ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
Suit No. 731 of 2010.

Date | Order with signature of Judge

For orders on Nazir's report dated 16.02.2017.
For hearing on CMA Nos:

1. 3517/2017 (U/s. 151 CPC.).
2. 18296/16. (U/s. 151 CPC.)
3. 9095/16. (U/s. 151 CPC.).
4. 5413/11. (U/O. 1 rule 10 R/w Section 151 CPC.).
5. 15779/14. (U/s. 151 CPC.).
6. 207/15. (U/s. 151 CPC.).
7. 1120/15. (U/S 3 and 4 of the contempt of court act and 204 of constitution of Pakistan R/w. Section 151 CPC)
8. 1227/15. (U/S 3 and 4 of the contempt of court act and 204 of constitution of Pakistan R/w. Section 151 CPC)
9. 2867/17. (U/O 39 rule 2(3) R/w Section 94, 151 CPC & Section 52) Notice issued.

24.03.2017

Mr. Shaukat Ali Shaikh, Advocate for Plaintiff.
Mr. Ziauddin Junejo, A.A.G.
Mr. Irshad Ahmed, Advocate for BoR.
Mr. Munir Ahmed Malik, Advocate for defendant No. 6.

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Through instant suit, plaintiff has prayed that:

a. *Declare that the plaintiff is lawful owner and lawful possession holder of the suit land viz. Nacalas No. 105, Deh Thoming, Tapo, Gurjo, Sector 50, Scheme 33, as per map issued by Survey scheme No.33, Karachi admeasuring 8 acres.*

b. *Direct the Defendants to restore the possession of the suit land viz. Nacalas No.105, Deh Thoming, Tapo Gurjo, Sector 50, Scheme 33, as per map issued by Survey scheme No.33, Karachi admeasuring 8 acres to the plaintiff as on 5.5.2010.*

c. *Restrain the defendants from creating any third party interest in the suit land viz. Nacalas No.105, Deh Thoming, Tapo Gurjo, Sector 50, Scheme 33, as per map issued by Survey scheme No.33, Karachi admeasuring 8 acres.*

d. *Award Rs.5 crore as damages against the defendants in favour of the plaintiff.*

Any other relief which this Hon'ble Court may deem fit and proper.

2. Precisely, relevant facts as set out in the plaint are that the plaintiff is owner of the land Naclass No.105, Deh Thoming, Tapo Gujro, Sector 50, Scheme No. 33, Karachi, admeasuring 8 acres. According to the plaint this land was purchased by the plaintiff from Metaro son of Ahmed and Rahim Bux son of Ghulam Muhammad through Power of Attorney; firstly this land was allotted to the seller but price challan was not issued by the defendant No.1/Land Utilization Department Board of Revenue; subsequently, challan of differential amount was paid by the plaintiff with the Government and the defendant No.1 issued letter in favour of the plaintiff for handing over the possession. Pursuant to that lease agreement deed was signed as well mutation was effected in Form-II, however, he got knowledge that defendant No.2/District Officer (Revenue) has issued direction to the defendant No.3/Deputy District Officer (Revenue) for removal of illegal encroachment; official defendants tried to dispossess the plaintiff in collusion with defendant No.6 and ultimately, they succeeded on the plea that this land was allotted to defendant No.6 under Sindh Goth abad Scheme. Plaintiff has appended certain documents with the plaint including challan and lease agreement.

3. In contra, claim of the defendant No.6 is that plaintiff was allotted Naclass No.158 but since same was occupied by the other persons, hence, he failed to get possession of that survey number and thereafter through D.O. (Revenue) he managed exchange of land, whereas, D.O. (Revenue) was not competent to exchange the land and grant the same for 99 years lease. Defendant No.6 claims that he is allottee of Naclass No.105 and same village has been regularized and mutation has been effected in his favour. As against above, claim of the official defendants is that exchange of land in lieu of Naclass No.158 is illegal and without authority as only Chief Minister is competent to approve the summary.

