

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

R.A. No. 154 of 2011

*Applicants* : Mr. Allah Bachayo Soomro,  
Addl. Advocate General, Sindh

*Respondents* : Nemo (despite service through  
publication vide order dated  
04.10.2021)

*Date of hearing* : 25.10.2021

*Date of Order* : 19.11.2021

**ORDER**

**ADNAN-UL-KARIM MEMON, J.-** Through this Civil Revision Application, the Applicants have called in question the order dated 07.03.2011 passed by learned 1<sup>st</sup> Additional District Judge, Badin in Civil Appeal No. 38 of 2001 (Re: Asst. Executive Engineer and 02 others v. Jalil Ahmed & 06 others) dismissing the appeal for non-prosecution with the following observation:

*“This order will dispose of application under section 5 of Limitation Act, praying to condone the delay in filing of application under Order 41 rule 19 CPC read with section 151 CPC.*

02. Heard Mr. Anees Ahmed Junejo learned DDA for the state, Mr. Ghulam Nabi Rahookro, Assistant Executive Engineer Matli Sub-Division. Mr. Ghulam Nabi Rahookro Assistant Executive Engineer, Matli, Sub Division, in his affidavit has stated that the officers posted at Matli when the matter was proceeded have been transferred and he has taken over charge as Assistant Executive Engineer Matli nowadays and he inquired about Civil Case where he came to know that this appeal was dismissed for non-prosecution due to lack of interest of predecessor, therefore, he has moved this application under section 5 of Limitation Act to condone delay for filing an application under Order 41 rule 19 CPC read with section 151 CPC.

03. The reasons disclosed in the affidavit of Assistant Executive Engineer Matli Sub-Division and learned DDA for the State are not satisfactorily. The Assistant Executive Engineer has not mentioned that when his predecessor transferred and when he assigned duty. He has to explain each and every day of delay for filing of the application for re-admission of the appellant but he has not explained such period of delay. The appeal was dismissed on 3.4.2010 and now he has filed application for re-calling the order dated 3.4.2010 on 18.02.2011. There is delay of eight months and 15 days in filing of the application and he has not explained such time of delay mere saying that due to lack of interest of his predecessor, the appeal was dismissed. This is not a cogent ground if, his predecessor was not taking interest then higher authorities has not looked and inquired about the cases pending in the Courts. Even at that time, Mr. Salahuddin learned DA for the State taking no interest in this case and not appeared in this case. After perusal of the case diary it reveals that on 19.10.2009, one canal Assistant was present on

*behalf of the appellant and DA was absent. He sought date on 17.11.2009 DA was called absent. On 14.11.2009, 19.12.2009, 09.1.2010, 16.01.2010, 23.01.2010, 13.12.2010, 6.3.2010, 20.03.2010 and 3.4.2010 none present on behalf of the appellant, therefore, the appeal was dismissed for non-prosecution on 3.4.2010. The appellant has provided sufficient time but he has no interest in this appeal, to restore the same. The appellant has to file cogent ground for condoning the delay in filing of the application but there is no sufficient cause to condone the delay in filing the application under order 41 rule 19 CPC, therefore, the application under section 5 of Limitation Act stand dismissed. Consequently, the application under order 41 rule 19 CPC also dismissed, being devoid of any force/substance.”*

2. Mr. Allah Bachayo Soomro, learned Addl. A.G. for applicants, has mainly contended that the appellate court has failed to appreciate the evidence brought on record by the applicants to the effect that F.C Suit No.12 of 2000 filed by the respondents for specific performance of contract and injunction arising out of the dispute of supply of water to them through watercourse No.52, BL, RD 64.0 Muradwah through their Lift pump installed thereon was/is not maintainable under the Specific Relief Act; that the judgments of trial court as well as appellate Court are based upon misreading, conjectures, surmises, arbitrary without assigning any cogent reasons and suffer from severe illegalities, infirmities, and irregularities as such liable to be set aside. He emphasized that the learned trial Court completely ignored the factum of maintainability of Suit as provided under Section 79 CPC read with Article 174 of the Constitution, thus the Judgment of trial Court as well as order of Appellate Court are perverse and against the basic spirit of law, thus liable to be set aside. He prayed for allowing the instant Revision Application.

