

IN THE HIGH COURT OF SINDH AT KARACHI

PRESENT: MR. JUSTICE SALAHUDDIN PANHWAR

SUIT NO.1435/2015

Plaintiff : Riaz Hassan,

Defendants : Haseeb Hassan Khoso and two others,

.....

SUIT NO.567/2017

Plaintiff : Rashid Hassan and two others,

Defendants : Riaz Hussain and five others.

Appearance:

Mr. Muhammad Mansoor Mir advocate for plaintiff in Suit No.1435/2015.

Mr. Agha Zafar Ahmed advocate for plaintiffs in Suit No.567/2017.

Mr. Jhammat Jethanand advocate for defendants in Suit No.1435/2015 and for defendants No.2 to 4 in Suit No.567/2017.

Date of hearing : 15th and 22nd March, 2017.

Date of announcement : 02.06..2017.

ORDER

By this order I intend to dispose of applications CMA No.17639/2016 and 18453/2015 filed in Suit No.1435/2015 and CMA No.4387/2017 filed in Suit No.567/2017.

- (i) By CMA No.17639/2015 u/o 39 Rule 1 and 2 CPC plaintiff prayed for restraining defendants form dispossessing the plaintiff from

suit land being Survey Nos.4(5-21), 5(5-05), 6(7-08), 7(2-34), 8(6-21), 9(6-13), 10(8-39), 11(6-09) and 12(7-30) Deh Khoso, Taluka Thul, District Jacobabad and Survey No.12(1-22), 13(6-17), 14(5-11), 15(7-37), 17(1-00)(4-33), 18(5-34), 19(6-35), 20(5-23) and 407(4-36) in possession of plaintiff. It was stated that this Court restrained the defendants from creating third party interest on suit property, subsequently present suit was consolidated with Suit No.1436/2015 which pertains to part of same suit property; that in that suit an application u/o 23 Rule 3 CPC was filed seeking compromise which was disposed of vide order date 30.11.2016, that crucial aspect of both these suits is that defendants in both suits are same and subject matter of both cases is also same; that pursuant to above referred order plaintiff in suit No.1436/2015 was given possession of part of the suit property from Survey Nos.15 and 16 while remaining land was directed to be handed over to defendants therein who are defendants in present Suit No.1435/2015; that sit property has been in possession of plaintiff pursuant to family settlement which was effected by late father of both the parties to present suit and in view of restraining order passed earlier in this suit the said land cannot be alienated or taken away from plaintiff without first adjudicating upon his claim thereon raised in this suit; that defendants have compromised Suit No.1436/2015 in suppression of facts and by misleading this Court whereby restraining order in instant suit and factum of consolidation of both suits was actively concealed by said defendants; that all parties concerned have right of hearing.

- (ii) CMA No. 18453/2015 filed by defendants u/o 41 Rule 1 CPC seeks appointment of receiver on suit land and land of defendants No.2 and 3 as described in para-3(i) of counter claim; it is claimed that plaintiff has no right, title or interest in suit land and in illegal and unauthorized possession thereof and misappropriated the income of the suit land and also committing waste of the suit land with

likelihood of dissipation of the lands, while there is no valid or enforceable agreement of sale in favour of plaintiff.

- (iii) By CMA No. 4387/2017 plaintiffs seek to restrain the defendants from alienating or creating third party interest on the suit property in question in Suit No.567/2017. It was pleaded that defendants therein are attempting to illegally dispose of the suit properties and there is obvious apprehension of misappropriation.

2. I have heard the respective parties and have also *carefully* examined the available record.

3. The perusal of the available record *prima facie* shows that plaintiff Riaz Hussain has filed suit No.1435 of 2015 for Declaration, Specific Performance of Contract and Temporary Injunction. A brief reference to *pleading* , being necessary, is made hereunder :