4. At this juncture, learned counsel for the defendant No. 6 has placed copies of letter dated 05.11.2015 and Deh Form-II, which show that defendant No.1 leased out an area of 04.00 acres land from Naclass No.158 of Deh Thoming, Karachi in favour of Rahim Bux but the allottee failed to deposit the occupancy price and thereafter land in question stand regularized on payment of differential amount in favour of Rahim Bux S/o. Ghulam Muhammad through Muhammad Haroon Awan.

5. Whereas, para No.4 reflects that Land Utilization Department with the approval of competent Authority had withdrawn/canceled/recalled such allotment in view of Sindh Government Lands (Cancellation of Allotments, Conversions & Exchanges) Ordinance No.III of 2001, pursuant to that allotment in favour of Rahim Bux has been cancelled. Record reflects that this Court has passed various orders and admittedly possession was with defendant No.6 but Nazir was directed to take over the possession of the suit land and now possession of suit land is lying with the Nazir and applications for construction of portion of demolished wall is filed by the defendant No.6, whereas, through listed application plaintiff also seeks cancellation of allotment in favor of defendant No.6, as well has filed objections over the notification and cancellation order filed by the Member Board of Revenue.

6. Learned A.A.G has mainly relied upon the judgment of apex Court passed in Suo Moto Case No. 16 of 2011. He has referred order dated 28.11.2012, paragraph No. 6 of that order states that "*In the face of the aforesaid directions, the Board of Revenue abusing its authority, has allowed transactions relating to transfer of state land, which, prima facie, must have caused huge financial losses to the exchequer, particularly, in the absence of reconstruction of record; and encouraged the menace of land grabbing, one of the basic causes of the poor law and order situation.*" and contends that instant suit as exchanged in favour of plaintiff is illegal and has been cancelled in

pursuance of judgment of apex Court. Whereas, learned counsel for the plaintiff has marshaled that any cancellation during pendency of suit is illegal and *Ab initio void;* decision of apex Court is not applicable for exchange of land, which was made in his favour and also contends that on one occasion Hon'ble apex Court reserved its findings on a case which was subjudice before the High Court. In support of his contentions the learned counsel has relied upon following case law reported as 1980 SCMR 89, 1983 SCMR 869, 1993 SCMR 1523, 1985 CLC, 2700, NLR Civil 1980 325, 2006 CLC 568, 1995 CLC 2020, 2011 MLD 75, 2009 SCMR 396, 2016 YLR 829, 2009 MLD 515 and 2007 PLD 83. Further, he has contended that allotment in favour of defendant No.6 is illegal and a*b initio void,* as per record there is no village; in connivance of official defendants he has succeeded in getting the suit land transferred in his favour.

7. I have heard learned counsel for the plaintiff as well learned counsel for the defendant No.6, learned counsel for the BoR and learned A.A.G.

8. The perusal of all the available material and arguments have brought number of interesting aspects to light, requiring to be attended but before attending thereof, it would be appropriate to *first* say few lines with regard to object of Order VII rule 11 CPC (the Code) and competence of the Courts in exercise thereof. The plain reading of the Order VII rule 11 of the Code should leave nothing to doubt that it *squarely* brings the Courts under a *mandatory* obligation to reject a plaint, if to satisfaction of the Courts, same is barred by law. This exercise is never dependant upon an application of party but it is the Court which must nib an *incompetent* suit at its bud else the object of induction of this proviso shall fail which, in my view, is aimed to save parties and properties from long lasting effects of *incompetent* litigations. Reference may be made to the case of *Noor Din & another v. Additional district Judge, Lahore & Ors* 2014 SCMR 513 wherein it is held:

> "5. … The object of the powers conferred upon the trial Court under Order VII, Rule 11, C.P.C. is that the Courts must put an end to the litigation at the very initial stage when on account of some legal impediments full fledged trial will be a futile exercise."

In another case of *Raja Ali shah v. M/s Essem Hotel Ltd. & Ors* 2007 SCMR 741 wherein it is held as:

> "10. It is pertinent to mention here that in view of the Order VII rule 11 CPC it is the duty of the Court to reject the plaint if, on a perusal thereto, it appears that the suit is incompetent, the parties to the suit are at liberty to draw courts' attention to the same by way of an application. The Court can, and, in most cases hear counsel on the point involved in the application meaning thereby that court is not only empowered but under obligation to reject the plaint, even without any application from a party, if the same is hit by any of the clauses mentioned under rule 11 of Order VII CPC."

