) to stay proceedings in any criminal matter;

(f) to prevent the breach of a contract the performance of which would not be specifically enforced;

(g) to prevent, on the ground of nuisance, an act of which it is not reasonably clear that it will be a nuisance;

(h) to prevent a continuing breach in which the applicant has acquiesced;

(i) when equally efficacious relief can certainly be obtained by any other usual mode of proceeding except in case of breach of trust;

(j) when the conduct of the applicant or his agents has been such as to disentitle him to the assistance of the Court;

(k) where the applicant has no personal interest in the matter.

17. The above legal position concludes that the suits of the appellants are barred not only by Section 42 of the Specific Relief Act but also by other sections of the Specific Relief Act. Their act of entering into lease agreement and to continue with after attachment orders passed by the Competent Court of Law regarding the subject land would not legalize their prayer for a declaratory decree which is in respect of legal character and right to property, if any, of appellants till subsistence of the attachment/mortgaged order. Thus, it is quite safe to conclude that in existence of above undeniable legal positions and facts the suits of the appellants in such situation are not sustainable hence continuity will not bear any fruit.

18. 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.”

19. 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. Section 9 of Civil Procedure Code only confers jurisdiction upon courts and does not grant a substantive right of action. The right of action is to be established by referring the substantive law. In the present matter, Appellants have asked for declaration for continuity of their lease Agreement made

with private respondents 2 & 3 who are still at large and fugitive from Court of law, thus their land which is under attachment by the order of the competent court of law, until and unless the same is redeemed from the attachment, prima-facie the contract made between the appellants and private parties will remain in cloud, which as per the law the appellants cannot continue to bear the fruit of the subject land, for the simple reason that the Appellants through the aforesaid contract seeks declaration to the effect that they are tenants of the subject land which is under attachment and such declaration at the juncture cannot be obtained as discussed in the preceding paragraph, which is not permissible under the law. In my view, the learned trial Court has rightly rejected the plaints till its attachment is over.

20. I am of the considered view that such an Agreement/ executed between the parties is hit by Sections 42 and 56 of the Specific Relief Act, thus no declaration can be made to that effect under the law.

21. I have noticed that there are concurrent findings of the facts against the appellants and the scope of the aforesaid appeals is very limited. However, it is noted that in the impugned orders, learned trial court as well as Appellate Court has dealt with every aspect of the matter and has rightly concluded in the impugned Orders that suits are not maintainable. The suits filed by the Appellants thus are not only barred by law but they have also failed to make out any case for interference of this Court.

22. In the light of above facts and circumstance of the case, these IInd Appeals filed by the Appellants are misconceived, and are dismissed.

**JUDGE**