“Mir Hassan Khan Khoso had contested General Election in 2008 from PS 15 and for *expenses* thereof required additional money which was taken from maternal uncle of plaintiff in late December 2007; against repayment of above mentioned loan, 40 acres of land, belonging to mother of the plaintiff, was given to the maternal uncle along with loan of further Rs.10 Million which was extended by plaintiff to his father for Election campaign in numerous stages for different purposes prior to election campaign; plaintiff further claimed that upon calculation of the outstanding repayment of the loan the suit property was agreed to be transferred to clear the debt of Mir Hassan Khan Khoso, father of the plaintiff vide agreement dated 6.12.2014. Plaintiff claims that defendant no.2 and defendant

no.3 owned agricultural land of total 56-08 acres; possession of land belonging to defendant no.1; defendant no.2 and defendant no.3 was given to the plaintiff by their father to ensure that the land remained fertile and was welcoming to cultivation. It is also a claim that the land belonging to defendant no.1 would be transferred in the name of the plaintiff in order to clear the loan of Rs.30,000,000 (thirty million rupees only). Father of the parties namely Mir Hassan Khan Khoso bought a flat located at Abida Tower in the name of the defendant no.1 who at the time of purchase was approximately 21 years old. It was intention of their late father (late) Mir Hassan Khan Khoso to give all his children equal worth of property and assets as per Sharia and hence he decided to transfer the agricultural land, belonging to defendant no.1 to the name of plaintiff and use what was actually his to clear his own debt. Father of the parties late Mir Hassan Khan Khoso passed away on 27.6.2015 and since then defendants are unwilling to honour the terms and conditions of the agreement dated 06.12.2014 and are deliberately neglecting to perform their obligations; it is claimed that defendants avoided to perform their obligation (s) and intended to sell out the property, hence he filed suit with following prayers:-

- a) Declaration that plaintiff is entitled for Specific Performance of agreement dated 06.12.2014.;
- b) Declare that suit property has been given to plaintiff by (late) Mir Hassan Khan Khoso father of plaintiff against repayment of loan to plaintiff and legally belongs to plaintiff;
- c) Direct the defendant no.1 to attend the office of Mukhtiarkar Taluka Thull District Jacobabad, Sub Registrar Taluka Thull, City Surveyor Office or any other office to execute such Deeds and Documents which are necessary for the mutation of plots of Agricultural lands in favour of plaintiff. Failing which, this Honourable Court may graciously be pleased to direct the Nazir of this honourable Court to execute

the documents of mutation directly for and on behalf of the defendant no.1 in favour of plaintiff or his nominee for mutation of land in the name of plaintiff;

- d) An injunction restraining the defendants , their agents, servants or any other person or persons acting on their behalf from creating any Third party interest of any nature whatsoever in the said land and to dispossess the plaintiff till the disposal of the suit;

The defendants, on service, have denied the assertions and claims of the *plaintiffs* and also came with specific counter-claim; filed *maximum* Court Fee Stamps of Rs.15,000/- and prayed as:

- a) That plaintiff may be dispossessed and defendants may be put in vacant possession of the suit land shown in para 3(i) above;
- b) That plaintiff do pay mesne profits at the rate of Rs.25 lacs per year from 01.9.2012 to 31.8.2015 and future mesne profits at the rate to be determined by this honourable court;
- c) That the plaintiff do retrieve excessive share which he is holding out of estate of Mir Hassan Khan Khoso to the defendants;
- d) That the plaintiff do give the share in plot admeasuring 4-00 acres from Sector 3-B, Corridor area Scheme -33 Karachi to defendants No.1 to 3;

4. I would attend the CMA No.4387 / 2017 *first*. This application has been filed in suit No.567/2017 which is filed for ***Declaration, Administration, Partition & Permanent Injunction*** wherein the parties of other suits, including 1435/2015, are arrayed as parties; since respective parties have been denying and disputing their *claims* and *title* however not disputing that all parties claiming their

rights, interests and *claims* under one *tree* (Mir Hassan Khan Khoso) therefore, in such eventuality it appears to be in *all* fairness to allow the CMA No.4387 of 2017 which is with regard to an order to restrain defendants from *creating* third party interest because this will only require the parties to maintain a *status-quo* without prejudice to their entitlements and rights which *otherwise* are required to be determined after due trial. This status of property to be of *family* and *parties* to be from one *tree* are not disputed and *pending* litigations do include a suit for *administration*. These are sufficient facts and circumstances to accept such request particularly when any *purchaser* during pending litigation shall continue with principle of *lis pendis*. A relief for *injunction* normally be not avoided where it *prima facie* appears to be satisfying *equity, fair-play* as well justice without any harm or prejudice to *opposite* party, as in the instant case is. Thus, keeping in view the principles of *equity* and safe administration of justice, the application is allowed. Guidance is *however* taken from the case reported in 2004 SCMR 1092 wherein it is held as:

'21. No doubt an injunction is a form of equitable relief and is to be issued in aid of equity and justice, but not to add injustice. Form grant of such relief, it is mandatory to establish that in order to obtain an interim injunction, the applicant has not only to establish that he has a prima facie case, but he has also to show that the balance of convenience is on his side and that he would suffer irreparable injury / loss unless he is protected during the pendency of suit.