3. I have noticed that the respondents have been served through publication in daily `Kawish Hyderabad`, but they have chosen to remain absent without any intimation, therefore, this Court has no option but to hear learned Additional Advocate General and decide the matter on merit.

4. Perusal of record reflects that learned appellate Court dismissed the appeal of the applicants on account of non-prosecution and its restoration application was initially allowed vide order dated 04.09.2003 on certain grounds, but lateron dismissed vide order dated 07.03.2011; against which the applicant has preferred this Civil Revision Application.

5. Initially the private respondents filed Suit No.12 of 2000 for Specific Performance of Contract and Injunction, before learned Senior Civil Judge Matli, *inter alia*, on the ground that they irrigate their lands through watercourse No.52-BL, RD. 64 of Murad Wah through lift pump installed thereon, which was contested by official respondents through written statement and denied the allegations leveled against them and raised the question of maintainability of the Suit. The trial Court due to divergent pleas of the parties framed the following issues:

1. Whether the Khachar distry/minor has been closed after 5-7 miles by irrigation authority due to excavation of Murad Wah?
2. Whether the plaintiffs are irrigating their land through watercourse No.52-BL, RD. 64 of Murad Wah?
3. Whether the plaintiffs are legally entitled to irrigate their lands through Pump/machine?
4. Whether the plaintiffs have no source to irrigate the suit land except from Murad wah?
5. Whether the plaintiffs have no cause of action for filing this suit?
6. Whether the suit is not maintainable under Law?
7. Whether the plaintiff is entitled for the relief as prayed?
8. What should the decree be?

6. Learned trial Court after recording evidence of the parties, decreed the Suit of plaintiffs vide judgment and decree dated 03.09.2001 as prayed; however, the same was concurred by the learned appellate Court by dismissing Civil Appeal No. 38 of 2001, vide order dated 07.03.2011.

7. The important question involved in this matter is whether the Suit for Specific Performance, arising out of the dispute of supply of water through watercourse No.52, BL, RD 64.0 Muradwah through their Lift pump installed thereon, was maintainable before the trial court under Section 42 of Specific Relief Act?

8. In principle Section 42 of Specific Relief Act deals with the legal rights as well as the threat or invasion to it by a person having corresponding duty not to invade it, but to respect it. It would, therefore, apply only to a case where the plaintiff sues for declaration of his legal right whether to property or legal character provided it is invaded or threatened within invasion by the defendant. It does not

deal with the negation of defendant's rights. Consequently, a declaration that the defendant has no right to do something which does not infringe upon any legal right to property or legal character of a plaintiff cannot be given under Section 42 of the Act. The cause of action under this section should, therefore, be a threat to the plaintiff's right or removal of cloud cast on his title. It does not allow the plaintiff to come to the Court to show his hostility only to what the defendant considers his right and which action does not cast any cloud upon the plaintiff's title. Primarily no declaration can be issued outside the provisions of Section 42 and the Courts' power to make declaratory decrees is, therefore, limited to the case contained in Section 42. A person entitled to any legal character or any property right can institute a suit for declaratory relief in respect of his title to such legal character or right to property, thus no declaration can be allowed unless it can be brought within the four corners of the section. It is well settled that where the suit is not based on legal right or character, discretionary relief of declaration cannot be granted. Even under the law, the Court must reject the plaint if, on perusal thereof, it appears that the suit is incompetent, the parties to the suit are at liberty to draw the court's attention to the same by way of an application. The principles involved are two-folds in the first place, it contemplates that a still born suit should be properly buried at its inception, and secondly, it gives the plaintiff a chance to retrace his steps, at the earliest possible moment, so that, if permissible under law, he may file a properly constituted suit. It appears from the language of Rule 11 of Order VII that it requires that an incompetent suit should be laid to rest at the earliest movement so that no further time is wasted over what has been bound to collapse as not being permitted by law.