9. I may safely add that while exercising jurisdiction U/o 7 rule 11 CPC the Court is not debarred from examining the defence or undisputed documents and to take judicial notice thereof even *permissible* presumption can be drawn, as held in the case of *Abdul Karim v. Florida Builders (Pvt.) Ltd.* PLD 2012 SC 247 as:

> "Thirdly, and it is important to stress this point, in carrying out an analysis of the averments contained in the plaint the court is not denuded of its normal judicial power. It is not obliged to accept as correct any manifestly self-contradictory or wholly absurd statements. The court has been given wide powers under the relevant provisions of the Qanun-e-Shahadat. It has a judicial discretion and it is also entitled to make the presumptions set out, for examine in Article 129 which enable it to presume the existence of certain facts. It follows from the above, therefore, that if an averment contained in the plaint is to be rejected perhaps on the basis of the documents appended to the plaint, or the admitted documents, or the position which is beyond any doubt, this exercise has to be carried out not on the basis of the denials contained in the written statement which are not relevant , but in exercise of the judicial power of appraisal of the plaint. "

It is also necessary to add here that plaintiff , while framing the suit, is also under an *implied* legal obligation and duty not only to bring all material facts into light but also required to include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action. The plaintiff *however* in law is also empowered to relinquish or *omit* any claim or part thereof but once he (plaintiff) chooses so he (plaintiff) shall not *afterward* entitled to sue for such relinquished / omitted claim or part thereof.

10. Now, I shall revert to the merits of the case. To make things a little clear a *direct* reference to certain paras of the plaint, being material, are made hereunder:-

> "Para-1 That the Plaintiff is law abiding citizen of Pakistan and **owner of the land Naclass No.105, Deh Thoming, Tapo Gujro, Sector 50, as per map issued by Survey Scheme no.33, Karachi total area is 8 acres**. The said land was **purchased by the plaintiff from Metro son of Ahmed and Rahim Bux son of Ghulam Muhammad**, both of them after receiving consideration gave registered power of attorney.
>
> Para-6 That thereafter lease agreement deed was registered and on behalf of govt. of Sindh, defendant no.1 District Officer Revenue, CDGK, Karachi registered lease agreement deed in favour of the plaintiff. Copy of lease agreement deed is annexed as Annexure C.

Per paras-1 & 6 of the plaint, the plaintiff has claimed *ownership* in respect of an area of 8-00 acres in Naclass No.105, Deh Thoming while admitting to have purchased land from Metaro and Rahim Bux. The perusal of the documents, produced by the plaintiff *himself* in support of his claims, reflects that Metaro and Rahim Bux *in fact* were granted land in Naclass No.158, Deh Thoming which shall stand evident from a direct referral of such documents.

> '**Challan no.1273 '** submitted to prove grant in favour of Metro and Rahim Bux, *itself* describes the land per column **Full particulars of the remigttance and of authority (if any)** as:

> "In pursuance of Ordinance No.III of 2001, the differential amount of Rs.32,00,000/- in respect of land measuring **04-00 acres from NK No.158,** deh Thoming Scheme 33, Karachi was leased out on 99 years lease for residential / commercial / industrial purpose vide order no…….

Annexure-B, also affirms such *grant* in respect of NK No.158, Deh Thoming Scheme 33, Karachi

> Annexure-B is **'VERIFICATION OF CHALLAN DEPOSITED IN HEAD NO.1321999-LJ-EXTRA ORDINARY RECEIPT-SALE OF LAND.**
>
> "Enclosed please find herewith a photo-stat copy of said challan no.1273…… by Muhammad Haroon, attorney of Rahim Bux ……. In respect of an area of **4 acres in Nakabuli No.158 of Deh Thoming, Scheme no.33, Karachi** ..

Not only has this, but the lease agreement (Annexure-C) also affirmed such *fact* as:

> "As per Order No.PS/MBR (L.U)/1164/96 / Dt. 28.71996 of the Secretary to the Government of Sindh, Land Utilization Department **an area of 4 Acres from N.K.No.158, Deh Thoming Karachi**…..

