

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD

R.A. No. 09 of 2023

[Irfan Ali and others Vs. Muhammad Tasleem & others]

Applicants: Mr. Muhammad Aslam Memon, Advocate.

Mr. Rafiq Ahmed Dahri, Asstt: A.G.

Date of hearing & order: 20.03.2023

JUDGMENT

ADNAN-UL-KARIM MEMON, J. Through this revision application, the applicants have called in question the order dated 20.10.2022 passed by learned Additional District Judge Hala / Model Civil Appellate Court, Hala in Civil Appeal No. 22 of 2022 (Re- Irfan Ali and others v. Muhammad Tasleem & others) whereby the learned Judge while dismissing C.A. No. 22 of 2022 maintained the order dated 28.04.2022 passed by learned Senior Civil Judge / Assistant Sessions Judge, Hala rejecting the plaint under Order VII Rule 11 CPC in F.C. Suit No. 126 of 2021 .

2. Brief facts of the case as per memo of plaint are that plaintiff No.1 is owner and co-sharer in agricultural land bearing survey No.48/1 and 2 situated in Deh Hala New (suit land) and the suit land is being irrigated by plaintiff through water course No.1-R of Chhur minor which is crossing near by the lands of defendants No.1 to 3 viz.survey No.29/1 and 2 and that the defendants were also irrigating their lands through same watercourse; however, the defendants converted their land into sikni plots and launched housing scheme in the name of New Yaqoob Colony.

3. The grievance of plaintiff is that the defendants unlawfully blocked the government watercourse irrigating the land of plaintiffs, hence plaintiff No.1 made complaints to Assistant Executive Engineer Irrigation (defendant No.7) and Assistant Commissioner (defendant No.5) for removing the hindrances in diverting the flow of water at the hands of defendants No.1 to 3 and that the defendant No.7 issued notice to the parties but of no avail, hence they filed the suit with following prayers.

a) That, this Honorable Court may kindly be pleased to Pass decree thereby declaring that the Plaintiffs being real owner of suit land are entitle to divert the

flow of water from sanctioned water course No.1-R of Chhur minor passing beside the lands of defendants No.1 to 3.

b) That, this Honorable Court may kindly be pleased to pass decree thereby declaring the act of defendants No.1 to 3 for blocking the flow of water from water course No.1-R of Chhur minor passing beside their lands towards the land of plaintiffs is illegal, unlawful, ultra-virus and void ab-initio.

c) That, this Honorable Court may also be pleased to pass decree for mandatory injunction thereby directing the defendants to restore the flow of water towards the suit land so that the plaintiffs shall irrigate their land.

d) That, this Honorable Court may also further be pleased to pass decree for permanent injunction thereby restraining the defendants No. 1 to 3 from blocking the flow of water from water course No. 1-R of Chhur minor or occupying the same by raising construction over the water course by themselves or through their servants, friend, agents, attorneys etc.

e) That, this Honorable Court may further saddle the costs of the suit upon the Defendants.

f) Any other relief this Honorable Court deems fit and proper be awarded.

4. Upon notice, private respondents 1 to 3 as well as official respondents 4 and 7 filed written statement; after filing of written statement the private respondents / defendants 1 to 3 also filed an application under Order VII Rule 11 CPC for rejection of plaint on the ground that the plaintiffs have no cause of action to file the suit, that the suit is barred by law and that the plaintiffs on the contrary have encroached upon water course No.1-R Chhur minor. He prayed for rejection of plaint.

5. In reply counsel for plaintiffs submitted that the suit is maintainable and the plaintiffs have cause of action to file the suit as the defendants 1 to 3 have blocked the flow of water course No.1-R Chhur minor; therefore, the land of plaintiffs cannot be irrigated.

6. Learned trial court, after hearing the parties rejected the plaint by allowing application under Order VII Rule 11 CPC in the following manner:-

4) I have heard the learned counsel for parties and with their able assistance perused the record. Mainly the grievance of plaintiff is that the defendants No.1 to 3 have blocked the water course No.1-R of Chhur minor wherefrom the land of plaintiffs is being cultivated and that the plaintiffs submitted application and complaint to Assistant Commissioner Hala (defendant No.5) and Assistant Executive Engineer Irrigation (defendant No.7) and that though the defendant No.7 issued notice to the parties but of no avail. It is well settled that besides averments made in the plaint other material available on record which on its own strength was legally sufficient to completely refute the claim of plaintiff, could also be looked into for the purpose of rejection of the plaint, reliance is placed on 2002 SCMR 338. Apparently no malafide is alleged by the plaintiffs against the official defendants and it appears that the Assistant Executive Engineer Hala (defendant No.7) submitted written statement and stated that “after receiving the complaint from