5. Through CMA No.17639/2015 (U/o 39 r 1 & 2 CPC) the plaintiff of Suit No.1435/2015 is seeking restraining *order* to continue his

possession onto suit land while the defendants of this suit through CMA No.18453/2015 (u/o 41 Rule 1 CPC) seek appointment of *Receiver*. Since decision on any of these *two* applications will have consequence upon other application because *legally* both the relief's i.e injunction and receiver belongs to the same branch of law, therefore, I would prefer to decide the same *jointly*.

I, *however*, would examine the objection, raised by plaintiff, regarding maintainability of application for *Receiver* in the suit of the plaintiff. The defendants in their written statement have *categorically* come forward with a specific *Counter Claim* for Possession of the very land for which the plaintiff has filed suit and seeking restraining order. The status of such a *counter claim* can well be taken as an *independent* suit and *relief*, sought therein, can well be granted if made out. This proposition is based on the conclusion, drawn by Apex Court, in the case of *Syed Niamat Ali and 4 others v. Dewan Jairam Dass and another* PLD 1983 SC 5. The operative part thereof is :

.... I have already stated that in absence of express provisions in the Code of Civil procedure, to that effect, a defendant cannot plead a counter claim as of right. In view of the aforesaid, it is right for the learned counsel for the appellants to contend that the counter claim of the respondents cannot be supported by the provisions of Order VIII, rule 6, C.P.C., or as an equitable set-off for the simple reason that it is not money claim, which is a common ingredient for both kinds of set-off. It is an independent claim for possession sought to be enforced by the defendant in his written statement. **It has, however, been held that although a counter-claim which is neither a legal set-off nor an equitable set-off, yet there is nothing in law—statutory or otherwise, which precludes a Court from treating a counter claim as a plaint in a cross suit.** The reasons advanced in support of this view that the Court has such a power are that, although a counter claim incorporated in the written statement does not conform to the requirements of the Code relating to contents of a plaint, this by itself is not sufficient to deny the Court, the power and jurisdiction to read

and construe the pleadings in a reasonable manner, that the Court is not prevented from separating the written statement proper from what was described as a counter claim and treating the latter as a cross suit, and if the counter claim contains all the necessary requisites sufficient to be treated as a plaint making a claim for the relief sought, it would be open to a Court to convert to treat the counterclaim as a plaint in a cross suit. **If the Court is so inclined, then the date of filing of such converted plaint in a cross suit will be the date on which the written statement containing the counter claim is filed and the maintainability of the cross suit contained in the counter claim would be determined with reference to that date.** There are very weighty considerations in support of the view and I have no hesitation in accepting it as the correct expression of law. In *H.M. Saya & Co., Karachi v. Wazir Ali Industries Ltd., Karachi* (1), the question was whether a stranger to a suit or proceedings is entitled to file an appeal from an order passed therein, this Court held that although there is no express provision to that effect in the Code of Civil Procedure, it cannot be understood to amount to a prohibition and "the Court ought not to act on the principle that every procedure is to be taken as prohibited unless it is expressly provided for". It was postulated in the case that "the court should proceed on the principle that every procedure which furthers administration of justice is permissible even if there is an express provision permitting the same". To sum up the conclusion, the correct position in law is that the plea set up by the respondents in the counter claim for recovery of possession was not admissible as a set off but was really of the nature of a counter claim proceeding on the basis of an independent cause of action which the Court had the power to convert as a plaint in a cross suit, if such suit is otherwise not barred under any provision of law and then to try and dispose it of alongwith the suit filed by the appellants. "

6. Before going further, I would add that where a party proves to satisfaction of the Court that there are circumstances which make it *just* and *convenient* for keeping the rights of the parties *protected* then the Court can:

- (a) appoint a receiver of any property whether before or after decree;
- (b) remove any person from the possession or custody of the property;
- (c) commit the same to the possession, custody or management

of the receiver; and

(d) confer upon the receiver all such powers for management and protection of the property....