Thus, from above documents of the plaintiff, it is evident that it was not the Naclass No.105, Deh Thoming but NK No.158, Deh Thoming, Karachi which was allotted to those under whom the plaintiff is *undeniably* claiming i.e Metaro and Rahim Bux. Thus, the grant was made by the *competent authority* specifically in respect of land area 8-00 acres of NK No.158, Deh Thoming and even Challan and registered lease deeds were executed in respect thereof. These facts *however* have not been properly worded by plaintiff although he (plaintiff) was under an obligation to have stated so, so as to establish to have approached the court with clean hands. It is always requirement of law that one *who* seeks equity must come with clean hands. Reference may be made to the case of *Rehmatullah v. Saleh Khan* 2007 SCMR 731. Be as it may, as per Annexure-D, it appears that the District Officer (Revenue), City District Government, Karachi had allowed

adjustment of 08-00 acres land from **NK No.105,** Deh Thoming against said *foundation* i.e grant of land and registered lease deed in respect of land in **NK no.158,** Deh Thoming although plaintiff has sought possession *specifically* for granted / allotted land. Things shall stand clear from a direct referral to Annexure-D. The relevant portions thereof are as:-

> "1. An application of Mr. Muhammad Haroon S/o M. Ayub Khan, attorney of Mr. Mattaro S/o Ahmed and Mr. Rahim Bux s/o Ghulam Muhammad, requesting therein to hand over physical possession of regularized land measuring 08-00 acres situated **in N.C.No./158** of Deh Thoming, Scheme No.33, Karachi
>
> **Para-6 page-2 of annexure-D**
>
> The Mukhtiarkar / ACSO Scheme No.33, under his office letter No……. has recommended an **un-committed available state land measuring 08-00 acres, situated in** N.C.No.105, Sector-50, Deh Thoming Scheme No.33, alongwith Revenue Surethal duly attested to be adjusted in lieu of earlier allotted land which is presently under illegal possession of inhabitants of **Village Dost Muhammad Jhunjhar**
>
> **Conclusion of said annexure**
>
> Therefore, on prior approval dated 18.9.2009, of Executive District Officer…. and as required Under Section-17 of the ….., **the proposed are measuring 08-00 acres out of Deh 105, Sector-50 of Deh Thoming Scheme No.133 is hereby allowed.**

11. The law is quite clear with regard to grant / allotment of *specific* State land which involves Secretary, LU *too;* determination of availability of such *specific* land; cost thereof; payment of challan within a *specific* period e.t.c hence straight away substitution of *another* land merely for reason of a *processed* grant of land under some **'unauthorized possession'** shall bring all the procedural requirements for allotment of *specific* land to nullity which *legally* cannot be stamped as it may prejudice to well settled principle of law, as held in the case of *Shahida Bibi v. Habib Bank Ltd.* PLD 2016 SC 995 that:

> ***'6. ….It is settled that where law requires an act to be done in a particular manner it has to be done in that manner alone and such dictate of law cannot be termed as mere technicality."***.

12. I would insist that plaintiff deliberated in framing the suit in its present *form* so as to conceal *adjustment* of land in question against allotted land which act *alone* is sufficient to disentitle the plaintiff of a help of Court which has to help who approaches it with clean hands.

13. Be as it may, the referral to para-14 of the plaint shall also make it clear that plaintiff was in *active* knowledge and *notice* of rights, title and interests of the defendant no.6. For sake clarity same is reproduced hereunder:

> Para-14 That, it has come to the knowledge of plaintiff that defendants 2 to 5 in collusion with defendant No.6 dispossessed the plaintiff from his legal land and possession although **defendant no.6 has been issued challan** which was still not paid by him and **he is claiming Gothabad land although according to gothabad Act 1987 only one ghunta approx. 120 sq.yds. would be granted to settled people** but **number of persons are only mentioned as 35 in the goth** and land was granted to more than according to Goth abad Act 1987 which is also in violation of law.