plaintiffs the Canal Assistant issued notice to the parties and visit the site and found that water was running without any hindrance and step boundaries encroached by both the parties after that as per instruction of Irrigation department the defendant No.1 to 3 cleared the step boundary of WC-1-R Chhur minor but the plaintiff has still encroached the step boundary of water course which is illegal act of plaintiff'. In view of the afore-noted statement of Assistant Executive Engineer Irrigation Hala, it appears that the plaintiffs have encroached the step boundary of water course, as such the plaintiffs have filed the suit with unclean hands, moreover as per said statement the Canal Assistant found the water running without any hindrance on site therefore, the claim of plaintiff that the defendants No.1 to 3 have blocked the water course has no legs to stand on. Hence, I am of the opinion that the plaintiffs being with unclean hands have no cause of action to file the suit, as such the plaint is hereby rejected U/o VII Rule 11 (a) CPC with no order as to cost.

7. The applicants / plaintiffs being aggrieved by the said order preferred Civil Appeal No. 22 of 2022 which was also dismissed vide order dated 20.10.2022. An excerpt of the same is reproduced as under:-

“ 8. In present case written statement of respondent No.7/A.Ex.En, Sub-Division Hala revealed that on the complaint of plaintiff/appellant No.1, the Canal Assistant issued notice to both parties and visited the Site, and found the water to be running without any hindrance while step-boundaries were encroached by both the parties, and at the directions of authority defendants / respondents No.1 to 3 cleared the step-boundaries but plaintiffs/appellants had still continued said encroachment over the step-boundaries of the watercourse. The said facts were suppressed by the plaintiff/appellant No.1 in the plaint, if they were taken as part of the plaint, the plaintiff/appellants would not have any cause of action for filing the suit. Learned counsel for plaintiff/appellant No.1 repeatedly drew the attention of the Court towards the facts averted by Mukhtiarkar Revenue/defendant No.4 in his written statement. perusal of said version reveals that Mukhtiarkar Revenue had never visited the Site, and he issued the report on the basis of report of Supervising Tapedar of the Beat. While mentioning about demolition or non-existence portion of the watercourse in between Survey No.29/1 & 2, and Survey No.30 he referred to the Deh Map. The verification of said fact from deh Map was nothing but misleading and misrepresentation of the facts. Learned trial Court has rightly ignored it. The written statement and its annexures filed by defendant No.7 reveals that proceeding was carried out on the complaint of plaintiffs/appellants and both parties joined the said proceedings at the Site, and their joint statement was also recorded. The plaintiffs/appellants sought relief of declaration and injunction on the basis of misrepresented facts which are unfounded and to the contrary they themselves found to be encroachers of the step-boundaries of the watercourse. Relief of declaration cannot be sought on the basis of imaginary or misrepresented facts. The said relief is discretionary one, and it cannot be granted to the person who has not come before the Court with clean hands, hence impugned order does not require any interference. It was passed in accordance with proper appreciation of settled principles within four corners of the law, therefore, it is maintained. The appeal is not maintainable, accordingly it is dismissed. Both parties shall bear their own costs.”

8. Being aggrieved by the above decision, the applicants have preferred the instant Civil Revision Application.

9. Learned counsel for the applicants argued that both the courts below have committed serious irregularity thereby denying the right of applicants; therefore, the impugned orders are not sustainable in law; that both the courts below while

passing the impugned orders have overlooked the rights and title of the applicants and without applying judicious mind has passed the order; therefore, the same requires interference of this Court; that both the courts below have passed the impugned orders without justifying the written statement of Respondent No.4, who clearly mentioned in his report that the water course has been demolished and has only considered the written statement filed by Respondent No.7 who mentioned in Para No.6 that the water is running without any hindrances, but step boundaries have been encroached by both the parties, which were cleared by Respondents No.1 to 3, but applicants are still encroaching the same; therefore, these two versions requires evidence by the parties, but the courts below have failed to consider the same and rejected the plaint, as such, the same requires interference of this Court; that the impugned orders passed by the courts below are based upon unsound reasons, without the purview to the related provisions of law; therefore, the same requires not only interference of this Court, but also liable to be set-aside; that, the impugned orders of both the courts below are not speaking and based upon technicalities and it is well settled law that technicalities are to be avoided while dispensing with justice and a fair trial is right of every citizen as guaranteed by the Constitution; therefore, the impugned orders require interference of this Court; that the impugned orders passed by the courts below are against the law, justice and equity and, as such, require interference by this Court; that both the courts below have passed the impugned orders without applying it's judicious mind and committed illegality, therefore, the same are required to be set-aside; that if the impugned orders of courts below are not set-aside, the very purpose of filing the instant Civil Revision Application would be frustrated; that, it is well settled that while deciding application under Order VII Rule 11 CPC, the Court has to see whether any cause of action had been disclosed and it would be immaterial to justify without recording of evidence; therefore, the impugned orders may be set-aside. He lastly prayed for allowing the instant Civil Revision Application.