such *jurisdiction* normally is avoided but would always be exercised where the facts and circumstances of the case prove co-existence of following:-

- i) *party, seeking appointment of receiver, must prove prima facie case in his favour;*
- ii) *the person in possession should be shown to be not in bona fide possession;*
- iii) *the continuity of possession with occupant is not just and convenient for interests and rights of parties as well for safe administration of justice;*

Once, the court finds all above co-existing, the appointment of the receiver should be ordered else the purpose of insertion of Order 40 r 1 CPC shall lose its efficacy and objective. Reference in this regard can well be made to the case of Aftab Ahmed Mutfi & Ors v. Mst. Seema @ Zareena 1988 CLC 1567 wherein it is held as:

“It, therefore, follows that under Order 40, Rule 1 C.P.C, as Court will appoint a receiver of the disputed property if the Court reaches the conclusion that it is just and convenient to order so and to persuade the Court to reach this conclusion the plaintiff has to make out a prima facie case that he owns the suit property or has a substantial interest therein which requires protection or preservation pending final determination of the rights of the parties in the suit and because of expected waste or peril to such property, the right or interest of the plaintiff cannot be protected or preserved without appointment of receiver.

In the case of Saeed ur Rehman v. Ehsanullah Khan Afridi PLD 2007 Karachi 527 wherein it is held as:

“The appointment as well as the removal of a receiver is also a matter which rests in the sound discretion of the Court. In exercising its discretion, the court should proceed with

caution and be governed by a view of the whole circumstances of the case. It is pointed out that a receiver should not be appointed in **suppression of a bona fide possessor of property** in controversy unless there is some substantial ground for interference. Reference is invited to the case of M. Ataur Rehman Alvi v. Inamur Rehman 1974 SCMR 54. It will be noticed that in order XI, Rule 1 CPC the words “just and convenient’ have been used which mean that the Court should appoint a receiver for the protection of property or the preservation of injury, according to legal principle and not that the court can make such appointment because it thinks convenient to do so.

In the instant matter, the *ownership* of the defendants is not disputed rather admitted by the plaintiff *himself* therefore, *prima facie* case lies with the owner particularly when the plaintiff does not claim to have been on any *direct* transaction with the defendants.

7. It is a matter of record that the plaintiff is seeking continuity of his *possession* over *undisputed* land of the defendants under an agreement with Mir Hassan Khoso i.e father of plaintiff and defendants. I would avoid making comments on *legality* of agreement which *however* has been denied by defendants to be legal. However, agreement is *prima facie* **between plaintiff and deceased Mir Hassan Khan Khoso** but surprisingly involves property of defendants without any signature or claim that these defendants had consented to. Such possession *legally* cannot be said to be *bonafide* which term requires acting of one in good faith.

8. Now, I would see whether it would be *just* and *convenient* to appoint Receiver or it may cause any harm or prejudice to rights of any of the parties. The following are *undisputed* factual positions:-

- i) *the plaintiff is occupying share (land) of defendants;*

- ii) *Plaintiff is not on any direct transaction with defendants;*
- iii) *Plaintiff has no direct claim against the defendants;*

Thus, letting the plaintiff continue in possession of such lands of the defendants would never qualify the term '**just**' and '**convenient**' particularly when the plaintiff, if succeeds in his claim, will get title. Even otherwise, it is settled law that a *document* / agreement is not a title document but a right to file a suit. Not only this, but since the appointment of the Receiver would keep the rights, title and interests of the parties protected as *earning* of the land shall remain in *safe* hands which shall stand delivered to *determined* rightful person; further management of land by Receiver, if is complained to be not in interest of *land*, the substitution can well be ordered. I would add that appointment of receiver would also be *justified* where if such appointment can result in maintaining the situation without prejudicing the under *adjudication* rights and interest of parties. Reference is made to the case of *Asadullah Mirbahar v. Ayesha Muzahir* (PLD 2011 Karachi 151).

9. Accordingly, in view of what has been discussed above, I am inclined to dismiss the injunction application while the application for Receiver is allowed. Accordingly Nazir of this court shall take over the possession of suit land and shall act in accordance with provision of Order 40 Rule 1(d) of the Code.

J U D G E