From the reading of the above, it is quite evident that the present plaintiff *himself* acknowledges active knowledge and notice to the facts that:

> *i)defendant no.6 has been issued challan in respect of suit land;*
>
> *ii)the suit land is being claimed as* **Gothabad land;**
>
> *iii) there are 35 persons, mentioned in such* **village;**

but the plaintiff deliberated to relinquish / omit to challenge :

a) title of 35 persons, including defendant no.6 as grantee / allottees of lands of such village;

b) status of land to be **'not Goth abad land'**;

c) legality of issuance of **'challan'** in favour of defendant no.6 in respect of suit land;

Which even stood affirmed by the defendant no.6 while pleading in para-6 of his written statement as:

> "…order no.**07-19-03/SO-1/28 dated 13.4.2010** and Challan amounting to Rs.75,31,920/- was also issued for an area of 34236.0 sq.yards **out of N.C.No.105,** Deh Thoming and after payment of due and differential challan the allotment had been **regularized by defendant No.1 vide no.07-19-03/SO-1/22 dated 19.5.2010 in favour of the sanad holders**.."

Such deliberate relinquishment as already discussed, shall have the effect of **'precluding the plaintiff from suing for same subsequently'** within *mandatory* requirement of Order II, Rule 2 CPC which is sufficient for rejection of the plaint of the plaintiff. Reference may be made to the case of *Trustees of the Port of Karachi v. Organization of Karachi* 2013 SCMR 238 wherein it is held as:

> '12. … According to Order II, Rule 2 CPC the splitting of claim and / or relief is prohibited and that is a mandatory provision of law, with the consequence that if a claim /relief which a person is etitled to on the basis of a cause of action, but omits and relinquish the same, such person / party shall be precluded to sue for the claim / relief so omitted. I do not find that the claim / relief no structured by the respondents is on a distinct cause of action. In my view, therefore, the bar of Order II, Rule 2 is also attracted to the case in hand."

In another case of *Ali Muhammad & another v. Muhammad Bashir & another* 2012 SCMR 930, it is held as:

> "7. …. The format of the suit is confined to declaration of title. In the plaint, the appellants in both the appeals, have admitted that the respondents are in physical possession of half portion of the properties and were in knowledge of the registered instruments of *pata milkiat* in favour of the respondents. In the face of such material, the appellants **have not sought cancellation of registered instruments in terms of section 39 of the Specific Relief Act in the suit nor direction of their ejectment in suits have been sought**. When confronted with this situation, the learned counsel for the appellants could not offer any plausible explanation except that he contended that the appellants had the right to file a separate suit for possession. Even this argument is without substance. **The law does not permit a second suit if a right to the plaintiff is available at the time of filing of the suit**. A second suit in such-like situation is otherwise **barred under Rule 2 , Order II C.P.C."**

In another case of *Anjuman Masjid New Town v. Muhammad Shahid Zaki & Ors* PLD 2011 Karachi 550, it is held as:

> … To which it may be observed that clause 1 of Rule 2 of Order II, C.P.C. provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but may relinquish any portion of his claim in order to bring the suit within the jurisdiction of any Court. It is, therefore, left or the discretion of the plaintiff how he, "frame" his suit and choose jurisdiction, according to his suiting, if law permits. However, once the plaintiff has opted, then by virtue of clause 2 of Rule 2 of Order II, C.P.C. **he, "shall not" afterwards sue in respect of the omitted or relinquished claim.** Since the plaintiff omitted and / or relinquished to raise the claim of damages in suit No.913 of 2010, he could have not raised the prayer of damages in this suit. **Therefore by virtue of clause 'd' of Rule 11 of Order VII C.P.C, this suit was barred by law and could have not been instituted and / or entertained at all.**

14. It is also a matter of record that documents, filed by the BoR, show that such exchange in favour of plaintiff has been cancelled, admittedly as the plaintiff has not challenged that order on any independent forum but has filed application for cancellation of that order. I have no hesitation in saying that status of *cancellation order* cannot be determined *even* adjudicated if same is not part of the pleading and reliefs, sought in the plaint as it would frustrate the requirement of *pleading,* provided in Order VI of the Code as well Specific Relief Act. Even otherwise, it is well settled principle of law that one *legally* cannot build his case *other* than what he pleaded in the plaint nor any such evidence, if led, will be considered. Reference may be made to the case of *Taj Muhammad Khan v. Munawar Jan* 2009 SCMR 598 wherein it is held as:

> "6. … … and as provided in Rule 4 of Order VI, of C.P.C., if a plea has not been taken in the plaint, no amount of evidence can be looked into upon such pleadings not specifically taken up I the plaint. Reference in this context can be placed on the cases of Siddik Mahmood Shah v. Mst. Saran and others, AIR 1930 PC 57. In Government of West Pakistan v. haji Muhammad, PLD 1976 SC 469, it was held that a plea of fact not pleaded, no case can be founded thereon…

Not only has this, but the providing clause of Section 42 of the Specific Relief Act also made the suit of the plaintiff as *'incompetent'* which reads as:

> **"**Provided that **no Court shall make** any such declaration where the plaintiff, being able to seek further relief than a **mere declaration of title**, **omits to do so.**

15. Since, per the contents of the *plaint* themselves it is no more disputed that when claimed cause of action, accrued to the plaintiff, he was to seek further reliefs, including cancellation of certain title documents in favour of defendant no.6 regarding suit land, but has omitted to do so but has sought a *mere declaration* of his *own* title. Such declaration with reference to providing clause of Section 42 of the Specific Relief Act cannot be **'made'** and in consequence of such *incompetence* the suit is liable to rejection, being barred by law. Accordingly, Nazir shall return the possession of suit land to the defendant No. 6 forthwith and defendant No.6 would be entitled to raise construction of wall, or deal with his property in accordance with law

16. At this juncture, learned counsel for the plaintiff contends that since Naclass No. 158 was allotted to the plaintiff and that even per letter of cancellation the grant in favour of the plaintiff in respect of NK No.158 is holding field which, for sake of clarity is reproduced hereunder:

> To
>
> The Deputy Commissioner, East
> Karachi.
>
> Subject CANCELLATION OF ORDER / LETTER-REGARDING EXCHANGE OF LAND UNDER SECITON 17 OF THE COLONIZATION OF GOVERNMENT LANDS (SINDH) ACT 1912
>
> The Government of Sindh, Land Utilization Department vide letter No.PS/MBR/LU/1164/96 dated 28.7.1996 had been pleased to leased out an area of **04-00** acres land from N.K.No.158 of Deh Thoming Karachi at the rate of Rs.25/- per sq.yd in favour of **Mr. Rahim Bux s/o Ghulam Muhammad** for Residential / Commercial /

Industrial purposes. The allottee failed to deposit the occupancy price.

2. The land in question stand regularized on payment of differential amount vide letter No.01-194-02/SO-1/596, dated 10.7.2009 in favour of **Mr. Rahim Bux s/o Ghulam Muhammad through Mr. Muhammad Haroon Awan s/o Muhammad Ayub Awan.**

3. The defunct District Officer (Revenue), CDG Karachi vide letter No.DO(Rev)/K/RB/3868/2009, dated 18.9.2009 had allowed adjustment / exchange of equivalent area of **04-00 acres** in **N.C.No.105 of Deh Thoming** Sector -50, Scheme-33 Karachi under Section 17 of the Colonization of Government Lands (Sindh) act 1912.

4. The land Utilization Department with the approval of competent authority has been pleased to withdraw / cancel / re-call all the orders, letters or notification issued after promulgation of Sindh Government Lands (Cancellation of Allotments, Conversions & Exchanges) Ordinance No.III of 2001 vide letter No.09-294-03/SO-1/493 dated 21.9.2015.

5. You are requested to cancel the entries of VF-II and subsequent entries if any, retrieve the precious Government land immediately. Also supply the colour attested copy of the original entry as well as subsequent entry kept on the basis of registered document alongwith compliance report to this department within three (03) days positively.

Sd/-
Secretary to Government of Sindh
Land Utilization Department.

Therefore, Board of Revenue may be directed to restore the possession of that land. Accordingly, counsel for the BoR present in Court shall ensure the validity of the title of Naclass 158, in case same is allotted *legally* in favour of the plaintiff, possession shall be restored to the plaintiff, while completing legal and codal formalities.

JUDGE

SAJID