8. I have gone through the memo of plaint of Suit No.12 of 2000 and prayers, which explicitly show that the respondents sought relief of declaration to the effect that they are irrigating their lands through watercourse No.52 BL, RD 64.0 Muradwah through their lift pump installed thereon. In principle receiving water in terms of Section 21 of the Irrigation Act is the right of every Khatedar, but it is subject to water sharing policy as discussed in the preceding paragraphs. Such right, however, would not be translated to mean depriving of other khatedars from their due share in the water on equitable terms, thus the prayer of the respondents/plaintiffs in the subject suit was/is

hardly fall within the exception provided under the Specific Relief Act, for the simple reason that to have a share of water as per share list under the Irrigation Act is a right; however, the said right could not be conferred upon the plaintiffs to irrigate their respective lands through their lift pump, which is not permissible under the Irrigation Act. The Honorable Supreme Court has settled this proposition in the *Suo-Moto Action Against Giving of Direct outlets from Naseer Branch Rohri Canal by Chief Minister Sindh* (2014 SCMR 353). For convenience sake, an excerpt of the order is reproduced as under:-

“In such view of the matter, we direct the Secretary, Irrigation that immediately he should take action to protect their interest. Here we deem it appropriate to reproduce the operative part of the report of the learned District and Sessions Judge Badin dated 27-11-2013:- "It is further submitted that frames of the outlets were tampered and some were having repaired freshly. The type of the frames as sanctioned was 2" x 2" inches but after tampering; the same were found up to 1 to 2 feet width. It is further submitted that on 25-11-2013 the most of the outlets were closed and the Irrigation Officers informed that the same have been closed due to rotation; hence, the flow of water was found up to the sanctioned level and reached at the tail of Sangi Pharho/Regulator. It is further submitted that the outlet of Kamal Khan Chang crossed Pir Sakhi Minor. It is further submitted that again on 26-11-2013 the undersigned conducted the surprise visit of the site without accompanying the Irrigation Officers and found that most of the outlets were opened, hence, there was no pressure of flow of the water at the tail and it was not flowing at sanctioned level at the tail of Sangi Phraho. It is further submitted that if all the outlets remain opened, then the flow of the water will not reach at the tail of Naseer Branch. In this situation, the Zamindars of tail of Naseer Canal Branch cannot get the Irrigation water for cultivating their lands"

9. The order passed by Honorable Supreme court resolves the issue, which is also the subject matter of this revision application. In short, proper compliance of above directions/observation shall not be satisfied if, every illegal lift machine, illegal out-lets, damage/ breach to the source of water, as well use of sanctioned lift machine if any/outlet over its purpose i.e. to take its share only are not immediately brought to an end so that water flows from top to end/ tail as per received discharge. As such the use of lift-machines in principle reduces the proper share of other khatedars under the Irrigation Act; even its use is for the limited purposes when you are unable to lift the water from the lower side, however subject to all just exception as provided under the law, which is not the case in hand. On the aforesaid proposition, I am fortified with the order passed by this court in the case of Khadim Hussain vs. Province of Sindh and others (2019 YLR 2390).

9. Further, I have noticed that Section 16 of the Sindh Irrigation Act requires that any person with the permission of a duly-empowered Canal Officer may construct a watercourse on land after obtaining the consent of owners of the land. Under section 17 of the Act, land may even be acquired to enable a person to construct the watercourse to irrigate his land and it may also cause to be constructed by the Canal Officer; but all expenses have to be borne by the person applying for construction of watercourse. Any person desirous of obtaining the benefit of such watercourse may also apply for joint ownership thereof and upon paying his share in construction can be benefited. Section 21 of the Act, however, deals with the rights and obligations of owners of watercourses and apart from requiring them to maintain them, confers upon such owners a right to have a supply of water on such terms as prescribed in the relevant Rules.

10. In view of the above, I am of the considered view that the basic Suit filed by the respondents for Specific Performance of Contract and Injunction for the aforesaid purpose was not maintainable under the law. Consequently, the judgment and decree passed by learned trial Court and appellate Court as well as subsequent orders are set aside. The F.C Suit No.12 of 2000 filed by the respondents is dismissed with no order as to costs.

**JUDGE**

*\*Hafiz Fahad\**