10. Mr. Rafiq Ahmed Dahri, Assistant Advocate General, Sindh while refuting the above arguments submitted that the impugned orders are well reasoned and speaking, hence need no interference in this limited revisional jurisdiction; that the applicants have failed to prove their claim hence there was no need to proceed further as it is well-settled law that bad suit must be buried at its inception, therefore, he prays for maintaining the impugned orders and dismissal of instant Revision Application.

11. I have given due consideration to the arguments advanced by learned respective counsels, having also gone through the record with their assistance.

12. This revision application has been filed against the decision made by the courts below, whereby the plaint of the applicants has been rejected on the ground that no cause of action accrued in favour of applicants, the appellate court concurred with the view taken by the trial court.

13. A perusal of record and consideration of contentions of the parties raised before this court has persuaded to believe that the issue involved in the present revision application is distribution of water to the lands of the parties in accordance with Sindh Irrigation Act through concerned watercourse, and certain encroachment of the step-boundaries of the watercourse.

14. Primarily, the issue could easily be resolved on the analogy that the Distribution of water according to its availability in equitable manner without discrimination to sanctioned watercourse in accordance with Sindh Irrigation Act is responsibility of Irrigation Department, Government of Sindh. Article 9 of the Constitution provides right to life, if a person is deprived of fundamental right, he can always approach the competent court of law subject to exceptions provided under the law, for the simple reason that a right to irrigate agricultural land is subject to irrigation law and the rules, this right however if infringed could be examined by the court of plenary jurisdiction. Section 16 of Sindh Irrigation Act requires that any person with the permission of duly empowered Canal Officer may construct watercourse on land after obtaining consent of owners of the land. Under section 17 of the Act, land may even be acquired to enable a person to construct a 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 rights and obligations of owners of watercourses and apart from requiring them to maintain them, confers upon such owners a right to have supply of water on such terms as prescribed in the relevant Rules.

15. A bare reading of above provisions shows that though receiving of water in terms of Section 21 is the right of khatedars subject to water sharing policy. Such right, however, would not be translated to mean depriving of other khatedars from their due share in the water. The water sharing policy has to be made on equitable distribution of water for benefits of all khatedars including those at the tail end of water source.

16. It appears from the record that the issue as raised in the present proceedings has already been settled by Honorable Supreme Court in its

judgment dated 03.12.2013 passed in Constitution Petition No. 59 of 2013 reported in (2014 SCMR 353).

17. A perusal of said decision shows that the Khatedars raised their voice of concern to protect their rights. The Honorable Supreme Court took Suo-Moto notice and passed the order dated 03.12.2013.

18. Learned AAG has filed statement of Assistant Executive Engineer, Irrigation Division Hala and Mukhtiarkar (Revenue) Taluka Hala and assured that water will be provided to the lands of Kahatedars as per share list accordingly and encroachment over the step-boundaries of the concerned watercourse shall be removed with the help of reinforcement agencies.

19. This revision application has been filed against the decision of two courts below, whereby the plaint of the applicants has been rejected on the ground that no cause of action accrued in favour of applicants, the Appellate Court also concurred the view point of trial court, however to resolve the controversy between the parties finally, I direct the Irrigation Department to ensure right of each party to their water share in accordance with irrigation Act and water sharing policy, subject to their entitlement under the law.

20. Before parting with this order, I direct the competent authority i.e. irrigation department that the issue of supply of water to the lands of parties shall be made as per share list from sanctioned watercourse after appropriate proceedings, in case if the applicants approach them. The compliance report shall be filed by the official Respondents with Additional Registrar of this Court within the stipulated period in regard to the distribution of water as per their share. So far as encroachment is concerned the applicants shall remove the encroachment if any made over the step-boundaries of the watercourse, within two weeks, in case of failure SSP concerned shall remove the encroachment with the help of irrigation department within three weeks positively.

21. This Revision Application is accordingly disposed of in the above terms.

JUDGE